

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

-----X
:
In Re: Vitamins Antitrust Litigation :
:
This Document Relates to: :
All Class Actions :
-----X

Misc. No. 99-197 (TFH); MDL 1285

FILED
NOV - 5 1999

DAVID M. HARRIS, CLERK
U.S. DISTRICT COURT

CLASS PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND FORM AND MANNER OF NOTICE TO THE CLASSES

For the reasons set forth in the accompanying Memorandum in Support of Class Plaintiffs' Motion for Preliminary Approval of Settlement and Form and Manner of Notice to the Classes ("Memorandum"), Class Plaintiffs respectfully move pursuant to Fed. R. Civ. P. 23 and Local Rule 23.1 (formerly Local Rule 203), that this Court:

1. Conditionally certify, and authorize plaintiffs to represent, two separate settlement classes (the "Settlement Classes"), one consisting of purchasers of Vitamin Products,¹ the other

¹ "Vitamin Products" means (i) the following vitamins and carotenoids: vitamin A, astaxanthin, vitamin B1 (thiamin), vitamin B2 (riboflavin), vitamin B5 (calpan), vitamin B6, vitamin B9 (folic acid), vitamin B12 (cyanocobalamine pharma), beta-carotene, vitamin C, canthaxanthin, vitamin E and vitamin H (biotin), as well as all blends and forms of the foregoing; and (ii) Premix. "Premix" means any product that contains one or more Vitamin Products in combination with other substances (such as other active ingredients or dilution agents) and is sold by a Settling Defendant as a premixed formulation.

151

of purchasers of Choline Chloride. The Vitamins Products Settlement Class is defined as:

All persons (excluding governmental entities, the entities identified on Schedule A [to the Settlement Agreement] and their respective subsidiaries and affiliates and all Vitamin Products Released Parties) that directly purchased one or more Vitamin Products for delivery in the United States from any manufacturer identified with respect to such Vitamin Product(s) on Schedule A [to the Settlement Agreement], or any subsidiary or affiliate thereof, at any time during the periods specified therein for such Vitamin Product(s).

The Choline Chloride Settlement Class is defined as:

All persons (excluding governmental entities, the other Choline Chloride Defendants and their subsidiaries and affiliates and all Choline Chloride Released Parties) that directly purchased Choline Chloride for delivery in the United States from any manufacturer of Choline Chloride, or any subsidiary or affiliate thereof, at any time during the period from 1992 through 1995.

2. Find that the proposed settlement reflected in the Settlement Agreement attached hereto as Exhibit A and described in the accompanying Memorandum is sufficiently fair, reasonable, and adequate to allow dissemination of notice thereof to the Settlement Classes;
3. Establish a date for a hearing on final approval of the proposed settlement and its terms;
4. Approve the Notice of Class Action Settlement and Hearing Thereon ("Notice"), the Proof of Claim and Release form ("Claim Form"), and Summary Notice of Hearing on Class Action Settlement and Hearing Thereon ("Summary Notice"), which have been agreed to by the settling parties, and which are attached hereto as exhibits to the Settlement Agreement;
5. Direct that the Notice, Claim Form and Summary Notice be disseminated in the manner described in Part IV of the accompanying Memorandum;

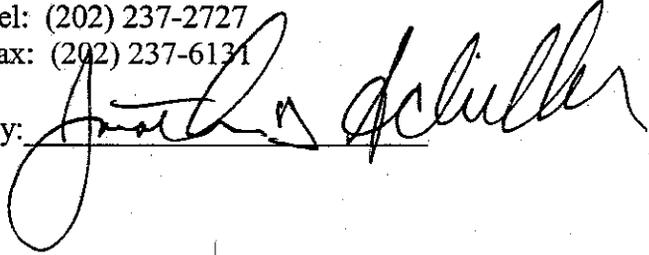
6. Establish deadlines for, inter alia, requests for exclusion from the Settlement Classes and filing objections to the proposed settlement, the Plan of Distribution of settlement proceeds and/or the fees and costs requested by class plaintiffs' counsel;

The following entities have consented to the granting of this motion: Hoffmann-La Roche Inc., Roche Vitamins Inc., Rhone-Poulenc Animal Nutrition S.A., BASF Corporation, Hoechst Marion Roussel, S.A., Eisai Co., Ltd., Daiichi Pharmaceuticals Co., Ltd., and Takeda Vitamin & Food USA, Inc.

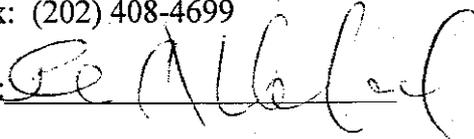
Dated: November 3, 1999.

David Boies
Robert Silver
BOIES & SCHILLER LLP
80 Business Park Drive
Armonk, NY 10504
Tel: (914) 273-9800
Fax: (914) 273-9810

Jonathan D. Schiller
(D.C. Bar No. 185496)
William A. Isaacson
Carl J. Nichols
BOIES & SCHILLER LLP
5301 Wisconsin Avenue, N.W.
Suite 570
Washington, D.C. 20015
Tel: (202) 237-2727
Fax: (202) 237-6131

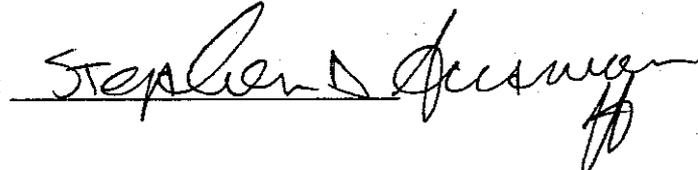
By: 

Michael D. Hausfeld
Ann C. Yahner
Deborah J. Vagins
COHEN, MILSTEIN, HAUSFELD
& TOLL, PLLC
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005
Tel: (202) 408-4600
Fax: (202) 408-4699

By: 

Stephen D. Susman
Barry C. Barnett
SUSMAN GODFREY L.L.P.
2323 Bryan Street, Suite 1400
Dallas, TX 75201
Tel: (214) 754-1900
Fax: (214) 754-1933

Marc M. Seltzer
SUSMAN GODFREY L.L.P.
1880 Century Park East, Suite 950
Los Angeles, CA 90067-1606
Tel: (310) 789-3100
Fax: (310) 789-3150

By: 

Plaintiffs' Co-Lead Counsel

Michael Straus
V. Gerald Johnson
Susan M. Donovan
BAINBRIDGE & STRAUS, LLP
2210 Second Avenue North
Birmingham, AL 35203
Tel: (205) 324-3800
Fax: (205) 324-3996

Martin Chitwood
Craig Harley
CHITWOOD & HARLEY
2900 Promenade Two
1230 Peachtree Street, NE
Atlanta, GA 30309
Tel: (404) 873-3900
Fax: (404) 876-4476

Mary Boies
BOIES & MCINNIS, LLP
Village Green
Bedford, NY 10506
Tel: (914) 234-3700
Fax: (914) 234-0929

Glenn Mitchell
STEIN MITCHELL & MEZINES
1100 Connecticut Ave., NW
Washington, DC 20036
Tel: (202) 737-7777
Tel: (202) 296-8312

Nicholas A. Gravante, Jr.
Michael Endler
BARRETT GRAVANTE CARPINELLO & STERN, LLP
1585 Broadway, 19th Floor
New York, NY 10036
Tel: (212) 969-5600
Fax: (212) 969-5650

Robert A. Skirnick
MEREDITH COHEN GREENFOGEL & SKIRNICK, P.C.
63 Wall St., 32nd Floor
New York, NY 10006
Tel: (212) 482-1250
Fax: (212) 482-1305

Allen D. Black
FINE KAPLAN & BLACK
1845 Walnut St., Suite 2300
Philadelphia, PA 19103
Tel: (215) 567-6565
Fax: (215) 568-5872

Charles Fox Miller
MILLER SCHWARTZ & MILLER, P.A.
2435 Hollywood Boulevard
Hollywood, FL 33020
Tel: (954) 962-2000
Fax: (954) 961-2124

Howard Sedran
LEVIN FISHBEIN SEDRAN & BERMAN
510 Walnut St., Suite 500
Philadelphia, PA 19106
Tel: (215) 592-1500
Fax: (212) 592-4663

Leonard Barrack
BARRACK, RODOS, BACINE
3300 Two Commerce Square
2001 Market St.
Philadelphia, PA 19103
Tel: (215) 963-0600
Fax: (215) 568-5872

H. Laddie Montague, Jr.
Jerome M. Marcus
Bart D. Cohen
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Tel: (215) 875-3000
Fax: (215) 875-4604

Herman Watson, Jr
WATSON & JIMMERSON, P.C.
200 Clinton Avenue West, Suite 800
Huntsville, AL 35801
Tel: (256) 536-7423
Fax: (256) 536-2689

Stephen K. Griffith
James Knight
KNIGHT & GRIFFITH
Post Office Drawer M
Cullman, AL 35056
Tel: (256) 734-0456
Fax: (256) 734-0466

Edgar D. Gankendorff
William M. Hudson, III
OATS & HUDSON
530 Natchez Street, Suite 250
New Orleans, LA 70130
Tel: (504) 527-0960
Fax: (504) 524-2823

John A. Cochrane
COCHRANE & BRESNAHAN, PA
24 East Fourth Street
St. Paul, MN 55101
Tel: (651) 298-1950
Fax: (651) 298-0089

Ira N. Richards
TRUJILLO, RODRIGUEZ & RICHARDS, LLP
The Penthouse
226 West Rittenhouse Square
Philadelphia, PA 19103
Tel: (215) 731-9004
Fax: (215) 731-9044

Samuel D. Heins
HEINS MILLS & OLSON, PLC
700 Northstar East
608 2nd Avenue South
Minneapolis, MN 55402
Tel: (612) 338-4605
Fax: (612) 338-4692

Michael Freed
MUCH SHELIST FREED DENENBERG
AMENT & RUBENSTEIN, P.C.
200 North LaSalle Street, Suite 2100
Chicago, IL 60601
Tel: (312) 346-3100
Fax: (312) 621-1750

Anthony J. Bolognese
SPECTOR & ROSEMAN, P.C.
2000 Market St., 12th Floor
Philadelphia, PA 19103
Tel: (215) 864-2400
Fax: (215) 864-2424

Robert N. Kaplan
KAPLAN KILSHEIMER & FOX, LLP
685 Third Avenue
New York, NY 10017
Tel: (212) 687-1980
Fax: (212) 687-7714

Joseph Goldberg
FREEDMAN BOYD DANIELS
HOLLANDER GOLDBERG & CLINE, P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
Tel: (505) 842-9960
Fax: (505) 842-0761

Aubrey B. Calvin
CALVIN GIBBS & VERNER, P.C.
1425 Louisiana Street, Suite 300
Houston, TX 77002
Tel: (713) 224-5771
Fax: (713) 654-8023

Richard Lockridge
LOCKRIDGE GRINDAL NAUEN & HOLSTEIN, PLLP
10 Washington Avenue South, Suite 200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981

Gary Specks
ALTHEIMER & GRAY
10 South Wacker Drive, Suite 4000
Chicago, IL 60606
Tel: (312) 715-4000
Fax: (312) 715-4800

Stephen Schwartz
GARWIN BRONZAFT GERSTEIN & FISHER
1501 Broadway, Suite 1416
New York, NY 10036
Tel: (212) 398-0055
Fax: (212) 764-6620

Roberta D. Liebenberg
LIEBENBERG & WHITE
261 Old York Road, Suite 810
Jenkintown, PA 19046
Tel: (215) 481-0272
Fax: (215) 481-0271

Steven J. Greenfogel
MEREDITH COHEN GREENFOGEL & SKIRNICK, P.C.
17th and Sansom Streets
Philadelphia, PA 19103
Tel: (215) 564-5182
Fax: (215) 569-0958

Darrell D. Gest
HEARNE EPPRIGHT & GEST, P.C.
700 Lavaca, Suite 1500
Austin, TX 78701
Tel: (512) 478-1500
Fax: (512) 478-2906

David J. Manogue
SPECTER SPECTER EVANS & MANOGUE, P.C.
26th Floor, Koppers Bldg.
Pittsburgh, PA 15219
Tel: (412) 642-2300
Fax: (412) 642-2309

