

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE BROILER CHICKEN ANTITRUST
LITIGATION,

Case No.: 1:16-cv-08637

The Honorable Thomas M. Durkin

This Document Relates To:

THE DIRECT PURCHASER PLAINTIFF
ACTION

**DIRECT PURCHASER PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF THE SETTLEMENTS WITH
THE MOUNTAIRE AND O.K. FOODS DEFENDANTS**

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I. INTRODUCTION

The Direct Purchaser Plaintiffs (“DPPs”) in this certified class action allege that Defendants conspired to fix, raise, maintain, and stabilize the prices of Broiler chicken sold in the United States. DPPs now seek preliminary approval of the settlements with the Mountaire¹ and O.K. Foods² Defendants (collectively, the “Settling Defendants”). Under the Settlements,³ Mountaire will pay \$15,899,826. and O.K. Foods will pay \$4,856,333. The addition of these meaningful Settlements for the Certified Class (ECF No. 5644, *see* Section V below) brings the total recovery to date to over \$209 million. (*See* Declaration of Michael H. Pearson in Support of this Motion (“Pearson Decl.”) at ¶ 8.) In addition to this monetary relief, Mountaire and O.K. Foods have also agreed to assist DPPs as they proceed toward the September 12, 2023 Track 1 trial by authenticating and providing foundation for documents, which will assist DPPs in the prosecution of their claims against the remaining three Defendants in the case. As with the earlier Mar Jac, Harrison and Simmons settlements, DPPs do not intend to distribute the proceeds of the Mountaire or O.K. Foods Settlements at this time.⁴

As detailed in this Motion for Preliminary Approval of the Settlement (“Motion”) and the supporting documents, these Settlements were the product of the DPPs’ efforts in litigating this case and extensive arm’s length negotiations among the parties. Neither Mountaire nor O.K. Foods have admitted any liability and continue to deny the legal claims alleged in DPPs’ Complaint, but

¹ Mountaire Farms Inc., Mountaire Farms of Delaware, Inc., and Mountaire Farms, LLC (collectively referred to as “Mountaire”).

² O.K. Foods, Inc., O.K. Farms, Inc., and O.K. Industries, Inc. (collectively referred to as O.K. Foods).

³ The Mountaire and O.K. Foods Settlement Agreements are attached as Exhibits “A” and “B” to the Pearson Declaration, respectively.

⁴ DPPs recently completed a first round of distribution, returning over \$100 million to class members from the previous settlements. (*See* ECF No. 5791 at ¶ 5.)

have agreed to the Settlements to avoid the cost and burden of litigation and eliminate the risk of an adverse judgment at trial. Similarly, the DPPs believe they would have prevailed at trial, but have agreed to the Settlements to obtain a meaningful recovery for the Class, obtain cooperation from Mountaire and O.K. Foods, and avoid the risk of an adverse outcome as to Mountaire and/or O.K. Foods at trial. Accordingly, these Settlements are the product of compromise and reflect the independent decisions of the DPPs, on the one hand, and Mountaire and O.K. Foods, on the other hand, to resolve this matter.

As described below, DPPs respectfully submit that the Court can preliminarily determine in this Motion that, on final approval, each Settlement will be found to be fair, reasonable, and adequate, and thus it is worthwhile to notify the DPP Class of the proposed Settlements. DPPs request that the Court grant their Motion, approve the proposed notice plan, and set a schedule for final approval of the Settlements.

II. LITIGATION BACKGROUND AND PRIOR SETTLEMENTS

This is an antitrust class action against certain producers of Broilers.⁵ DPPs allege that Defendants combined and conspired to fix, raise, maintain, or stabilize prices of Broilers sold in the United States. DPPs allege that Defendants implemented their conspiracy in various ways, including via coordinated supply restrictions, sharing competitively sensitive price and production information, and otherwise manipulating Broiler prices.

