IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

STATE OF ILLINOIS, by its Attorney General LISA MADIGAN, Plaintiff, v. DAICEL CHEMICAL INDUSTRIES, LTD., EASTMAN CHEMICAL COMPANY, HOECHST AKTIENGESELLSCHAFT, NUTRINOVA NUTRITION SPECIALTIES & FOOD INGREDIENTS, GMBH, HOECHST CELANESE CORPORATION, a/k/a CNA HOLDINGS, INC., NUTRINOVA, INC., CELANESE AG, NIPPON GOHSEI, a/k/a NIPPON SYNTHETIC CHEMICAL INDUSTRY CO., LTD., and UENO FINE CHEMICALS INDUSTRY, LTD., Defendants.	)	No. 02CH19575 *Parens Patriae*/Class Action

MEMORANDUM IN SUPPORT OF ILLINOIS' MOTION
FOR PRELIMINARY APPROVAL OF SETTLEMENTS

Plaintiff State of Illinois respectfully submits this Memorandum in support of its Motion for Preliminary Approval of Settlements. The proposed settlements provide for payments totaling just over $1,600,000. The settlements resolve all claims brought by the State of Illinois on behalf of itself, its political subdivisions and its natural citizens as indirect purchasers of Sorbates.

For the reasons set forth below, the proposed settlement and notice plan are fair, reasonable and adequate; the plan for distribution of the proceeds *cy pres* is warranted by the difficulty and excessive administrative cost of a direct distribution to consumers; and the notice plan meets the requirements of 735 ILCS 5/2-803 and 5/2-806 and due process. Consequently, the State requests this Court to preliminarily approve the settlements. Such approval will allow the parties to provide

notice to affected consumers throughout the State, to seek final approval, and – if the Court grants final approval – to distribute the settlement proceeds on behalf of injured parties.

BACKGROUND

I.. Nature of the allegations

The State of Illinois has brought this action on behalf of itself and its political subdivisions, and as class representative and *parens patriae* on behalf of its natural citizens,[1] seeking damages and civil penalties. The State alleged that such indirect purchasers of sorbates within the State of Illinois were harmed as a result of illegal overcharges arising from a pervasive and harmful price-fixing conspiracy engaged in by the defendants.

Sorbates are non-toxic chemical preservatives, used as mold inhibitors in high-moisture and high-sugar food products, such as cheese and other dairy products, baked goods and other processed foods. Sorbates also are used in various beverages, and other products, including household products such as shampoos. Worldwide sales of sorbates are roughly $200 million annually.

The State alleged that, beginning in or about January 1979 and continuing until in or about June 1997, the defendants and their named and unnamed coconspirators participated in a conspiracy affecting the prices of sorbates sold indirectly in the State of Illinois. Certain of the defendants have pled guilty to federal criminal antitrust charges brought by the United States Department of Justice. These defendants agreed to pay at least $132 million, collectively, in criminal fines to the federal government for participating in the sorbates price-fixing conspiracy. In addition, all or several of

[1] The State's original complaint sought to represent all of the State's citizens, both natural citizens and businesses. As part of the compromise of this action, the State has filed a motion to amend its complaint to represent only itself, its political subdivisions and its natural citizens.

the defendants have agreed to settle private actions seeking recovery on behalf of direct purchasers and indirect purchasers in several other states.

II. The Settlements

A. Monetary Payments and Distributions

The State of Illinois has entered into two separate settlement agreements. The first of these (Exhibit 1) is with all of the defendants except Ueno Fine Chemicals, Ltd. ("Ueno"). These defendants (collectively referred to as the "Group Defendants") are Daicel Chemical Industries, Ltd., Eastman Chemical Company, Hoechst Aktiengesellschaft, Nutrinova Nutrition Specialties & Food Ingredients, GmbH, Hoechst Celanese Corporation, a/k/a CNA Holdings, Inc., Nutrinova, Inc., Celanese AG, and Nippon Gohsei, a/k/a Nippon Synthetic Chemical Industry Co., Ltd. Under the terms of the Settlement Agreement with these Group Defendants, these defendants will pay $1,560,000 into the settlement fund.

The second settlement (Exhibit 2) is with Ueno. Under the terms of that settlement, Ueno will pay $50,000 into the settlement fund.