Robert Thrig
Robert J. Hennessey
Thomas F. Pursell
LINDQUIST & VENNUM
4200 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Tel: (612) 371-3211
Fax: (612) 371-3207

A.B. Conant, Jr.
William French
CONANT WHITTENBERG FRENCH & SCHACHTER
2300 Plaza of the Americas
600 North Pearl Street, LB 133
Dallas, TX 75201
Tel: (214) 999-5700
Fax: (214) 999-5747

Joseph Opper
MILBERG WEISS BERSHAD HYNES & LERACH, LLP
One Pennsylvania Plaza
New York, NY 10019
Tel: (212) 594-5300
Fax: (212) 868-1229

David R. Scott
Neil Rothstein
SCOTT & SCOTT
108 Norwick Avenue
Colchester, CT 06145
Tel: (860) 537-5537
Fax: (860) 537-4432

Robert Finnell
THE FINNELL FIRM
One West Fourth Avenue, Suite 200
Rome, GA 30162
Tel: (706) 235-7272
Fax: (706) 235-9461

Terry Noffsinger
BOWERS HARRISON KENT & MILLER, LLP
25 N.W. Riverside Drive
P.O. Box 1287
Evansville, IN 47706-1287
(812) 426-1231

Joseph P. Danis
CAREY & DANIS LLC
8182 Maryland Avenue, Suite 1400
St. Louis, MO 63105

Dan Karon
1422 Euclid Avenue, Suite 1510
Cleveland, OH 44115
Tele: (216) 619-8517

Mark Edelson
HOFFMAN & EDELSON
45 West Court Street
Doylestown, PA 18901
215/230-8043

Lynn L. Sarko, Esq.
KELLER ROHRBACK
1201 Third Avenue, Suite 3200
Seattle, WA 98101-3052
Tele: 206-623-1900

Joseph R. Saveri, Esq.
LIEFF CABRASER HEIMANN & BERNSTEIN, L.L.P.
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Tele: 415-956-1000

Linda Nussbaum
POMERANTZ HAUDEK BLOCK
GROSSMAN & GROSS LLP
100 Park Avenue
New York, NY 10017-5516
Tele: (212) 661-1100

Anthony Shapiro, Esq.
ROHAN GOLDBARB RAFEL & SHAPIRO
1601 One Union Square
600 University Street
Seattle, WA 98101-3112
Tel: (206) 223-1600

Howard I. Langer
SANDALS LANGER & TAYLOR LLP
One Liberty Place
1650 Market Street
50th Floor
Philadelphia, PA 19103
Bus: (215) 419-6500

Guido Saveri
SAVERI & SAVERI
One Embarcadero Center, Suite 1020
San Francisco, CA 94111-3600
Tel: 415/217-6810

Mark S. Goldman
WEINSTEIN KITCHENOFF SCARLATO
& GOLDMAN LTD.
1608 Walnut Street
Suite 1400
Philadelphia, PA 19103

Eric D. Freed, Esq.
Law Office of Eric D. Freed
505 N. Lake Shore Drive
No. 3905
Chicago, IL 60611

Mark Reinhardt
Gary Ansel
REINHARDT & ANDERSON
E-1000 First National Bank Building
332 Minnesota Street
St. Paul, MN 55101
Tel: (612) 227-9990
Fax: (612) 297-6543

Plaintiffs' Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

-----X
:
In Re: Vitamins Antitrust Litigation :
:
This Document Relates to: :
All Class Actions :
-----X

Misc. No. 99-197 (TFH); MDL 1285

FILED

NOV - 5 1999

GRACY M. WHITTINGTON, CLERK
U.S. DISTRICT COURT

**MEMORANDUM IN SUPPORT OF CLASS PLAINTIFFS'
MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT
AND FORM AND MANNER OF NOTICE TO THE CLASSES**

November 3, 1999
Washington, D.C.

TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	iii
I. PRELIMINARY STATEMENT	2
A. PLAINTIFFS' INVESTIGATION AND SUBSEQUENT LITIGATION	3
B. THE PROPOSED SETTLEMENT	6
C. THE REQUEST FOR PRELIMINARY APPROVAL	9
II. THE PROPOSED SETTLEMENT IS WELL WITHIN THE RANGE OF POSSIBLE FINAL APPROVAL AND THEREFORE PLAINLY MERITS PRELIMINARY APPROVAL	12
A. GOVERNING STANDARDS.	12
B. BECAUSE THE SETTLEMENT AGREEMENT RESULTED FROM ARM'S-LENGTH NEGOTIATIONS CONDUCTED BY HIGHLY EXPERIENCED COUNSEL REPRESENTING A WIDE RANGE OF INDUSTRY PARTICIPANTS, THERE IS NO BASIS TO DOUBT THE FAIRNESS OF THE AGREEMENT.	14
C. THE TERMS OF THE SETTLEMENT AGREEMENT ARE FAIR, REASONABLE AND ADEQUATE.	16
1. Settlement Payments	16
2. Forward-Looking Provisions Of The Settlement	18
3. Attorneys' Fees	19
III. PROPOSED TIMETABLE	20
IV. NOTICE TO THE SETTLEMENT CLASSES	22
V. THE PROPOSED SETTLEMENT CLASSES SATISFY ALL OF THE REQUIREMENTS OF RULE 23.	23

A.	CLASS CERTIFICATION IS ROUTINELY GRANTED IN HORIZONTAL PRICE-FIXING CASES.	24
B.	THE PROPOSED SETTLEMENT CLASSES SATISFY THE REQUIREMENTS OF RULE 23(a).	27
1.	The Settlement Classes Are So Numerous That Joinder Of All Members Is Impracticable.	27
2.	There Are Questions Of Law And Fact Common To Each Settlement Class.	29
3.	The Claims Of The Representative Parties Are Typical Of The Claims Of The Members Of The Respective Settlement Classes.	30
4.	The Representative Plaintiffs Will Fairly And Adequately Protect The Interests Of The Settlement Classes.	31
C.	THIS ACTION MEETS THE REQUIREMENTS OF RULE 23(b)(3).	32
1.	Common Questions Of Law And Fact Predominate In This Action. ...	33
2.	A Class Action Is Superior To Other Available Methods For The Fair And Efficient Adjudication Of This Controversy.	33
VI.	CONCLUSION	35

TABLE OF AUTHORITIES

Federal Cases

<u>Agretti v. ANR Freight System</u> , 982 F.2d 242, 245 (7th Cir. 1992)	10
<u>Amchem Products v. Windsor</u> , 521 U.S. 591 (1997)	28, 40
<u>Amino Acid Lysine Antitrust Litig.</u> , No. 95 C 7679, MDL NO. 1083 (N.D. Ill. February 15, 1996).....	18, 31
<u>Ampicillin Antitrust Litig.</u> , 526 F. Supp. 494 (D.D.C. 1981).....	10,13, 23
<u>Anthracite Coal Antitrust Litig.</u> , 79 F.R.D. 707 (M.D. Pa. 1978)	20
<u>Armored Car Antitrust Litig.</u> , 472 F. Supp. 1357 (N.D. Ga. 1979).....	19
<u>Arnold v. Postmaster General</u> , 667 F. Supp. 6 (D.D.C. 1987)	34
<u>Arnold v. U.S. Postal Service</u> , 863 F.2d 994 (D.C. Cir. 1988).....	34
<u>Art Materials Antitrust Litig.</u> , 100 F.R.D. 367 (N.D. Ohio 1983).....	19, 21
<u>Axelrod v. Saks & Co.</u> , 1980-81 Trade Cas. (CCH) ¶ 63,861 (E.D. Pa. Feb. 23, 1981).....	19
<u>Bagel Inn, Inc. v. All Star Dairies</u> , 1982-1 Trade Cas. (CCH) ¶ 64,512 (D.N.J. Dec. 21, 1981). 19	
<u>Bagel Inn, Inc. v. All Star Dairies</u> , 1982-1 Trade Cas. (CCH) ¶ 64,512 (W.Va. 1981).....	19
<u>Bebchick v. Washington Metropolitan Area Transit Comm'n</u> , 805 F.2d 396 (D.C. Cir. 1986) ..	23
<u>Beef Indus. Antitrust Litig.</u> , 607 F.2d 167 (5th Cir. 1979).....	28
<u>Bermudez v. U.S. Department of Agriculture</u> , 348 F. Supp. 1279 (D.D.C. 1972).....	35
<u>Berry v. School District of the City of Benton Harbor</u> , 184 F.R.D. 93 (W.D. Mich. 1998)	10
<u>Blank v. Talley Industries, Inc.</u> , 64 F.R.D. 125 (S.D.N.Y. 1974).....	17
* <u>Brand Name Prescription Drugs Antitrust Litig.</u> , 1994 WL 663590 (N.D. Ill. 1994)...	31, 38, 42

<u>Brand Name Prescription Drugs Antitrust Litig.</u> , 1996 WL 351180, at *2 (N.D. Ill. June 24, 1996).....	10
<u>Carbon Dioxide Antitrust Litig.</u> , 149 F.R.D. 229 (M.D. Fla. 1993).....	31
<u>Catfish Antitrust Litig.</u> , 826 F. Supp. 1019 (N.D. Miss. 1993)	31, 36
<u>Cement and Concrete Antitrust Litig.</u> , 1981-1 Trade Cas. (CCH) ¶ 63,892 (D. Ariz. 1981).....	21
<u>Chambers Development Secs. Litig.</u> , 912 F. Supp. 822 (W.D. Pa. 1995).....	27
<u>Chevalier v. Baird Sav. Ass'n</u> , 72 F.R.D. 140, 149 (E.D. Pa. 1976).....	41
<u>Chicken Antitrust Litig.</u> , 1980-81 Trade Cas. (CCH) ¶ 63,237 (N.D. Ga. 1980).....	19
<u>Chlorine and Caustic Soda Antitrust Litig.</u> , 116 F.R.D. 622 (E.D. Pa. 1987).....	32, 41
<u>Citric Acid Antitrust Litig.</u> , 1996 U.S. Dist. LEXIS 16409 (N.D. Cal. 1996).....	31
<u>Citric Acid Antitrust Litig.</u> , MDL No. 1092, Master File No. C-9502963 (N.D. Cal.).....	18
<u>Coatings, Inc. v. Bennett Indus., Inc.</u> , 85 F.3d 1198 (6th Cir. 1996).....	19
<u>Commercial Tissue Products</u> , 1998 U.S. Dist. LEXIS 17614 (N.D. Fla. 1998).....	30
<u>Committee of Blind Vendors v. District of Columbia</u> , 695 F. Supp. 1234 (D.D.C. 1988)	34, 39
<u>Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions</u> , 410 F. Supp. 659 (D. Minn. 1974).....	17
<u>Corrugated Container Antitrust Litig.</u> , 1979 WL 1637 (S.D. Tex. May 30, 1979)	13
<u>Corrugated Container Antitrust Litig.</u> , 643 F.2d 195 (5th Cir. 1981).....	15
<u>Cotton v. Hinton</u> , 559 F.2d 1326 (5th Cir. 1977)	16
<u>Cumberland Farms, Inc. v. Browning-Ferris Indus., Inc.</u> , 120 F.R.D. 642 (E.D. Pa.)	32, 41
<u>D.C. Soft Drinks Antitrust Litig.</u> , 1989 WL 77350, 1989 WL 77337 (D.D.C. May 23, 1989)....	23
<u>Disposable Contact Lens Antitrust Litig.</u> , 170 F.R.D. 524 (M.D. Fla. 1996).....	38
<u>Domestic Air Transp. Antitrust Litig.</u> , 137 F.R.D. 677 (N.D. Ga. 1991).....	16, 32