⁵ Consistent with the Complaint, the term Broilers is defined in the Settlement Agreements as “chickens raised for meat consumption to be slaughtered before the age of 13 weeks, and which may be sold in a variety of forms, including fresh or frozen, raw or cooked, whole or in parts, or as a meat ingredient in a value added product, but excluding chicken that is grown, processed, and sold according to halal, kosher, free range, or organic standards.” (*See* Settlement Agreements § 1.d.) Settling Defendants agree to this definition only for purposes of approving the Settlements and otherwise reserve all rights, arguments and defenses with respect to this definition.

DPPs commenced this litigation on September 2, 2016, when they filed a class action lawsuit on behalf of all direct purchasers of Broilers in the United States. (ECF No. 1.) Other class plaintiffs and direct-action plaintiffs subsequently filed similar actions. On October 14, 2016, the Court appointed the undersigned law firms as Direct Purchaser Plaintiffs' Interim Co-Lead and Liaison Counsel. (ECF No. 144.) After extensive briefing by the parties, on November 20, 2017, the Court denied Defendants' Motions to Dismiss the DPPs' First Consolidated Amended Complaint. (ECF No. 541.) DPPs filed their operative Fifth Consolidated Amended Complaint on October 23, 2020. (ECF No. Nos. 3919 (Redacted) and 3935 (Unredacted).)

DPPs thoroughly investigated the case and engaged in extensive discovery prior to reaching the Settlement. These efforts commenced prior to the filing of DPPs' initial complaint and included pre-litigation investigation into Defendants' conduct that formed the basis of the DPPs' complaints. (*See* Pearson Decl. ¶ 4.) In denying Defendants' motions to dismiss, the Court held that these "alleged factual circumstances plausibly demonstrate that [Defendants'] parallel conduct was a product of a conspiracy." (*See* ECF No. 541, p. 18.) During the litigation, DPPs obtained responses to multiple sets of interrogatories, and received over 8 million documents in response to their requests for production and third-party subpoenas. (*See* Pearson Decl. ¶ 5.) DPPs, along with other plaintiffs, have taken over 100 depositions of the Defendants and third parties. (*Id.* ¶ 6.) DPPs have also provided responses to written discovery, produced documents, and appeared for depositions noticed by the Defendants. (*Id.* ¶ 7.)

Prior to the Court's ruling on Defendants' motions to dismiss, DPPs reached an "ice-breaker" settlement with Defendant Fieldale. Fieldale, a small producer, agreed to pay \$2.25 million, provide cooperation including attorney and witness proffers, and produce certain documents to DPPs. (*See* Pearson Decl. ¶ 8.) The Court granted final approval to the Fieldale

settlement on November 18, 2018. (*See* ECF No. 1414.) DPPs later settled with Defendants Amick, Peco, and George's. Like Fieldale, these three Defendant groups are small producers. (*See* Pearson Decl. ¶ 8.) In addition to providing cooperation to DPPs, Peco paid \$4,964,600, George's paid \$4,097,000, and Amick paid \$3,950,000. (*See id.*) The Court granted final approval of the Amick, Peco, and George's settlements on October 27, 2020. (*See* ECF Nos. 3944 (Peco and George's), 3945 (Amick).) DPPs then secured significant settlements with Pilgrim's and Tyson in the amount of \$75 million and \$79,340,000, respectively. (*See* Pearson Decl. ¶ 8.) The Court granted final approval of the Pilgrim's and Tyson settlements on June 29, 2021. (*See* ECF No. 4789.) DPPs then settled with Mar Jac and Harrison Poultry in the amount of \$7,975,000 and \$3,300,000, respectively. (*See* Pearson Decl. ¶ 8.) The Court granted final approval of the Mar Jac and Harrison settlements on January 27, 2022. (*See* ECF No. 5397.) Most recently, DPPs secured a settlement with Simmons in the amount of \$8,018,991. (*See* Pearson Decl. ¶ 8.) The Court granted preliminary approval of the Simmons settlement on June 12, 2023 and set a final fairness hearing for December 12, 2023. (*See* ECF No. 6615.)