All of these funds are to be paid directly to the State within thirty days of preliminary approval of the settlements. The State is asking the Court, if it grants preliminary approval, to order the funds received to be divided into two accounts. One account (the "Distribution Fund"), to receive $1,250,000, would be reserved exclusively for the *cy pres* distribution if the Settlements receive final approval (or to be returned to the defendants if the Settlements are not approved). The other account (the "Fees and Expenses Fund"), to receive the remainder of $360,000, would be used to pay the costs of notice and the States' attorneys' fees. If the Settlements are approved, any funds not used from this account would be added to the Distribution Fund. If the Settlements do not

receive this Court's final approval, the monies from this account would be returned to the defendants less the amounts the parties agreed need not be returned if spent on notice costs.

The State will seek its attorneys fees from the Fees and Expenses Fund. While the exact amount of those fees will be submitted with the Motion for Final Approval of the Settlement, the State will not request more $240,000 for its fees. The State currently believes that notice costs will not exceed $120,000.

All monies in the Distribution Fund will be distributed *cy pres* for the benefit of the State and its natural citizens. Given the relatively small amount of damages suffered by each injured consumer, the cost of identifying and returning money to individuals would quickly outstrip the amount of restitution provided. For this reason, *cy pres* distribution to non-profit organizations or government entities, to support health or nutritional causes is the best way to benefit the class of indirect sorbates purchasers as a whole. The State will prepare a detailed distribution plan setting forth the recipients of the funds. The plan will be submitted to the Court for its approval along with the State's Motion for Final Approval.

B. Release of Claims

The Settlement Agreements provide that, upon Final Approval of the Settlements, the State will provide with each of the Settlement groups a release. (Set. Agrs.¶ VII.A..) Those releases cover claims arising out of the facts alleged in the Complaint, and release each of the defendants and their successors, assigns, parents, subsidiaries, divisions, officers, directors, employees, agents, representatives, related or affiliated entities, and any other person acting on their behalf. (Set. Agrs. Exs. A.) The language of the releases is tailored to release those claims implicated by the conduct

at issue in this case, without barring causes of action unrelated to the Complaint. The releases will be given on behalf of the State, its political subdivisions and the natural citizens of the State.

ARGUMENT

I. The Settlement Agreement Is Fair and Adequate

Under 735 ILCS 5/2-806, a representative of a class may, with court approval, settle the claims of the represented class. Similarly, under the Illinois common law, the State may act as *parens patriae* to represent the claims of its citizens when the conduct at issue implicates a quasi-sovereign interest of the State. *Illinois v. Bristol-Myers Co.*, 470 F.2d 1276, 1278 (D.C. Cir. 1972). Indeed, under 740 ILCS 10/7(2), the Attorney General is the party expressly authorized to act in a representative capacity on behalf of indirect purchasers making claims under the Illinois Antitrust Act.

735 ILCS 5/2-806 also provides that a settlement of a class action is not final until it is approved by the court. The purpose of the court's approval is to ensure that the proposed settlement agreement is "fair and reasonable and in the best interests of all those who will be affected by it." *People ex rel. Wilcox v. Equity Funding Life Insurance*, 61 Ill.2d 303, 316, 335 N.E.2d 448, 455 (1975). The court's approval involves a two-step process whereby the court first grants preliminary approval of the negotiated settlement. In the second step, the court holds a fairness hearing before granting final approval of the settlement agreement. At the fairness hearing, the court must determine whether, taken as a whole, the agreement is "fair, reasonable, and adequate." *People ex rel. Wilcox*, 61 Ill.2d at 317, 335 N.E.2d 448 at 456.

The purpose of the preliminary approval is for the court to ascertain whether reason exists to proceed by notifying the class members of the settlement and to hold a fairness hearing. *Odon*

USA Meats, Inc. v. Ford Motor Credit Corp., 1994 WL 529339 at *7 (N.D. Ill. 1994). The preliminary approval is given before class members are notified that a settlement agreement has been reached. Thus, the pre-notification preliminary approval requires a lesser standard of judicial scrutiny than the final fairness hearing. *See Odon*, 1994 WL 529339 at *7 (explaining that the standard is different at the pre-notification hearing stage.) The standard for granting preliminary approval of the proposed settlement is a determination of whether the settlement is *within the range* of possible settlements that could receive final approval. *Id.,* citing *Armstrong v. Board of Directors*, 616 F.2d 305 at 314 (7th Cir. 1980). "A trial court should not disapprove a settlement...unless, taken as a whole, the settlement appears on its face so unfair as to preclude judicial approval." *Gowdey v. Commonwealth Edison Co.*, 37 Ill. App.3d 140, 149-50, 345 N.E.2d 785, 793 (1st Dist. 1976).