<u>EEOC v. Printing Industry</u> , 92 F.R.D. 51 (D.D.C. 1981)), <u>affd</u> , 124 F.3d 1309 (D.C. Cir. 1997).....	37
<u>Eisen v. Carlisle & Jacquelin</u> , 417 U.S. 156 (1974).....	26, 29
<u>Fifth Moorings Condominium, Inc. v. Shere</u> , 81 F.R.D. 712 (S.D. Fla. 1979).....	43
<u>Fine Paper Antitrust Litig.</u> , 82 F.R.D. 143 (E.D. Pa. 1979).....	33
<u>Fisher Bros. v. Mueller Brass Co.</u> , 102 F.R.D. 570 (E.D. Pa. 1984).....	32
<u>Fisher Bros. v. Mueller Brass Co.</u> , 630 F. Supp. 493 (E.D. Pa. 1985).....	19
<u>Fisher Brothers v. Phelps Dodge Industries Inc.</u> , 604 F. Supp. 446 (E.D. Pa. 1985).....	16
<u>Flinn v. FMS Corp.</u> , 528 F.2d 1169 (4th Cir. 1975).....	16
* <u>Folding Carton Antitrust Litig.</u> , 75 F.R.D. 727 (N.D. Ill. 1979).....	35, 43
<u>Gas Meter Antitrust Litig.</u> , 500 F. Supp. 956 (E.D. Pa. 1980).....	20
<u>Glassine and Greaseproof Paper Antitrust Litig.</u> , 88 F.R.D. 302 (E.D. Pa. 1980).....	33
<u>Gordon v. Hunt</u> , 117 F.R.D. 58 (S.D.N.Y. 1987).....	27
<u>Gottlieb v. Wiles</u> , 11 F.3d 1004 (10th Cir. 1993).....	26
<u>Grice v. PNC Mortgage Corp. of America</u> , 1998 WL 350581 (D. Md. May 21, 1998).....	13
<u>Gunter v. Ridgewood Energy Corp.</u> , 164 F.R.D. 391 (D. N.J. 1996).....	35
<u>High Fructose Corn Syrup Antitrust Litig.</u> , 936 F. Supp. 530 (C.D. Ill. 1996).....	31
<u>Infant Formula Antitrust Litig.</u> , 1992 WL 503465 (N.D. Fla. 1992).....	32
<u>Jack Faucett Associates, Inc. v. AT & T Co.</u> , 1985 WL 5199 (D.D.C., Dec. 16, 1985), 1986 WL 944 (D.D.C. Apr. 1, 1986).....	23
<u>Lease Oil Antitrust Litig. (No. II)</u> , 186 F.R.D. 403 (S.D. Tex. 1999).....	16
<u>Lewis v. National Football League</u> , 146 F.R.D. 5 (D.D.C. 1992).....	42
<u>Lumco Indus., Inc. v. Jeld-Wen, Inc.</u> , 171 F. R. D. 168 (E.D. Pa. 1997).....	41

<u>Mayfield v. Barr</u> , 985 F.2d 1090 (D.C. Cir. 1993)	10
<u>McGuiness v. Parnes</u> , 1989 WL 29814 (D.D.C. Mar. 22, 1989).....	16
<u>Medical X-Ray Film Antitrust Litig.</u> , 1997 U.S. Dist. LEXIS 21936 (E.D.N.Y. 1997)	30
<u>Meredith v. Mid-Atlantic Coca Cola Bottling Co.</u> , 129 F.R.D. 130 (E.D. Va. 1989).....	32
<u>Minolta Camera Products Antitrust Litig.</u> , 668 F. Supp. 456 (D. Md. 1987).....	16
<u>NASDAQ Market Makers Antitrust Litig.</u> , 176 F.R.D. 99 (S.D.N.Y. 1997).....	13
<u>NASDAQ Market-Makers Antitrust Litig.</u> , 169 F.R.D. 493 (S.D.N.Y. 1996); 1997 U.S. Dist. LEXIS 20835 (S.D.N.Y. 1997)	31
<u>NASDAQ Market-Makers Antitrust Litig.</u> , 187 F.R.D. 465 (S.D.N.Y. 1998).....	14
<u>National Association of Regional Medical Programs v. Mathews</u> , 551 F.2d 340 (D.C. Cir. 1976).....	39
<u>Neal v. D.C. Department of Corrections</u> , Civ. No. 93-2420 (D.D.C. June 28, 1999).....	22
<u>Newbridge Networks Sec. Litig.</u> , 1998 WL 765724 (D.D.C. Oct. 22, 1998).....	15, 20
<u>Newbridge Networks Sec. Litig.</u> , 926 F. Supp. 1163 (D.D.C. 1996).....	35
<u>Northwestern Fruit Co. v. A. Levy & J. Zentner Co.</u> , 117 F.R.D. 670 (E.D. Cal. 1987).....	19
<u>Osher v. SCA Realty I, Inc.</u> , 945 F. Supp. 298 (D.D.C. 1996))	14
<u>Partners, LP v. Mehta</u> , 723 F. Supp. 540 (D. Colo. 1989).....	28
<u>Peters v. National Railroad Passenger Corp.</u> , 966 F.2d 1483 (D.C. Cir. 1992).....	26
<u>Philadelphia Elec. Co. v. Anaconda Am. Brass Co.</u> , 43 F.R.D. 452 (E.D. Pa. 1968)	36
<u>Pigford v. Glickman</u> , 185 F.R.D. 82 (D.D.C. 1999).....	14
<u>Plastic Cutlery Antitrust Litig.</u> , 1998 U.S. Dist. LEXIS 3628 (E.D. Pa. 1998).....	30
<u>Plastic Tableware Antitrust Litig.</u> , 1995 Trade Cas. (CCH) ¶ 71,184 (E.D. Pa. Oct. 25, 1995)..	19
<u>Playmobil Antitrust Litig.</u> , 1998 U.S. Dist. LEXIS 20806 (E.D.N.Y. 1998).....	30

* <u>Playmobil Antitrust Litig.</u> , 35 F. Supp.2d 231 (E.D.N.Y. 1998).....	29, 30, 38
<u>Plummer v. Chemical Bank</u> , 668 F.2d 654 (2d Cir. 1982)	28
<u>Polypropylene Carpet Antitrust Litig.</u> , 996 F. Supp. 18 (N.D. Ga. 1997)	30
<u>Potash Antitrust Litig.</u> , 159 F.R.D. 682 (D. Minn. 1995).....	31, 35
<u>Prudential Ins. Co. Sales Practices Litig.</u> , 148 F.3d 283 (3d Cir. 1998).....	28
<u>Prudential Securities Inc. Limited Partnerships Litig.</u> , 163 F.R.D. 200 (S.D.N.Y. 1995).....	10, 28
<u>Rubenstein v. Collins</u> , 162 F.R.D. 534 (S.D. Tex. 1995)	29
<u>Scholes v. Stone, McGuire & Benjamin</u> , 143 F.R.D. 181 (N.D. Ill. 1992)	36, 37, 43
<u>Service Spring, Inc. v. Cambria Spring Co.</u> , Nos. 81 C 1835, 32 C 3901 & 82 C 3371 (N.D. Ill. Feb. 17, 1987).....	19
<u>Shelter Realty Corp. v. Allied Maintenance Corp.</u> , 75 F.R.D. 34 (S.D.N.Y. 1977).....	30
<u>South Cent. States Bakery Prods. Antitrust Litig.</u> , 86 F.R.D. 407 (M.D. La. 1980)	33
<u>State of Illinois v. Harper & Row Publishers, Inc.</u> , 301 F. Supp. 484 (N.D. Ill. 1969).....	36
<u>Stewart v. Rubin</u> , 948 F. Supp. 1077 (D.D.C. 1996).....	16, 37
<u>Stoetznner v. U.S. Steel Corp.</u> , 897 F.2d 115 (3d Cir. 1990)	15
<u>Swedish Hospital Corp. v. Shalala</u> , 1 F.3d 1261 (D.C. Cir. 1993).....	23
* <u>Thomas v. Albright</u> , 139 F.3d 227 (D.C. Cir. 1998).....	13, 14, 15, 29, 40
<u>Thomas v. Christopher</u> , 169 F.R.D. 224 (D.D.C. 1996).....	14, 15, 28
<u>Traffic Executive Association-Eastern Railroads</u> , 627 F.2d 631 (2d Cir. 1980).....	15
<u>United Nat'l Records, Inc. v. MCA, Inc.</u> , 101 F.R.D. 323 (N.D. Ill. 1984)	32, 43
<u>Weinberger v. Kendrick</u> , 698 F.2d 61 (2d Cir. 1982).....	28
<u>Wirebound Boxes Antitrust Litig.</u> , 128 F.R.D. 268 (D. Minn. 1989).....	32

Miscellaneous

Manual for Complex Litigation Third (1997) (Manual) at § 30.41 12, 16, 17

Moore's Federal Practice ¶ 23.22[3][a] (3d. ed.1999)..... 34

Newberg on Class Actions § 11.25 (3d ed. 1992) 13

Newberg on Class Actions § 11.41 (3d ed. 1992) 16

Newberg on Class Actions § 18.28 (3d ed. 1992) 40

**MEMORANDUM IN SUPPORT OF CLASS PLAINTIFFS'
MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT
AND FORM AND MANNER OF NOTICE TO THE CLASSES**

Class plaintiffs respectfully submit this memorandum in support of their motion for an order preliminarily approving the proposed partial settlement of these consolidated class actions. The settlement provides for the payment of approximately \$1.05 billion in cash to be made available to the Vitamin Products Settlement Class, as defined below, and the payment of at least \$5 million and possibly up to \$25 million in cash to be made available to the members of the Choline Chloride Settlement Class, as defined below. This class action litigation is being resolved as to seven international companies and their affiliates, nineteen firms in all:

Hoffmann-La Roche Inc., Roche Vitamins Inc., F. Hoffmann-La Roche Ltd, Rhone-Poulenc Inc., Rhone-Poulenc Animal Nutrition Inc., Rhone-Poulenc Rorer Pharmaceuticals, Inc., Rhone-Poulenc S.A., BASF Corporation, BASF AG, Hoechst Marion Roussel, S.A., Eisai Co., Ltd., Eisai U.S.A., Inc., Eisai Inc., Daiichi Pharmaceuticals Co., Ltd., Daiichi Pharmaceuticals Corporation, Daiichi Fine Chemicals, Inc., Takeda Chemical Industries, Ltd., Takeda U.S.A., Inc., and Takeda Vitamin & Food USA, Inc.¹ Sales by these entities represent more than 90% of the total market for the affected vitamin products.

The settlement also provides for the payment to class plaintiffs' counsel of attorneys' fees of approximately \$122 million (together with a fee of 15% of the choline chloride recovery). The vitamin products fee is approximately 10.4% of the total amount of the settlement funds made available to the Vitamin Products Settlement Class and the fee amount, a substantially

¹ The signatories to the Settlement Agreement ("Sett. Agr.") are Hoffmann-La Roche Inc.; Roche Vitamins Inc.; BASF Corporation; Daiichi Pharmaceutical Co., Ltd.; Eisai Co., Ltd.; Rhone-Poulenc Animal Nutrition S.A.; Hoechst Marion Roussel, S.A.; and Takeda Vitamin &
(Continued . . .)

lower percentage than this Court has approved in other antitrust class actions. This sum is in addition to the approximately \$1.05 billion in cash to be made available to the members of the Vitamin Products Settlement Class.²

As explained below, this antitrust settlement is believed to be unprecedented both in amount and in the percentage of recovery of the sales of the affected products sold by the Settling Defendants.³ The present motion seeks preliminary approval of the settlement and requests that the Court set in motion the process to determine whether final approval should be granted to the settlement, after notice to the classes, at a subsequent fairness hearing to be held by the Court.

Each of the Settling Defendants has consented, solely for purposes of this settlement, to the granting of class plaintiffs' motion.

I. PRELIMINARY STATEMENT

These consolidated actions arise out of a worldwide conspiracy or conspiracies to fix prices and allocate markets for the sale of bulk vitamins. For almost a decade, officials of some of the world's largest vitamin manufacturers met in secret to agree upon the means and methods to artificially raise the prices of bulk vitamins sold in the United States and elsewhere in the

Food USA, Inc. (the "Settling Defendants").

² The settlement further provides that BASF AG shall be obligated to pay up to \$25 million in cash to the Choline Chloride Settlement Class, and to pay, in addition thereto, an amount equal to 15% of the settlement payment for attorneys' fees.

³ The sales in question are for specified vitamin products, carotenoids (collectively, "Vitamin Products") and choline chloride during the periods of time they were allegedly affected by defendants' collusive conduct. Those products and periods are spelled out in the proposed notices to be mailed to the classes. The affected sales only include sales for products delivered in the United States and do not cover sales made abroad. Claims based on foreign sales are not

(Continued . . .)

world.⁴ Bulk vitamins are used in the production of a wide variety of food products from animal feed to soft drinks to breakfast cereal -- in short, they are a key component of products produced by the agricultural, food and beverage industries. The evidence gathered by class plaintiffs tends to show that the collusive conduct exposed in this litigation artificially raised producer prices in the United States for an extended period of time.