On May 27, 2022, the Court certified the DPP Class (as defined in Section V below). (*See* ECF No. 5644.) On June 30, 2023, the Court granted in part and denied in part Defendants' (including Mountaire and O.K. Foods) motions for summary judgment. (*See* ECF No. 6641.) This matter is set for trial on September 12, 2023.

III. SUMMARY OF THE SETTLEMENT NEGOTIATIONS AND TERMS

A. Mountaire

The Settlement Agreement with Mountaire was reached through confidential, protracted, arm's length settlement negotiations. (*See* Pearson Decl. ¶¶ 9-11.) The Settlement was the product of a negotiation process that commenced in July 2023. (*Id.* ¶ 9.) As this litigation has been pending for nearly seven years and is nearing trial in less than one month, the parties have had ample

opportunity to assess the merits of DPPs' claims and Mountaire's defenses, through investigation, discovery, research, settlement discussions and contested motion practice; and to balance the value of Class members' claims against the substantial risks and expense of continuing litigation. The parties ultimately executed the Settlement Agreement on August 14, 2023. (*See id.* ¶ 11; *see also* Mountaire Settlement Agreement.)

B. O.K. Foods

The Settlement Agreement with O.K. Foods was reached through confidential, protracted, arm's length settlement negotiations. (*See* Pearson Decl. ¶¶ 9, 12-13.) The Settlement was the product of a negotiation process that commenced in April 2023, and ultimately culminated after a mediation with highly experienced mediators Professor Eric Green and Mr. Fouad Kurdi. (*Id.* ¶ 12.) As this litigation has been pending for nearly seven years and is nearing trial in less than one month, the parties have had ample opportunity to assess the merits of DPPs' claims and O.K. Foods's defenses, through investigation, discovery, research, settlement discussions and contested motion practice; and to balance the value of Class members' claims against the substantial risks and expense of continuing litigation. The parties ultimately executed the Settlement Agreement on August 25, 2023. (*See id.* ¶ 13; *see also* O.K. Foods Settlement Agreement.)

C. Terms of the Settlement Agreements

Under the Settlements, Mountaire will pay \$15,899,826. and O.K. Foods will pay \$4,856,333. into separate interest-bearing escrow accounts. The Settlement Agreements do not contain any reduction or termination provisions. In addition to monetary relief, Mountaire and O.K. Foods will make reasonable efforts to provide declarations or affidavits relating to the authentication or foundation for admissibility of documents for DPPs' use at trial. (*See* Settlement Agreements § 10.)

In exchange, the DPPs and the Certified Class will separately release certain Released Claims (as defined in the Settlement Agreements) against the Released Parties (as defined in the Settlement Agreements). (*See id.* §§ 14, 15.) The narrowly tailored releases do not extend to other Defendants or to unrelated claims that are not the subject matter of the lawsuit. (*Id.*)

Finally, consistent with a judgment-sharing agreement among certain Defendants, the Settlement removes an amount reflecting Mountaire's sales of Broilers to the DPP Class from any damages award resulting from a verdict and Final Judgment DPPs obtain against any other Defendant who is a signatory to the judgment-sharing agreement. (Mountaire Settlement Agreement § 39.) Thus, any other such Defendant against whom DPPs obtain a verdict and judgment would not be jointly and severally liable for Mountaire's share of damages.⁶

In sum, the Settlement Agreements: (1) are the result of extensive good-faith and hard-fought negotiations between knowledgeable and skilled counsel; (2) were entered into after extensive factual investigation and legal analysis; and (3) in the opinion of experienced Class Counsel, are fair, reasonable, and adequate. Based on both the monetary and cooperation elements of the Settlement Agreements, Co-Lead Class Counsel submits that the Settlement Agreements are in the best interests of the Certified Class members and should be approved by the Court. (Pearson Decl. ¶ 17.)

Subject to the approval and direction of the Court, the settlement amounts (with accrued interest) will be used to: (1) pay notice costs and costs incurred in the administration and distribution of the Settlements; (2) pay taxes and tax-related costs associated with the escrow accounts⁷ for proceeds from the Settlements; (3) make a distribution to Certified Class members

⁶ O.K. Foods is not a party to the judgment sharing agreement and therefore its sales are not removed from any amount awarded by a jury verdict to DPPs.