These settlements clearly meet this standard as well as the stricter standard for final approval. The agreements were reached as a result of arms length bargaining between experienced counsel. The value of the settlement will outweigh the expenses of continued litigation and will benefit all members of the class.

Illinois did not enter into these settlements until it had reviewed the proceedings and materials from the preceding criminal investigation and did not enter into these settlement discussions until over a year had passed since filing of the complaint, during which time jurisdiction discovery had been completed and numerous jurisdictional and procedural motions had been briefed. As this Court has already noted, many of these presented significant and difficult issues. Continued litigation of these issues, as well as the various issues presented by the merits of the case, presented significant risks for both sides that these settlements serve to compromise.

Once negotiations commenced, they took several months to complete with numerous face-to-face and telephone negotiations. These negotiations were lengthy and complex involving the individual interests of each of the eight defendants. The settlement structure now presented to the Court was agreed upon only after both sides had rejected substantial elements of the proposals put forth by opposing counsel. The Attorney General has concluded that the final resolution in this case is fair, adequate and reasonable. This determination by public law enforcement officers weights in favor of approval. *In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp 1379, 1386; *see also*, *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369, 380 (court may place "greater weight" on opinion of counsel "in addressing a settlement negotiated by government attorneys committed to protecting the public interest").

In addition, several other indirect purchaser cases have been settled in the courts of other States. The settlement achieved in this case compares favorably with the results obtained in those cases. For example, in Ohio, with only a slightly smaller population, the total settlement including both the consumer recovery and attorneys fees was $505,000. However, the statutory basis for Ohio's claims are arguably different than in Illinois.

Perhaps more comparable settlements are presented by the cases in Wisconsin and Tennessee. In Wisconsin, a class action was brought on behalf of both the individual and commercial indirect businesses in Wisconsin and eleven other states with a combined population roughly three-and-one-half times the size of Illinois. However, the settlement, which totaled $8,700,000, has advanced to the point where a breakdown between the consumer recovery, the commercial recovery, and the attorneys fees has been determined. When these recoveries are adjusted for the difference in population, the attorneys fees recovered in Wisconsin significantly

exceed those to be requested here, but the consumer recovery is equal to approximately $940,000. If similar ratios are applied to the Tennessee settlement where only one state's indirect purchasers were suing these defendants, the total Tennessee recovery of $1,425,000 would represent an individual consumer recovery of just over $1,205,000 when adjusted for Tennessee's smaller population. In comparison, the consumer recovery in this case will be at least $1,250,000, larger than in either of these two comparable cases.

Finally, none of the factors that might warrant delaying or denying preliminary approval are present in this case. The contemplated requests for attorneys' fees and costs are at the low end of fees frequently awarded in cases with million-dollar plus common fund recoveries. The Attorney General receives no personal benefit as a result of the settlement.

Considering the benefits of a prompt settlement, the significant relief obtained by Plaintiff, and the uncertainty and expense of a contested antitrust suit, preliminary approval is clearly warranted.

II. The *Cy Pres* Distribution is Fair, and Superior to Direct Consumer Distribution

Numerous courts have found *cy pres* distribution to be appropriate when it not economical or feasible to distribute the settlement proceeds to the victims of an antitrust conspiracy. Where the administrative cost of identifying claimants and apportioning and distributing the funds would quickly outstrip the restitution actually available to consumers, *cy pres* distributions are considered to be the more desirable approach to compensating the victims of the conspiracy. *In re Microsoft Corp.*, 2002 WL 99709 at *3 (D. Md. 2002); Draba, *Motorsport Merchandise: A Cy Pres Distribution Not Quite "As Near As Possible,"* 16 Loyola Consumer Law Review at 128-31; Miller & Singer, *Nonpecuniary Class Actions Settlements*, 60 Law & Contemporary Problems (autumn

1997) at 129-30. These same factors led the State, after careful consideration, to conclude that a *cy pres* distribution was appropriate in this case.