After difficult and protracted arm's-length negotiations, class plaintiffs have now reached agreement, subject to the Court's approval, to settle the lawsuit on superb monetary terms. The proposed settlement also contains important provisions designed to protect the interests of class members in the future. For the reasons set forth below, it is respectfully submitted that the proposed settlement easily satisfies the standard for preliminary approval, namely, that the settlement falls within the range of possible final approval after the members of the classes have been notified of the settlement and been given an opportunity to be heard with respect thereto.

A. PLAINTIFFS' INVESTIGATION AND SUBSEQUENT LITIGATION

The proposed settlement is the culmination of more than two years of intensive effort by class plaintiffs' counsel. In March 1998, following seven months of investigation, plaintiff Donaldson & Hasenbein, Inc., d/b/a J&R Feed Services, Inc., brought the first suit on behalf of a class of direct purchasers of vitamins. The Donaldson & Hasenbein complaint alleged that as early as 1990, and continuing into 1998, the world's largest manufacturers of vitamins, vitamin

released by the settlement.

⁴ The evidence gathered by plaintiffs to date demonstrates that, in light of the international nature of the market for bulk vitamins, the concerted action had to be conducted on an international scale to be effective to artificially raise prices for such vitamins in the United States.

premises and other bulk vitamin products had conspired to fix prices, allocate markets and engage in other illegal collusive conduct with respect to certain vitamin products, in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. That complaint, together with a second complaint filed shortly thereafter, named as defendants F. Hoffmann-La Roche Ltd, Hoffmann-La Roche Inc., and Roche Vitamins Inc. (collectively, "Roche"); BASF AG and BASF Corporation (collectively, "BASF"); and Rhone-Poulenc S.A., Rhone-Poulenc Inc. and Rhone-Poulenc Animal Nutrition Inc. (collectively with Rhone-Poulenc Rorer Pharmaceuticals, Inc., "Rhone-Poulenc").

For the next year, class plaintiffs' counsel vigorously prosecuted this action over the repeated personal jurisdictional objections of F. Hoffmann-La Roche Ltd, BASF AG, and Rhone-Poulenc S.A. During that period, class plaintiffs' counsel acquired substantial documentary evidence from Roche, BASF and Rhone-Poulenc; conducted numerous interviews of fact witnesses; retained, at substantial expense, economists and accountants to assist in developing econometric models to quantify and prove the adverse impact of the alleged conspiracy on the class; opposed, in extensive briefing, various motions to dismiss filed by defendants; undertook extensive negotiations, briefing and appearances before the Special Master in seeking discovery from the foreign defendants in order to rebut defendants' jurisdictional objections; and moved for class certification.

In 1997, counsel for other purchasers of vitamin products began to investigate collusive practices in the bulk vitamins industry. Counsel for these purchasers interviewed fact witnesses and hired economists and investigated the economics of the industry, including the structure,

performance and behavior of the bulk vitamins industry and the pricing and sales practices of manufacturers and sellers of those products.⁵

In March 1999 -- nineteen months after class plaintiffs first began their investigation, and twelve months after the initiation of the first class action lawsuit -- the United States Department of Justice announced that several defendants had pled guilty to antitrust violations.⁶ Two months later, one defendant, F. Hoffmann-La Roche Ltd, pled guilty and a second, BASF AG, agreed to plead guilty to violating section 1 of the Sherman Act for fixing the prices of vitamins. In early September 1999, three additional defendants, Takeda Chemical Industries, Ltd., Eisai Co., Ltd., and Daiichi Pharmaceuticals Co., Ltd., agreed to plead guilty to similar charges.

⁵ These other purchasers and their counsel ultimately joined forces with the initial plaintiffs. Pursuant to this Court's orders, all of the direct purchaser class actions have been coordinated and the litigation has been managed and supervised under the direction of Plaintiffs' Co-Lead Counsel.

⁶ In March 1999, non-settling defendant Lonza AG pled guilty to violating section 1 of the Sherman Act for fixing the price of niacin, while non-settling defendant Chinook Group Ltd. and certain executives of non-settling defendants Chinook Group Ltd. and DuCoa, LP pled guilty to violating section 1 of the Sherman Act for fixing the price of choline chloride. Lonza AG is named as a defendant in the vitamin products consolidated complaint, as well as a separate consolidated amended class action complaints filed with the Court relating to niacin. Chinook Group Ltd. and DuCoa, LP are named as defendants in a separate consolidated amended class action complaint relating to choline chloride. The following other non-settling defendants are named in the vitamin products, choline chloride, niacin and methionine complaints: Merck KgaA, E. Merck, EM Industries, Inc., Sumitomo Chemical Co., Ltd., Sumitomo Chemical America, Inc., Tanabe Seiyaku Company, Ltd., Tanabe U.S.A., Inc., Alusuisse Lonza Group Ltd., and Lonza, Inc. (vitamin products defendants); Cope Investments, Ltd., Peter Copland, Patrick Stayner, Chinook Group, Inc., Russ Cosburn, John Kennedy, Robert Samuelson, DCV, Inc., Lindell Hilling, J.L. "Pete" Fischer, Antonio Felix and BioProducts, Inc. (choline chloride defendants); Lonza Inc., Alusuisse Lonza Group Ltd., Degussa-Hüls AG, Degussa-Hüls Corporation, Reilly Industries, Inc., Reilly Chemicals, S.A. and Nepera, Inc. (niacin defendants); Degussa-Hüls AG, Degussa-Hüls Corporation, Mitsui & Co., Ltd., Nippon Soda Company, Ltd.

(Continued . . .)

These guilty pleas confirmed the substance of the class plaintiffs' claims and the enormity of the price-fixing schemes at issue in this litigation. As part of their plea agreements, these defendants formally admitted their participation in a long-running, price-fixing conspiracy or conspiracies and agreed to pay the largest criminal fines ever obtained by the Justice Department. By that time, class plaintiffs' counsel had expended substantial amounts of time and money investigating and prosecuting the claims asserted on behalf of the class.

Class plaintiffs uncovered illegal conspiratorial conduct among bulk vitamin producers long before any grand jury handed down any indictments, long before the cooperation agreements became public and long before any defendants confessed to their wrongdoing. By so doing, and by their continuing efforts to obtain redress for the wrongs committed, class plaintiffs have substantially contributed to the enforcement of our Nation's antitrust laws and believe they have helped to restore market efficiency to a critical segment of this country's economy.

B. THE PROPOSED SETTLEMENT

The proposed settlement will terminate class plaintiffs' claims as to Roche, BASF, Rhone-Poulenc, and Hoechst Marion Roussel, S.A. ("Hoechst") (collectively, the "Initial Settling Defendants"), as well as to Daiichi Pharmaceuticals Co., Ltd., Eisai Co., Ltd., Takeda Chemical Industries, Ltd., Takeda U.S.A., Inc. and Takeda Vitamin & Food USA, Inc. (collectively, the "Additional Settling Defendants"), and their affiliates.

Class plaintiffs' counsel and counsel for the Settling Defendants, who are among the most experienced and knowledgeable antitrust and class action attorneys in the United States,

and Novus International, Inc. (methionine defendants).

negotiated the Settlement Agreement after extensive, arduous, arm's-length negotiations undertaken in good faith and after substantial factual investigation and legal analysis of the claims and defenses of the parties. Class counsel unanimously concur that the settlement now before the Court is fair, reasonable and adequate to the settlement class.

As noted above, the proposed Settlement Agreement provides for the payment of approximately \$1.05 billion in cash to the Vitamin Products Settlement Class and the payment of \$5 million and possibly up to \$25 million in cash by BASF AG to the Choline Chloride Settlement Class. This is believed to be the largest antitrust class action settlement in our Nation's history. This vitamin products settlement amount, which represents a recovery of between 18-20% of the dollar value of the Class' total purchases of affected vitamin products during the periods in which the defendants are alleged to have conspired, will be distributed to purchasers of each affected Vitamin Product with net recoveries for different vitamin products within that 18-20% range.⁷ The settlement amount will be reduced proportionately based on the amount of sales to class members who opt-out in such a way that the percentage recovery for class members who do not opt-out will be preserved. A recovery of 18-20% is one of the highest, if not the highest, rates of recovery ever achieved in the settlement of an antitrust class

⁷ The settlement amount (after reduction for opt-outs) will be distributed to purchasers of vitamin A, astaxanthin, vitamin B1 (thiamin), vitamin B2 (riboflavin), vitamin B5 (calpan), vitamin B6, vitamin B9 (folic acid), vitamin B12 (cyanocobalamin pharma), beta-carotene, vitamin C, canthaxanthin, vitamin E and vitamin H (biotin), with recoveries in the ranges set forth in Schedule B to the Settlement Agreement based on purchases in the periods indicated on Schedule B. Vitamin premix contains one or more vitamins and carotenoid products as well as fillers and other non-vitamin and non-carotenoid products. For calculating the extent of sales of affected vitamins through premix and for allocation purposes, the non-Vitamin Product

(Continued . . .)

action. Moreover, the requested attorney's fee will not reduce this record class recovery as the agreed upon fee is a fixed amount to be paid in addition to the settlement amounts.

Moreover, as a result of settlement provisions negotiated by plaintiffs' counsel, the class will not be disadvantaged should the Settling Defendants agree to pay higher percentages of their sales made to any class members who opt out of the Vitamin Products Settlement Class. The settlement contains a "Most-Favored Nations" clause, pursuant to which the Settling Defendants have agreed to pay to the members of the Vitamin Products Settlement Class additional monies if such Settling Defendants agree to pay any opt-out proportionately more than the payment made available to the members of the Vitamin Products Settlement Class with respect to any covered vitamin product. This clause is enforceable for a two-year period, or until the date of a final pretrial order in such opt-out plaintiff's action, or 30 days prior to the date set for commencement of the trial of such opt-out plaintiff's action.

Other provisions of the proposed settlement provide additional benefits for the members of the settlement classes. The proposed settlement provides for injunctive relief; requires the Settling Defendants to continue to be treated as parties for purposes of discovery as class plaintiffs' counsel continue to prosecute claims against the non-settling defendants; and provides for payment of interest on the settlement funds beginning 45 days after preliminary approval of the settlement by the Court. In exchange for the consideration provided pursuant to the settlement, class members will release all claims related to the conduct alleged in the class actions, but will not release any claims based upon purchases of vitamin products and choline

components of premix purchases have been excluded.

chloride sold for delivery outside the United States. Nor will the class members relinquish their right to participate in class actions based on their indirect purchases of vitamin products or choline chloride. As demonstrated below, the certification of the proposed settlement classes also clearly satisfies the requirements of Fed. R. Civ. P. 23.⁸

In sum, class plaintiffs' counsel have negotiated a historic settlement that is exceedingly beneficial to the classes, and have accomplished this remarkable result at a relatively early stage in this massive litigation.

C. THE REQUEST FOR PRELIMINARY APPROVAL

The limited purpose of preliminary approval of a class action settlement is to determine whether the settlement falls within the range of possible approval after notice has been given to the class of a fairness hearing to be conducted by the Court to determine whether final approval

⁸ The Vitamin Products Settlement Class is defined as follows:

All persons (excluding governmental entities, the entities identified on Schedule A [to the Settlement Agreement] and their respective subsidiaries and affiliates and all Vitamin Products Released Parties) that directly purchased one or more Vitamin Products for delivery in the United States from any manufacturer identified with respect to such Vitamin Product(s) on Schedule A [to the Settlement Agreement] or any subsidiary or affiliate thereof, at any time during the periods specified therein for such Vitamin Product(s).

The Choline Chloride Settlement Class is defined as follows:

All persons (excluding governmental entities, the other Choline Chloride Defendants and their subsidiaries and affiliates and all Choline Chloride Released Parties) that directly purchased Choline Chloride for delivery in the United States from any manufacturer of Choline Chloride, or any subsidiary or affiliate thereof, at any time during the period from 1992 through 1995.

should be given. See Berry v. School District of the City of Benton Harbor, 184 F.R.D. 93, 96 (W.D. Mich. 1998); In re Prudential Securities Inc. Limited Partnerships Litig., 163 F.R.D. 200, 209 (S.D.N.Y. 1995).