⁷ DPPs respectfully request that the Court appoint US Bank as the Escrow Agent.

in accordance with a plan of distribution to be filed in the future; (4) pay attorneys' fees to Co-Lead Class Counsel, as well as costs and expenses, that may be awarded by the Court (subject to a separate, not-yet-filed motion); and (5) pay service awards to the DPP Class Representatives that may be awarded by the Court (subject to a separate, not-yet-filed motion).

As set forth in conjunction with the Simmons settlement, in the near term DPPs will move the Court to reimburse DPPs' incurred litigation expenses (not to exceed \$6 million⁸), which will be filed 30 days before the last date to object to the Settlements. This forthcoming second petition for reimbursement of litigation costs will be limited to the settlement proceeds from the Mar Jac, Harrison Poultry, Simmons, Mountaire, and O.K. Foods settlements, which total \$40,050,150. DPPs propose that the litigation expense reimbursement be paid *pro rata* from the Mar Jac, Harrison Poultry, Simmons, Mountaire, and O.K. Foods settlement funds.

IV. THE SETTLEMENTS SATISFY THE STANDARD FOR PRELIMINARY APPROVAL

There is an overriding public interest in settling litigation, and this is particularly true in class actions. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985), *cert. denied*, 478 U.S. 1004 (1986) (noting that there is a general policy favoring voluntary settlements of class action disputes); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312 (7th Cir. 1980) ("It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement."), *overruled on other grounds, Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). Class action settlements minimize the litigation expenses

⁸ Class Counsel previously sought the reimbursement of up to \$3.5 million in incurred litigation expenses, but given the additional settlements received and the additional expenses incurred in preparation of the September 12, 2023 Track 1 trial, Class Counsel now intend to seek up to \$6 million in incurred litigation expenses.

of the parties and reduce the strain such litigation imposes upon already scarce judicial resources. *Armstrong*, 616 F.2d at 313 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). However, a class action may be settled only with court approval. Fed. R. Civ. P. 23(e).

“The first step in district court review of a class action settlement is a preliminary, pre-notification hearing to determine whether the proposed settlement is ‘within the range of possible approval.’” 2 NEWBERG ON CLASS ACTIONS, § 11.24 (3d ed. 1992); *see also Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982); *Armstrong*, 616 F.2d at 314; *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002); *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). Generally, before directing notice to the class members, a court makes a preliminary evaluation of the proposed class action settlement pursuant to Rule 23(e). The Manual For Complex Litigation (Fourth), § 21.632 (2004), explains:

Review of a proposed class action settlement generally involves two hearings. First counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation . . . The Judge must make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms and must direct the preparation of notice of the . . . proposed settlement, and the date of the [formal Rule 23(e)] fairness hearing.

A proposed settlement falls within the “range of possible approval” when it is conceivable that the proposed settlement will meet the standards applied for final approval. *See* Newberg, § 11.25, at 38-39 (quoting Manual for Complex Litig., § 30.41 (3d ed.)). The standard for final approval of a class action settlement is whether the proposed settlement is fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e); *see also Uhl v. Thoroughbred Tech. & Telecomms, Inc.*, 309 F.3d 978, 986 (7th Cir. 2002); *Isby*, 75 F.3d at 1198-99. When granting preliminary approval, the court does not conduct a “definitive proceeding on the fairness of the proposed settlement,” and the court “must be careful to make clear that the determination permitting notice to members of the class is not a finding that the settlement is fair, reasonable and adequate.” *In re Mid-Atlantic*

Toyota Antitrust Litig., 564 F. Supp. 1379, 1384 (D. Md. 1983) (quoting *In re Montgomery Cty. Real Estate Antitrust Litig.*, 83 F.R.D. 305, 315-16 (D. Md. 1979)). That determination must await the final hearing when the court can assess the fairness, reasonableness, and adequacy of the proposed settlement.