Here, while identification of claimants may be straight forward, as the Sorbates overcharges are alleged to have affected virtually everyone who ate food in Illinois, apportioning and distributing the funds could quickly absorb the entire recovery in administrative costs. Indeed, the costs of simply processing and mailing the checks to the individuals involved could exceed the recovery that each individual received. In such situations, courts have consistently upheld the use of *cy pres* distributions. *See, e.g.*, *New York v. Reebok International, Ltd.*, 96 F.3d 44, 49 (2d Cir. 1996) (approving *cy pres* remedy where average individual damage was less than $4.00); *see also*, *State of New York v. Nintendo of America, Inc.* 775 F. Supp 676, 681 (S.D.N.Y. 1991) (estimating cost of check reimbursement scheme at $5.00 per check).

The focus of the *cy pres* distribution – health and fitness or nutrition-related causes – is designed to aid indirect purchasers of sorbates. Such purchasers were harmed by the overcharges they paid on the (primarily) food products that they purchased. By supporting charitable and governmental causes that advance health and fitness or nutritional goals, the proposed *cy pres* distribution will benefit such purchasers in the same areas of interest where defendants' conspiracy harmed them. Moreover, the State will submit its distribution plan identifying specific recipients with its motion for final approval of the settlements, so that the Court will have the opportunity to review the recipients to insure that the charities and government programs selected will closely match these goals.

III. The Notice Plan Set Forth in the Settlement Agreements is Appropriate

Under 735 ILCS 5/2-803, "the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties." "The means employed to notify class members of an action depends on the circumstances of each individual case." *Fox v. Northwest Insurance Brokers*, 113 Ill. App. 3d 255, 257, 446 N.E.2d 1260, 1262 (1st Dist. 1983). In considering the type of notice to be given, the courts have looked to the number of recipients, the cost of sending individual notice, and the amount at issue in the proposed settlement.

In the current case, sending individual notice to each of the indirect purchasers of sorbates would mean sending individual notice to everyone in the State. Such a procedure is far too costly. In such situations, notice by publication has been accepted as the best practical way of providing notice. *See, e.g.*, *In re Toys "R" Us Antitrust Litigation*, 191 F.R.D. 347, 350 (E.D.N.Y. 2000) (concluding that publication notice is reasonable when the class potentially numbers over ten million); *New York v. Reebok Int'l Ltd.*, 903 F. Supp. 532, 533 n. 1 (S.D.N.Y. 1995), *aff'd* 96 F. 3d 44 (2d Cir. 1996) (explaining that publication notice was "plainly the best notice practicable . . . given the enormous number of potential class [members], . . . and the high costs of individual notice"); *Carlough v. Amchem Products*, 158 F.R.D. 314, 327 (E.D. Pa. 1993) (concluding that when individual notice would require efforts that would be unduly time consuming, expensive and not necessarily fruitful, such notice is not required). The State's notice plan calls for placement of notices in newspapers in every region of Illinois.[2] In addition, the notice will be published on the Attorney General's web site and banner ads using certain Illinois-related web sites will direct web

[2] The list of newspapers is attached hereto as Exhibit 3.

traffic to the notice. The Attorney General and the notice administrator will also issue press releases for the press and radio outlets in Illinois.

Finally, the text of the notice itself will sufficiently apprise affected consumers of the existence and nature of the case and the terms of the settlement. The notice agreed upon in the Settlement Agreement (Ex. C to Ex. 1 hereto) informs readers of:

- the nature of the claims made against the defendants;
- the amount to be paid in damages and the maximum attorneys' fees to be sought;
- the manner in which the settlement proceeds will be distributed *cy pres*, the reasons for the absence of an individual distribution, and the goals for which the settlement fund will be spent
- the need for the settlement to be approved by the Court
- the process by which participants may opt out, object to the settlement, or appear at the final approval hearing; and
- the preclusive effect of the final judgment on those who do not opt out.

The notice also refers interested individuals to the Attorney General website, where they may access the complaint and settlement documents (including this filing), should they seek further information. Such notice fully informs represented consumers of the key terms of the settlement.

CONCLUSION

For the foregoing reasons, the State of Illinois respectfully requests that the Court grant preliminary approval of the settlement and notice plan.

Dated this 20th day of May, 2004

STATE OF ILLINOIS
LISA MADIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS

By: _____

Blake L. Harrop #99000
Assistant Attorney General
Antitrust Bureau
Office of the Attorney General
100 W. Randolph St.
Chicago, Illinois 60601
(312) 814-1004

CERTIFICATE OF SERVICE

The undersigned, being duly sworn upon oath, deposes and states that a copy of the foregoing was served upon counsel on the attached list, at the listed addresses, by first class mail, postage prepaid, on the 20th day of May, 2004.

_____