There can be no question that this unprecedented settlement falls well within the range of possible approval.⁹ It is truly an outstanding result and, if the Court sets in motion the process for final approval, class plaintiffs are confident that they will satisfy the Court that the settlement merits final approval at the fairness hearing.¹⁰

⁹ At the September 8, 1999 status conference, certain direct action plaintiffs indicated they may oppose the Most Favored Nations clause of the settlement without having seen its terms. Class plaintiffs note that if these direct action plaintiffs opt out of the classes, they will have no legal standing to be heard with respect to any aspect of the settlement. See Mayfield v. Barr, 985 F.2d 1090, 1092 (D.C. Cir. 1993); Agretti v. ANR Freight System, 982 F.2d 242, 245 (7th Cir. 1992); In re Ampicillin Antitrust Litig., 82 F.R.D. 652, 654 (D.D.C. 1979). They would have standing only if they could demonstrate "plain legal prejudice," as when a settlement strips a non-settling party of a legal claim, which is not the case here. Mayfield v. Barr, 985 F.2d at 1092; Agretti v. ANR Freight System, 982 F.2d at 245. Class plaintiffs will respond to any objections on this score should they be made. Class plaintiffs would only note at this time that the courts have approved similar settlement provisions which operate to provide for additional payments to a class based on future settlements reached between opt-outs and settling defendants: "[T]he benefits conferred upon class plaintiffs by the most favored nations clause are not improper. In any case, such benefits should not be discounted by plaintiffs not party to the settlements." In re Brand Name Prescription Drugs Antitrust Litig., 1996 WL 351180, at *2 (N.D. Ill. June 24, 1996).

¹⁰ Furthermore, substantial benefits for the settlement classes from the proposed settlement will result from prompt preliminary approval, and thus class plaintiffs respectfully request that their motion be granted as expeditiously as possible. Preliminary approval will permit notices of the proposed settlement to be issued and the fairness hearing to take place so that, if final approval is granted, the settlement classes will receive payments from the \$1.05 billion settlement fund as rapidly as possible. In addition, 45 days following preliminary approval, defendants are to begin paying interest on the \$1.05 billion settlement amount. Sett. Agr., ¶ 7(d). Also, 30 days after determination of the amount of purchases of qualifying products made by any opt-outs, the Vitamin Products Settling Defendants are required to pay the total

(Continued . . .)

Class plaintiffs therefore request that the Court:

- (a) establish a date for a hearing on final approval of the proposed settlement and its terms;
- (b) approve the form of Notice of Class Action Settlement and Hearing Thereon (the "Notice"), and Summary Notice of Class Action Settlement and Hearing Thereon (the "Summary Notice"), which have been agreed to by the settling parties, and which have been submitted concurrently herewith;
- (c) direct that the Notice and Summary Notice be disseminated in the manner discussed in section IV, infra;
- (d) establish a deadline for the submission of requests for exclusion from the settlement classes, for filing objections to the proposed settlement and the award of attorneys' fees and reimbursement of litigation costs and expenses; and
- (e) conditionally certify the Vitamin Products and Choline Chloride Settlement Classes for the purpose of effectuating the settlement.¹¹

settlement payment, principal and interest, into the Vitamin Products Settlement Fund. Sett. Agr., ¶ 7(b). BASF AG is required to make its initial Choline Chloride payment 30 days after final approval of the settlement. Sett. Agr., ¶ 17(a).

¹¹ Plaintiffs have lodged concurrently herewith a proposed Order Conditionally Certifying Settlement Classes and Preliminarily Approving Proposed Settlement (the "Settlement Hearing Order") that provides for the class notice in a manner that fully complies with the requirements
(Continued . . .)

**II. THE PROPOSED SETTLEMENT IS WELL WITHIN THE RANGE
OF POSSIBLE FINAL APPROVAL AND THEREFORE
PLAINLY MERITS PRELIMINARY APPROVAL**

A. GOVERNING STANDARDS.

Before the Court is class plaintiffs' motion for preliminary approval of the settlement and notice to be given of the settlement to members of the settlement classes.

Rule 23(e) of the Federal Rules of Civil Procedure provides:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

The Manual for Complex Litigation Third (1997) (Manual) at § 30.41, provides the established framework for the Court's preliminary evaluation of a the proposed settlement:

Approval of class action settlements involves a two-step process. First, counsel submit the proposed terms of the settlement and the court makes a preliminary fairness evaluation. . . . If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

See also 2 Herbert B. Newberg and Alba Conte, Newberg on Class Actions § 11.25 (3d ed. 1992). See also Grice v. PNC Mortgage Corp. of America, 1998 WL 350581, at *2 n.1 (D. Md. May 21, 1998); In re NASDAQ Market Makers Antitrust Litig., 176 F.R.D. 99, 102 (S.D.N.Y. 1997).¹²

of Fed. R. Civ. P. 23(c)(2) and (e) and Rule 203 of the Local Rules of this Court.

¹² See also In re Ampicillin Antitrust Litig., 526 F. Supp. 494, 496 (D.D.C. 1981); In re
(Continued . . .)

The standard for preliminary review thus calls on the Court to make two related inquiries. The Court must first ensure that no basis exists to question the fairness of the settlement, typically by determining that it "is not the product of collusion between the parties." Thomas v. Albright, 139 F.3d 227, 231 (D.C. Cir. 1998). See also Thomas v. Christopher, 169 F.R.D. 224, 240 (D.D.C. 1996) (court must determine that the agreement is "not the product of fraud or overreaching by, or collusion between, the negotiating parties"). See also In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 474 (S.D.N.Y. 1998) (settlement should be "result of good faith, arm's length bargaining undertaken by experienced counsel").

Next, the Court must assess the substance of the proposed settlement to decide whether it appears to fall within the range of possible approval, i.e., whether it appears that the settlement is one that could be found to be fair, adequate and reasonable to the class. See Fed. R. Civ. P. 23(e); Thomas v. Albright, 139 F.3d at 231. There is "no obligatory test' . . . to determine whether a settlement is fair, adequate and reasonable." Pigford v. Glickman, 185 F.R.D. 82, 98 & n.13 (D.D.C. 1999) (quoting Osher v. SCA Realty I, Inc., 945 F. Supp. 298, 303-04 (D.D.C. 1996)). Fact bound and case-specific, the adequacy inquiry is properly confined to the Court's discretion. Pigford, 185 F.R.D. at 98.

If the proposed settlement withstands these preliminary inquiries, the Court should approve dissemination of notice to the settlement class of the formal fairness hearing.¹³ Because

Corrugated Container Antitrust Litig., 1979 WL 1637, at *1 (S.D. Tex. May 30, 1979).

¹³ This procedure for disseminating notice to a class of a proposed settlement and then conducting a final fairness hearing to approve the settlement is now well established. See, e.g., Thomas v. Albright, 139 F.3d at 230 (citing Thomas v. Christopher, 169 F.R.D. at 230-31); In re (Continued . . .)

preliminary approval is a provisional step that merely starts the settlement approval process, any doubts should be resolved in favor of preliminary approval. See In re Traffic Executive Association-Eastern Railroads, 627 F.2d 631, 634 (2d Cir. 1980) (preliminary approval “is at most a determination that there is what might be termed ‘probable cause’ to submit the proposal to class members and hold a full-scale hearing as to its fairness”).

B. BECAUSE THE SETTLEMENT AGREEMENT RESULTED FROM ARM'S-LENGTH NEGOTIATIONS CONDUCTED BY HIGHLY EXPERIENCED COUNSEL REPRESENTING A WIDE RANGE OF INDUSTRY PARTICIPANTS, THERE IS NO BASIS TO DOUBT THE FAIRNESS OF THE AGREEMENT.

This Court and other 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., Stewart v. Rubin, 948 F. Supp. 1077, 1099 (D.D.C. 1996), aff'd, 124 F.3d 1309 (D.C. Cir. 1997); McGuinness v. Parnes, 1989 WL 29814, at *1 (D.D.C. Mar. 22, 1989). See also In re Lease Oil Antitrust Litig. (No. II), 186 F.R.D. 403, 424-425 (S.D. Tex. 1999); In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 312-13 (N.D. Ga. 1993); Manual § 30.42, at 240; 2 Newberg on Class Actions § 11.41 at 11-88, 11-91.¹⁴ The presumption in favor of such

Newbridge Networks Sec. Litig., 1998 WL 765724, at *2 (D.D.C. Oct. 22, 1998). See also Stoezner v. U.S. Steel Corp., 897 F.2d 115, 117-120 (3d Cir. 1990); In re Corrugated Container Antitrust Litig., 643 F.2d 195, 205-206 (5th Cir. 1981).

¹⁴ See also Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977); Flinn v. FMS Corp., 528 F.2d 1169, 1173 at n.14 (4th Cir. 1975); In re Minolta Camera Products Antitrust Litig., 668 F. Supp. 456, 459 (D. Md. 1987); Fisher Brothers v. Phelps Dodge Industries Inc., 604 F. Supp. 446, 452 (E.D. Pa. 1985) (“[T]he professional judgment of counsel involved in the litigation is entitled to significant weight”); Blank v. Talley Industries, Inc., 64 F.R.D. 125, 132 (S.D.N.Y. 1974) (a factor “entitled to substantial weight is that the settlement bears the imprimatur of seasoned and experienced counsel . . .”); In re Coordinated Pretrial Proceedings in Antibiotic

(Continued . . .)

settlements reflects courts' understanding that vigorous expert negotiation protects against collusion and advances the fairness interests of Rule 23(e).

The settlement proposed here is the product of extensive arm's-length negotiations undertaken in good faith, after substantial factual investigation and legal analysis. Indeed, the settlement was negotiated on behalf of the settlement classes by counsel who are among the most experienced antitrust attorneys in the United States, and who have been involved in many of the major antitrust cases litigated over the last several decades.

Moreover, as detailed above, this settlement follows an extensive investigation by class counsel into the price-fixing activities of the defendants and their alleged co-conspirators. Class plaintiffs have reviewed and analyzed many thousands of documents produced by defendants, and have interviewed approximately 50 fact witnesses. Class counsel have also retained and consulted extensively with economics and industry experts, who have themselves reviewed numerous documents and conducted an extensive analysis of the existence and magnitude of the damages sustained by members of the settlement classes. On the basis of this assessment of their case, class counsel have concluded that the proposed settlement is fair, reasonable and adequate.

In sum, nothing in the course of the negotiations or the substance of the settlement "disclose[s] grounds to doubt its fairness." Manual § 30.41. To the contrary, the arm's-length nature of the negotiations, and the participation of experienced advocates throughout the process, strongly supports the conclusion that the proposed settlement is fair, reasonable and adequate to the settlement classes.

Antitrust Actions, 410 F. Supp. 659, 667 (D. Minn. 1974) ("The recommendation of experienced
(Continued . . .)

**C. THE TERMS OF THE SETTLEMENT AGREEMENT ARE FAIR,
REASONABLE AND ADEQUATE.**

1. Settlement Payments

Pursuant to the terms of the proposed settlement, the Settling Defendants have agreed to pay approximately \$1.05 billion in settlement of the claims of the Vitamin Products Settlement Class. The settlement payments represent 18-20% of the sales made for delivery in the United States by the Settling Defendants and their affiliates of relevant vitamin products to class members during the applicable time periods, a result that far exceeds recoveries approved in other major antitrust cases. Indeed, the proposed settlement amount would rank at the top of the very highest tier of the most exceptional settlements ever achieved in the history of antitrust class actions. Compare In re Citric Acid Antitrust Litig., MDL No. 1092, Master File No. C-9502963 (N.D. Cal.) (recovery equal to 14.3% of total sales following guilty pleas by the settling defendants); In re Amino Acid Lysine Antitrust Litig., MDL No. 1083 (N.D. Ill.) (recovery equal to 7.2% of total sales following guilty pleas).¹⁵

antitrust counsel is entitled to great weight”).

¹⁵ The settlement compares very favorably to other antitrust class action settlements. See, e.g., In re Chicken Antitrust Litig., 1980-81 Trade Cas. (CCH) ¶ 63,237 (N.D. Ga. 1980) (recovery of approximately 1% of sales during a two-year period); Bagel Inn, Inc. v. All Star Dairies, 1982-1 Trade Cas. (CCH) ¶ 64,512 (W.Va. 1981) (recovery of less than 1% of sales during a four year period); Fisher Bros. v. Mueller Brass Co., 630 F. Supp. 493 (E.D. Pa. 1985) (settlements of 2% to 2.4% of sales; largest settlements followed indictments); Cintech Industrial Coatings, Inc. v. Bennett Indus., Inc., 85 F.3d 1198, 1200 (6th Cir. 1996) (individual defendants settled for 4% of gross sales during one year of the alleged conspiracy period); In re Plastic Tableware Antitrust Litig., 1995 Trade Cas. (CCH) ¶ 71,184, at 75,737 (E.D. Pa. Oct. 25, 1995) (settlement amounts to 3.5% of total sales); Northwestern Fruit Co. v. A. Levy & J. Zentner Co., 117 F.R.D. 670, 671 (E.D. Cal. 1987) (stating that settlement is unusually favorable as a percentage of defendants' sales in that the settlement amounted to 15% of the settling

(Continued . . .)

Each Settling Defendant will make an initial payment of \$35,000 into an escrow fund, which will be available immediately after the Court's preliminary approval of the settlement for reimbursement of all expenses related to providing notice of the settlement to the settlement classes. Sett. Agr., ¶ 7(a). Each Settling Defendant will be obligated to pay the remainder of its settlement payment into the Vitamin Product Settlement Fund no later than 30 days after the determination of the amount by which such Settling Defendant's payments are to be reduced to the extent class members elect to opt out of the Vitamin Products Settlement Class. Sett. Agr., ¶ 7(b). The Settlement Agreement further provides that interest on the Vitamin Products settlement amounts will begin to accrue 45 days after the date of the Court's order preliminarily approving the settlement. Sett. Agr., ¶ 7(d).

In settlement of the claims of the Choline Chloride settlement class members, defendant BASF AG has agreed to pay a minimum of \$5 million, and a maximum of \$25 million, into the

defendants' total revenues over the four-year statute of limitations period); Service Spring, Inc. v. Cambria Spring Co., Nos. 81 C 1835, 32 C 3901 & 82 C 3371 (N.D. Ill. Feb. 17, 1987) (settlements represented 4% of settling defendants' sales over a four-year period); In re Art Materials Antitrust Litig., 100 F.R.D. 367 (N.D. Ohio 1983) (settlement amount represents less than 4.3% of defendants' sales during the "focus years" of 1973-76); Bagel Inn, Inc. v. All Star Dairies, 1982-1 Trade Cas. (CCH) ¶ 64,512 (D.N.J. Dec. 21, 1981) (settlement was less than 1% of total sales). Axelrod v. Saks & Co., 1980-81 Trade Cas. (CCH) ¶ 63,861 (E.D. Pa. Feb. 23, 1981) (settlement amounts to 3.7% of sales); In re Armored Car Antitrust Litig., 472 F. Supp. 1357, (N.D. Ga. 1979) (settlement amounts equaled 3.88% of sales), modified on other grounds, 645 F.2d 488 (5th Cir. 1981); In re Gas Meter Antitrust Litig., 500 F. Supp. 956 (E.D. Pa. 1980) (settlement amount equalled 8% of total class purchases); In re Anthracite Coal Antitrust Litig., 79 F.R.D. 707 (M.D. Pa. 1978) (approving recovery of 3% of estimated sales, modified on other grounds, 612 F.2d 576 (3d Cir. 1979). See also In re Newbridge Networks Sec. Litig., 1998 WL 765724 (D.D.C. Oct. 22, 1998) (approving settlement equal to 6-12% of potential damages in securities fraud class action, holding that such a figure "seems to be within the targeted range of reasonableness" for all types of class actions).

Choline Chloride Settlement Fund to be distributed to members of the Choline Chloride Settlement Class. Sett. Agr., ¶ 17. The Settlement Agreement provides that attorneys' fees, in an amount not to exceed 15% of the Choline Chloride Settlement Class's recovery, are additionally to be paid by BASF AG. Sett. Agr., ¶¶ 12, 17.

It is well known that antitrust conspiracy cases are notoriously complex and difficult to litigate; success is never assured. See, e.g., In re Cement and Concrete Antitrust Litig., 1981-1 Trade Cas. (CCH) ¶ 63,892 (D. Ariz. 1981) (recognizing "complexity and uncertainty" of legal and factual issues in antitrust case; approving settlement); In re Art Materials Antitrust Litig., 100 F.R.D. 367, 372 (N.D. Ohio 1983) (noting "recognized difficulties of proof and requirements of a costly [antitrust] trial on the merits"; approving settlement). Had the case proceeded to trial against the Settling Defendants, they would likely have raised thorny issues of causation and impact, and vigorously challenged class plaintiffs' measures of damages, based on factors such as fluctuations in foreign currency exchange rates and variations in product demand levels. In addition, the litigation involves multiple foreign defendants, and substantial jurisdictional defenses have been raised. Viewed against any probable recovery, and considering the risks of protracted litigation, this settlement falls well within the range of possible final approval as fair, adequate and reasonable, and therefore merits preliminary approval at this time.

2. Forward-Looking Provisions Of The Settlement

Three provisions of the Settlement Agreement are important because they protect the future interests of the members of the settlement classes. First, a clause providing for injunctive relief effectively precludes the Settling Defendants, for three years following the date of the

Agreement, from agreeing with each other or their competitors to fix the prices of or allocate markets for Vitamin Products or Choline Chloride in violation of Section 1 of the Sherman Act. The inclusion of significant equitable relief “weighs heavily in favor of a finding that the proposed [settlement] is fair, adequate and reasonable.” See Neal v. D.C. Department of Corrections, Civ. No. 93-2420 (D.D.C. June 28, 1999).

Second, the settlement’s Most Favored Nations clause obligates the Settling Defendants to pay additional amounts to the Vitamin Products Settlement Class if the Settling Defendants agree to pay to persons or entities who exclude themselves from the Settlement Class any amounts proportionately more favorable than the amounts agreed upon in the class settlement.¹⁶

Finally, the Settling Defendants have agreed, despite their dismissal from the litigation, to remain subject to discovery, pursuant to the Federal Rules of Civil Procedure or Hague Convention, as applicable, from class plaintiffs in this action.

3. Attorneys’ Fees

The vitamin products settling defendants have agreed to establish a separate fund of approximately \$122 million to be paid, subject to Court approval to class plaintiffs’ counsel for their attorneys’ fees.¹⁷ Calculated as a percentage of the total recovery made available to the Vitamin Products Settlement Class and such fee amount – approximately 10.4 % of the total

¹⁶ The sole Vitamin Product excepted from the Most Favored Nations provision is Vitamin B9, which represents only \$12 million of the settlement payments. The Vitamin B9 settlement payments, unlike those for other Vitamin Products, will not be reduced in the event persons or entities exclude themselves from the Settlement Class.

¹⁷ The settlement further provides that BASF AG shall make a payment in an amount equal to 15% of its choline chloride settlement payment as attorneys fees.

amount made available to that class and the fee amount -- the fees sought by plaintiffs' counsel are far below those approved by this Court in previous antitrust class actions. See In re D.C. Soft Drinks Antitrust Litig., 1989 WL 77350, 1989 WL 77337 (D.D.C. May 23, 1989) (approving fee award of 27 % of total recovery); Jack Faucett Associates, Inc. v. AT & T Co., 1985 WL 5199 (D.D.C., Dec. 16, 1985), 1986 WL 944 (D.D.C. Apr. 1, 1986) (approving fee award of 20% of total recovery); In re Ampicillin Antitrust Litig., 526 F. Supp. 494 (D.D.C. 1981) (approving fee award of 45% of total recovery).¹⁸ Should the Court rule that plaintiffs' counsel are entitled to less than that amount, the excess will revert to the Settling Defendants, subject to the terms of the settlement.

In sum, the proposed settlement provides substantial relief for all members of the settlement classes, obviating the rigors and uncertainty of lengthy litigation, and provides a truly magnificent result for the members of the settlement classes. The monetary recovery provided by the Agreement is extraordinary, measured either in dollar terms or as a percentage of total sales. The injunctive relief and most-favored nation provisions safeguard the forward-looking interests of class members. And the attorneys' fees provision ensures fair compensation for class counsel. For these reasons, the settlement falls well within the range of possible approval.

III. PROPOSED TIMETABLE

Class plaintiffs propose the following schedule:

¹⁸ The D.C. Circuit has ruled similarly in other types of class actions. See, e.g., Swedish Hospital Corp. v. Shalala, 1 F.3d 1261, 1272 (D.C. Cir. 1993) (approving award of 20 % of common fund, noting that "a majority of common fund class action fee awards fall between twenty and thirty percent"); Bebchick v. Washington Metropolitan Area Transit Comm'n, 805

(Continued . . .)

1. The Notices and Proof of Claim and Release forms to be mailed and posted on Plaintiff's Co-Lead Counsels' and (subject to the Court's approval) the Court's World Wide Web site no later than thirty (30) days from the date the Court enters the Settlement Hearing Order assigning a date for the final approval hearing;
2. Summary Notices to begin publication within ten (10) days after the date the Notice is mailed;
3. Any member of the Settlement Classes who wishes to be excluded therefrom, and from participating in the settlement, must file a Request to be Excluded by 45 days after the Notice is mailed;
4. Class plaintiffs must file their motions for final approval, for attorneys' fees and for approval of the plan of distribution 30 days prior to the Settlement Hearing Date;
5. Any objections to the settlement, the Plan of Distribution of settlement proceeds and/or the fees and costs requested by class plaintiffs' counsel must be filed no later than 14 days prior to the Settlement Hearing Date;
6. A hearing before the Court on final approval of the settlement as soon as possible on or after ninety (90) days from the date that the Court enters the Settlement Hearing Order; and
7. A bar date of ninety (90) days after the Hearing Date, by which date members of the Settlement Classes should have mailed their completed and verified Proof of Claim forms.

F.2d 396, 405 (D.C. Cir. 1986) (approving fee award of 25 % of common fund).

IV. NOTICE TO THE SETTLEMENT CLASSES

Rule 23(e) provides that “notice of the proposed dismissal or compromise [of a class action] shall be given to all members of the class in such manner as the court directs.” The purpose of the notice is to “afford members of the class due process which, in the context of the Rule 23(b)(3) class action, guarantees them the opportunity to be excluded from the class action and not be bound by any subsequent judgment.” Peters v. National Railroad Passenger Corp., 966 F.2d 1483, 1486 (D.C. Cir. 1992) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-74 (1974)). See Gottlieb v. Wiles, 11 F.3d 1004, 1012-13 (10th Cir. 1993) (notice must fairly apprise class members of the settlement and their options). The proposed notice program clearly meets this standard.

Here, class plaintiffs propose providing individual notice, in the form of notice attached to the Settlement Agreement as Exhibit 3, via first-class postage prepaid mail to each prospective member of either settlement class who may be reasonably identified from the Settling Defendants’ customer lists and the customer lists of other defendants who manufacture Choline Chloride. The same notice, as well as a Proof of Claim and Release form, would also be posted on Plaintiffs’ Co-Lead Counsel’s and (subject to the Court’s approval) the Court’s World Wide Web sites.

Class plaintiffs further propose to publish a summary notice once during each of two consecutive weeks in the national edition of The Wall Street Journal, once in Chemical Market Reporter, a trade journal primarily for the human side of the market, and once in Feedstuffs, the principal trade journal for the animal feed industry. This notice is adequate to apprise members

of the Settlement Classes of the proposed settlement. See, e.g., In re Chambers Development Secs. Litig., 912 F. Supp. 822, 836 (W.D. Pa. 1995) (notice by mail and publication in Wall Street Journal and local newspaper is "best possible notice"); Gordon v. Hunt, 117 F.R.D. 58, 63 (S.D.N.Y. 1987) (combination of mailed and published notice is "long-accepted norm in large class actions"). In addition, there already has been and undoubtedly will continue to be widespread press coverage concerning the settlement. The content of the notice proposed here, and the proposed method of dissemination of the notice, plainly fulfill the requirements of Fed.R.Civ.P. 23(e), as well as the more rigorous requirements of Fed. R. Civ. P. 23(c)(2),¹⁹ and due process.

**V. THE PROPOSED SETTLEMENT CLASSES SATISFY
ALL OF THE REQUIREMENTS OF RULE 23.**

Rule 23 governs the issue of class certification, whether the proposed class is a litigation class or, as here, a settlement class. Amchem Products v. Windsor, 521 U.S. 591 (1997). All the criteria for certification of a class for litigation purposes, except manageability, apply to certification for settlement purposes. Courts routinely and properly certify classes for settlement purposes only,²⁰ and the proposed certification of the Vitamin Products and Choline Chloride

¹⁹ Rule 23(c)(2) provides that "[I]n any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel."

(Continued . . .)

Settlement Classes is fully consistent with the applicable authorities.

A class action is to be certified where, as here, the class plaintiff satisfies the four prerequisites of Rule 23(a) (numerosity, commonality, typicality and adequacy), as well as one of the three subsections of Rule 23(b). See Thomas v. Christopher, 169 F.R.D. at 236. A “settlement-only class certification” depends upon compliance with all the requirements of 23(a) and (b). Thomas v. Albright, 139 F.3d at 234.

The only matters pertinent to a motion for class certification are the requirements of Rule 23 and the facts which bear on those requirements. Rubenstein v. Collins, 162 F.R.D. 534, 536 (S.D. Tex. 1995). The underlying merits of the plaintiff’s claims are not considered. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) (“[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action”).

A. CLASS CERTIFICATION IS ROUTINELY GRANTED IN HORIZONTAL PRICE-FIXING CASES.

Courts have long recognized that horizontal price-fixing actions are particularly suitable for class action treatment, because the central issue -- whether a price-fixing conspiracy existed -- is identical for each prospective plaintiff. As courts have recognized, moreover, “[a]ntitrust claims are well suited for class actions” because they facilitate broad enforcement of the antitrust laws. In re Playmobil Antitrust Litig., 35 F. Supp.2d 231, 238 (E.D.N.Y. 1998) (citing Shelter

²⁰ See, e.g., In re Prudential Ins. Co. Sales Practices Litig., 148 F.3d 283 (3d Cir. 1998); Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982); Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982); In re Beef Indus. Antitrust Litig., 607 F.2d 167 (5th Cir. 1979); In re Prudential Securities Inc. Limited Partnerships Litig., 163 F.R.D. 200 (S.D.N.Y. 1995); Alvarado Partners,

(Continued . . .)

Realty Corp. v. Allied Maintenance Corp., 75 F.R.D. 34, 38 (S.D.N.Y. 1977)). See also Playmobil, 35 F. Supp.2d at 239 (“Because of the important role that class actions play in the private enforcement of antitrust actions, courts resolve doubts in favor of certifying the class”). Federal courts have therefore routinely granted class certification in antitrust cases involving claims of horizontal price-fixing with respect to a wide variety of products, particularly where those products are relatively homogeneous.²¹

LP v. Mehta, 723 F. Supp. 540 (D. Colo. 1989).

²¹ Cases in which the courts certified classes of purchaser plaintiffs in horizontal price-fixing cases include, among many others, the following:

1. In re Commercial Tissue Products, 1998 U.S. Dist. LEXIS 17614 (N.D. Fla. 1998) (Judge Paul certified a nationwide class of purchasers of commercial tissue products);
2. In re Plastic Cutlery Antitrust Litig., 1998 U.S. Dist. LEXIS 3628 (E.D. Pa. 1998) (Judge McGlynn certified nationwide class of purchasers of medium weight plastic cutlery);
3. In re Playmobil Antitrust Litig., 1998 U.S. Dist. LEXIS 20806 (E.D.N.Y. 1998) (Judge Seybert certified a nationwide class of purchasers of specialty toys);
4. In re Medical X-Ray Film Antitrust Litig., 1997 U.S. Dist. LEXIS 21936 (E.D.N.Y. 1997) (Judge Sifton certified nationwide class of purchasers of medical x-rays and imaging);
5. In re Polypropylene Carpet Antitrust Litig., 996 F. Supp. 18 (N.D. Ga. 1997) (Judge Murphy certified nationwide class of purchasers of polypropylene carpet);
6. In re Amino Acid Lysine Antitrust Litig., No. 95 C 7679, MDL NO. 1083 (N.D. Ill. February 15, 1996) (Judge Shadur certified a nationwide class of purchasers of lysine);
7. In re Citric Acid Antitrust Litig., 1996 U.S. Dist. LEXIS 16409 (N.D. Cal. 1996) (Judge Smith certified nationwide class of purchasers of citric acid);
8. In re High Fructose Corn Syrup Antitrust Litig., 936 F. Supp. 530 (C.D. Ill. 1996) (Judge Mihm certified a nationwide class of purchasers of high fructose corn syrup);

(Continued . . .)

-
9. In re NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493 (S.D.N.Y. 1996); 1997 U.S. Dist. LEXIS 20835 (S.D.N.Y. 1997) (Judge Sweet certified nationwide class of purchasers of NASDAQ securities);
 10. In re Potash Antitrust Litig., 159 F.R.D. 682 (D. Minn. 1995) (Judge Kyle certified a nationwide class of purchasers of potash);
 11. In re Brand Name Prescription Drugs Antitrust Litig., 1994 WL 663590 (N.D. Ill. 1994) (Judge Kocoras certified a nationwide class of purchasers of brand name prescription drugs);
 12. In re Carbon Dioxide Antitrust Litig., 149 F.R.D. 229 (M.D. Fla. 1993) (Judge Fawsett certified a nationwide class of bulk purchasers of carbon dioxide);
 13. In re Catfish Antitrust Litig., 826 F. Supp. 1019 (N.D. Miss. 1993) (Judge Davidson certified a nationwide class of purchasers of catfish and catfish products);
 14. In re Infant Formula Antitrust Litig., 1992 WL 503465 (N.D. Fla. 1992) (Chief Judge Paul certified a nationwide class of purchasers of infant formula);
 15. In re Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677 (N.D. Ga. 1991) (Judge Shoob certified a nationwide class of purchasers of domestic airline passenger tickets);
 16. Meredith v. Mid-Atlantic Coca Cola Bottling Co., 129 F.R.D. 130 (E.D. Va. 1989) (Judge Merhige certified a class of soft drink purchasers);
 17. In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 268 (D. Minn. 1989) (Judge Murphy certified a nationwide class of wirebound box purchasers);
 18. Cumberland Farms, Inc. v. Browning-Ferris Indus., Inc., 120 F.R.D. 642 (E.D. Pa.) (Judge Bechtle certified a nationwide class of purchasers of waste collection services), reconsid. denied, 1988 U.S. Dist. LEXIS 12510 (E.D. Pa. 1988);
 19. In re Chlorine and Caustic Soda Antitrust Litig., 116 F.R.D. 622 (E.D. Pa. 1987) (Judge Bechtle certified a nationwide class of purchasers of chlorine and caustic soda from defendants);
 20. Fisher Bros. v. Mueller Brass Co., 102 F.R.D. 570 (E.D. Pa. 1984) (Judge Shapiro certified a national class of purchasers of copper tubing);

(Continued . . .)

This case -- like those referenced above, and many others -- falls squarely within the requirements of Rule 23. The members of the Settlement Classes for which certification is sought number at least in the hundreds; the issues with respect to the alleged illegality of defendants' actions under section 1 of the Sherman Act are common to the claims of all members of the Settlement Classes; the claims of the representative plaintiffs arise from the same factual matrix and are based on the same legal theory as the claims of the absent class members and thus are typical of each member of the Settlement Classes; and the adequacy of representation cannot be seriously challenged. In addition, questions affecting only individual members are minimal and a class action is superior to any other method for fairly and efficiently adjudicating this controversy.

B. THE PROPOSED SETTLEMENT CLASSES SATISFY THE REQUIREMENTS OF RULE 23(a).

1. The Settlement Classes Are So Numerous That Joinder Of All Members Is Impracticable.

The first requirement for maintaining a class action under Rule 23(a) is that the class be so numerous that joinder of all members would be "impracticable." Fed. R. Civ. P. 23(a)(1).

21. United Nat'l Records, Inc. v. MCA, Inc., 101 F.R.D. 323, 325 (N.D. Ill. 1984) (Judge Bua certified a nationwide class of purchasers of records and tapes);

22. In re Glassine and Greaseproof Paper Antitrust Litig., 88 F.R.D. 302 (E.D. Pa. 1980) (Judge Pollak certified a national class of purchasers of glassine and greaseproof paper);

23. In re South Cent. States Bakery Prods. Antitrust Litig., 86 F.R.D. 407 (M.D. La. 1980) (Judge Schwartz certified a class of bakery product purchasers); and

24. In re Fine Paper Antitrust Litig., 82 F.R.D. 143 (E.D. Pa. 1979) (Judge McGlynn certified a national class of purchasers of fine paper).

Although there is no “magic number” of plaintiffs that will qualify for class certification, courts have historically certified class groups of more than fifty in recognition that it is impracticable to bring groups of this size before a single court. See, e.g., Committee of Blind Vendors v. District of Columbia, 695 F. Supp. 1234 (D.D.C. 1988) (63 members), rev'd on other grounds, 28 F.3d 130 (D.C. Cir. 1990); Arnold v. Postmaster General, 667 F. Supp. 6, 15 (D.D.C. 1987) (at least 39 members), rev'd on other grounds sub nom. Arnold v. U.S. Postal Service, 863 F.2d 994 (D.C. Cir. 1988). See generally 3B Moore, Moore's Federal Practice ¶ 23.22[3][a] (3d. ed.1999) (modern trend is that twenty-one or fewer plaintiffs will be insufficient, between twenty-one and forty plaintiffs will receive a mixed response, and with more than forty plaintiffs the courts generally find that the requirement of numerosity has been met).

The proposed settlement classes, with membership numbering in the hundreds if not thousands, easily fulfill the numerosity requirement. The settlement classes are not so large as to pose manageability problems, and therefore fit well within the numerical range of other classes that have been certified by this and other courts. See In re Newbridge Networks Sec. Litig., 926 F. Supp. 1163, 1175-76 (D.D.C. 1996) (certifying class with “thousands” of members); Bermudez v. U.S. Department of Agriculture, 348 F. Supp. 1279, 1280 n.2 (D.D.C. 1972) (same), aff'd, 490 F.2d 718 (D.C. Cir. 1973); Gunter v. Ridgewood Energy Corp., 164 F.R.D. 391, 395 (D. N.J. 1996) (certifying class whether there were “hundreds,” rather than “thousands,” of members); In re Potash Antitrust Litig., 159 F.R.D. 682, 689 (D. Minn. 1995) (certifying class of “thousands” of purchasers); In re Folding Carton Antitrust Litig., 75 F.R.D. 727, 732 (N.D. Ill.

1979) (35,000 members of the class).

2. There Are Questions Of Law And Fact Common To Each Settlement Class.

The second prerequisite to class certification is the existence of questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). A “common nucleus of operative fact” generally satisfies the commonality requirement of Rule 23(a)(2). Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 185 (N.D. Ill. 1992). The commonality requirement has been aptly characterized as a “‘low hurdle’ easily surmounted.” Id. (quotations and citations omitted).

Here, as in virtually every horizontal price-fixing case, the commonality requirement is easily satisfied. Price-fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy. In re Playmobil Antitrust Litig., 35 F. Supp.2d at 240; In re Catfish Antitrust Litig., 826 F. Supp. 1019, 1034 (N.D. Miss. 1993). In all these cases — as in the instant case — issues of liability and damages presented a “common core of questions,” State of Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 488 (N.D. Ill. 1969), relevant to each claim: “the existence of the alleged conspiracy and establishment of what the prices should have been.” Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 458 (E.D. Pa. 1968).

In this case, evidence regarding the following issues is common to all members of the Settlement Classes: (1) whether the defendants agreed to fix and raise prices for Vitamin Products and/or Choline Chloride; (2) whether the defendants agreed to allocate customers and/or the volume of sales and market shares for such products; (3) whether the defendants agreed to rig bids for contracts to supply vitamin premixes and/or Choline Chloride to customers

in the United States; and (4) whether the defendants participated in meetings and conversations to monitor and enforce adherence to the agreed-upon prices and market shares.

3. The Claims Of The Representative Parties Are Typical Of The Claims Of The Members Of The Respective Settlement Classes.

Rule 23(a)(3) requires that “the claims . . . of the representative parties [be] typical of the claims . . . of the class.” “A plaintiff’s claim is typical ‘if it arises from the same event or practice or course of conduct that gives rise to a claim of another class member’s where his or her claims are based on the same legal theory.’” Stewart v. Rubin, 948 F. Supp. 1077, 1088 (D.D.C. 1996) (quoting EEOC v. Printing Industry, 92 F.R.D. 51, 54 (D.D.C. 1981)), aff’d, 124 F.3d 1309 (D.C. Cir. 1997). “Typical” does not mean identical, however, Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. at 185, and the typicality requirement has been liberally construed by courts in this and other circuits. Id. See also In re Disposable Contact Lens Antitrust Litig., 170 F.R.D. 524, 532 (M.D. Fla. 1996).

“[C]laims in antitrust price-fixing cases generally satisfy Rule 23(a)(3)’s typicality requirement,” and “typicality in the antitrust context will be established by plaintiffs and all class members alleging the same antitrust violations by defendants.” In re Playmobil Antitrust Litig., 35 F. Supp.2d at 241(citations omitted). Thus, in Prescription Drugs, 1994 WL 663590 at *3, the court rejected the defendants’ argument that the class representatives’ claims were not typical of the class because the class allegedly consisted of “an amalgam of diverse businesses, facing different competitive environments and paying widely differing prices.” The court found the typicality requirement satisfied and observed:

As we see it, the factual variations in plaintiffs’ methods of business operation

does not dilute the typicality of their common claim of a conspiracy to fix, and/or stabilize the price of brand-name prescription drugs in violation of antitrust laws. The legal substance and theory of the putative class plaintiffs' claim -- i.e., proof of a conspiracy and its effectuation -- are the same.

Id. This analysis obtains with equal force here. Class plaintiffs allege practices or common courses of conduct by defendants directed respectively against direct purchasers of Vitamin Products and/or Choline Chloride and advance the same theory of antitrust liability on behalf of all class members.

4. **The Representative Plaintiffs Will Fairly And Adequately Protect The Interests Of The Settlement Classes.**

The final requirement of Rule 23(a) is that the representative parties fairly and adequately represent the class. Fed. R. Civ. P. 23(a)(4). The D.C. Circuit has summarized the showing named plaintiffs must make to establish their ability to protect adequately the interests of all members of the plaintiff class:

Two criteria for determining the adequacy of representation are generally recognized: (1) the named representative must not have antagonistic or conflicting interests with unnamed members of the class, and (2) the representatives must appear to be able to vigorously prosecute the interests of the class through qualified counsel.

National Association of Regional Medical Programs v. Mathews, 551 F.2d 340, 345 (D.C. Cir. 1976) (citations omitted), cited in Committee of Blind Vendors, 695 F. Supp. at 1242-43. In this case, the requirements of Rule 23(a)(4) are clearly satisfied. The named plaintiffs have no conflicting interests with absent members of the Settlement Classes.²² On the contrary, plaintiffs

²² The named plaintiffs include Livengood Feeds, Inc., Lakeland Cash Feed Company, Inc., Donaldson & Hasenbein d/b/a J&R Feed Services, Inc., Animal Science Products, Inc.,

(Continued...)

and each member of the proposed settlement classes have a strong and identical interest in establishing liability on the part of the defendants. Plaintiffs are represented by well-qualified and experienced counsel who are thoroughly familiar with class and antitrust litigation, so that there is no ground for supposing that plaintiffs will not adequately represent the settlement classes.

Moreover, the named plaintiffs have collectively purchased substantial amounts of vitamin products and choline chloride, for both human and animal consumption. Named plaintiffs have therefore incurred injury as a result of defendants' conduct, and they have incurred such injury with respect to each product at issue in this case.

C. THIS ACTION MEETS THE REQUIREMENTS OF RULE 23(b)(3).

Once the four prerequisites of Rule 23(a) are met, as in this case, the potential class must also satisfy at least one provision of Rule 23(b). Thomas v. Albright, 139 F.3d at 234. Pursuant to Rule 23(b)(3), a class must be certified where the court finds that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Id. The Supreme Court has recently observed that “predominance [of common issues] is a test readily met in certain cases . . . involving violations of antitrust laws.” Amchem, 521 U.S. at 625. See also Newberg on Class Actions § 18.28 at

Nature's Value, Inc., McDuffy Feed & Supply, Inc., Pilgrim's Pride Corporation, Midwestern Pet Foods, Inc., Dad's Products Co., Inc., J.B.D.L. Corporation, Allied Feed, Inc., Horizon Laboratories, Inc., Nutrition Specialties, Hi-Tek Rations, Freeman Industries, L.L.C., Domain, Inc., AG Mark, Inc., 1700 Pharmacy, Inc., Central Connecticut Cooperative Farmers Association and United Cooperative Farmers, Inc.

18-98, 99 (“As a rule, the allegation of a price-fixing conspiracy is sufficient to establish predominance”). Accordingly, “[s]everal courts have held that when a defendant is alleged to have participated in a nationwide price-fixing conspiracy, impact will [be] presumed as a matter of law, and the predominance requirement of Fed.R.Civ.P. 23(b)(3) will be satisfied.” Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F. R. D. 168, 172 (E.D. Pa. 1997).

1. Common Questions Of Law And Fact Predominate In This Action.

In determining whether common questions of law or fact predominate, liability issues are the primary focus. Cumberland Farms, Inc. v. Browning-Ferris Indus., Inc., 120 F.R.D. 642, 647 (E.D. Pa.); In re Chlorine and Caustic Soda Antitrust Litig., 116 F.R.D. at 627. “[I]n section 1 Sherman Act cases, the existence vel non of a conspiracy has been recognized as an overriding issue common to the plaintiff class.” Chevalier v. Baird Sav. Ass’n, 72 F.R.D. 140, 149 (E.D. Pa. 1976) (emphasis added). It is thus axiomatic that where, as here, a price-fixing conspiracy is alleged, the questions of law or fact common to the members of the settlement classes predominate over questions affecting only individual members. Under these circumstances, the common questions of law and fact identified by plaintiffs’ complaints predominate in this case, and certification of the settlement classes should be granted.

2. A Class Action Is Superior To Other Available Methods For The Fair And Efficient Adjudication Of This Controversy.

A class action is a superior device for litigating plaintiffs’ antitrust law claims in this case. This Court previously held that a class action was the superior method of adjudication under similar circumstances in Lewis v. National Football League, 146 F.R.D. 5 (D.D.C. 1992):

In this case, the conclusion that the class action is superior cannot seriously be questioned. First, there are approximately 250 plaintiffs, located nationwide, each of whom would have to conduct extensive and expensive discovery in order to demonstrate anti-trust liability. Second, 250 separate trials would certainly be a waste of judicial resources. Moreover, as there is a great risk of inconsistent adjudications if these trials were pursued across the country, a trial in only one forum is justified. And, there is no indication that this class action would be unmanageable or would present any unusual difficulties for the court. In light of these considerations, the court finds that the class action is the superior method of adjudicating plaintiffs' claims.

Id. at 18.²³ See also In re Brand Name Prescription Drugs Antitrust Litig., 1994 WL 663590, at *5 (single class action is less complex than thousands of individual actions).

Prosecution of this action as a class action will also “achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated.” Fifth Moorings Condominium, Inc. v. Shere, 81 F.R.D. 712, 719 (S.D. Fla. 1979), quoting 1966 Advisory Committee Notes to Rule 23, 39 F.R.D. 69, 102-03 (1966); accord United Nat'l Records, Inc. v. MCA, Inc., 101 F.R.D. at 323. “What would be unmanageable is the institution of numerous individual lawsuits.” Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. at 189.

The words of Judges Will and Robson in In re Folding Carton Antitrust Litig. apply fully to this case:

We are further of the opinion that the alternative methods of adjudication inevitably involve duplicative, expensive, and time-consuming suits without any countervailing benefits. Conversely, the class action embodies an efficient and fair balance of the interests of the plaintiffs, the class members, and the defendants, all of whom will have their claims and the claims against them adjudicated in one lawsuit. While such litigation presents some problems to counsel and the court, these burdens are not nearly as onerous to the judicial

²³ In Lewis, based strictly on class counsel's conflict of interest the Court denied class certification with leave to amend.

system as a series of extended suits against the defendants.

The public at large likewise will benefit from a class action and expeditious adjudication of the issues involved, since class actions reenforce the regulatory scheme by providing an additional deterrent beyond that afforded either by public enforcement or by single-party private enforcement.

75 F.R.D. at 733 (citations and quotations omitted).

Accordingly, the proposed settlement classes meet the requirements of Rule 23(b)(3) and should be certified.

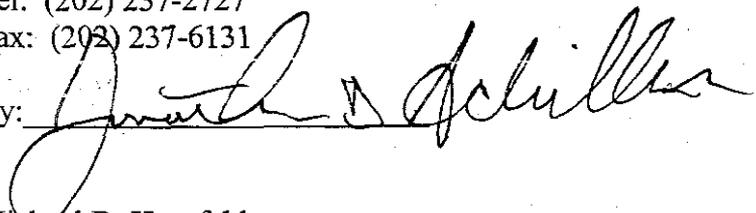
VI. CONCLUSION

For the foregoing reasons, class plaintiffs respectfully request that the Court grant their motion and: (1) conditionally certify this case as a class action on behalf of the proposed settlement classes; (2) establish a date for a hearing on approval of the proposed settlement and the proposed plan of allocation; (3) approve the forms of Notice of Class Action Settlement and Hearing Thereon and Proof of Claim and Release, and the Summary Notice of Class Action Settlement and Hearing Thereon, submitted herewith; (4) direct that the Notices, Proofs of Claim and Summary Notice be disseminated in the manner described in section IV, *supra*; and (5) establish a deadline, *inter alia*, for requests for exclusion from the Settlement Classes, for filing objections to the proposed settlement, or the petition for an award of attorneys' fees and reimbursement of litigation costs and expenses, as required.

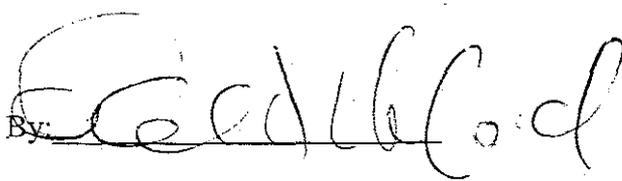
Dated: November 3, 1999.

David Boies
Robert Silver
BOIES & SCHILLER LLP
80 Business Park Drive
Armonk, NY 10504
Tel: (914) 273-9800
Fax: (914) 273-9810

Jonathan D. Schiller
(D.C. Bar No. 185496)
William A. Isaacson
Carl J. Nichols
BOIES & SCHILLER LLP
5301 Wisconsin Avenue, N.W.
Suite 570
Washington, D.C. 20015
Tel: (202) 237-2727
Fax: (202) 237-6131

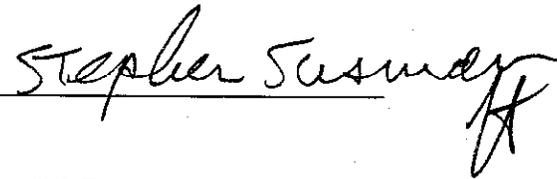
By: 

Michael D. Hausfeld
Ann C. Yahner
Deborah J. Vagins
COHEN, MILSTEIN, HAUSFELD
& TOLL, PLLC
1100 New York Avenue, N.W.
West Tower, Suite 500
Washington, D.C. 20005
Tel: (202) 408-4600
Fax: (202) 408-4699

By: 

Stephen D. Susman
Barry C. Barnett
SUSMAN GODFREY L.L.P.
2323 Bryan Street, Suite 1400
Dallas, TX 75201
Tel: (214) 754-1900
Fax: (214) 754-1933

Marc M. Seltzer
SUSMAN GODFREY L.L.P.
1880 Century Park East, Suite 950
Los Angeles, CA 90067-1606
Tel: (310) 789-3100
Fax: (310) 789-3150

By: Stephen Susman 

Plaintiffs' Co-Lead Counsel