The requirement that class action settlements be fair is designed to protect against collusion among the parties. *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. at 1383. There is usually an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's length negotiations. See 2 NEWBERG ON CLASS ACTIONS, § 11.40 at 451 (2d ed. 1985); *Goldsmith v. Tech. Solutions Co.*, No. 92-CV-4374, 1995 WL 17009594, at *3 n.2 (N.D. Ill. Oct. 10, 1995) (“[I]t may be presumed that the agreement is fair and adequate where, as here, a proposed settlement is the product of arm's length negotiations.”). Settlements that are proposed by experienced counsel and result from arm's length negotiations are entitled to deference from the court. See, e.g., *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) (“A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.”) (quoting *Hanrahan v. Britt*, 174 F.R.D. 356, 366 (E.D. Pa. 1997)). The initial presumption in favor of such settlements reflects courts' understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness concerns of Rule 23(e). In making the determination as to whether a proposed settlement is fair, reasonable, and adequate, the Court necessarily will evaluate the judgment of the attorneys for the parties regarding the “strength of plaintiffs' case compared to the terms of the proposed settlement.” *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 346 (N.D. Ill. 2010).

A. The Settlements Resulted from Arm's Length Negotiations

In this case, the proposed Settlements satisfy the standard for preliminary approval. As detailed in this Motion and supporting declarations, the Settlements were the product of arm's length negotiations by experienced and knowledgeable counsel. (*See* Sections II and III *infra*; *see also* Pearson Decl. ¶¶ 9-15.) The hard-fought negotiations with Mountaire were kept confidential, and the negotiations necessitated numerous conferences as well as written exchanges between counsel during which they negotiated the material terms of the Settlement, as well as the final Settlement Agreement. (*Id.*) The hard-fought negotiations with O.K. Foods were kept confidential, and the negotiations necessitated numerous conferences, including with mediators Professor Eric Green and Mr. Fouad Kurdi, as well as written exchanges between counsel during which they negotiated the material terms of the Settlement, as well as the final Settlement Agreement. (*Id.*) In engaging in these settlement discussions, counsel for DPPs focused on obtaining the best possible result for the Certified Class. (*Id.*)

These protracted arm's length settlement negotiations support approval of the Settlements by demonstrating they are free from collusion. *See, e.g., In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 640. Moreover, the fact that the negotiations occurred over several months, and were supported by substantial discovery, class certification, and other significant proceedings in this litigation, demonstrate that DPPs worked to achieve the best possible result on behalf of the Certified Class. *Id.*

B. The Settlements Provide Substantial Relief to the Certified Class

Even though such a finding is not required at the preliminary approval stage, the fairness, reasonableness, and adequacy of the Settlements is also supported by the relief obtained on behalf of the Certified Class, including monetary relief of \$15,899,826 from Mountaire and \$4,856,333 from O.K. Foods. This is a significant monetary recovery on behalf of the Certified Class and

brings the total amount of settlements to over \$209 million, with three Defendants remaining in the DPP case. Thus, the Settlements provide significant recovery from Mountaire and O.K. Foods. Prior to the Settlements, DPPs and Co-Lead Class Counsel conducted extensive discovery and analysis of the relevant facts during the nearly seven years since this case was filed. (Pearson Decl. ¶¶ 4-7.) Co-Lead Class Counsel further considered the strength of DPPs' claims and Mountaire's and O.K. Foods' defenses, and the substantial benefits that the Settlements will provide to the Certified Class. (*Id.*)

Further, this is a very significant amount of money recovered for the Certified Class from two relatively small Defendants. The Settlements thus falls well within the range of possible final approval, and should be preliminarily approved by the Court.

V. THE SETTLEMENTS ARE ON BEHALF OF A CERTIFIED CLASS

On May 27, 2022, the Court granted DPPs' motion for class certification and certified the following DPP Class:

All persons who purchased raw Broilers directly from any of the Defendants or their respective subsidiaries or affiliates either fresh or frozen, in the form of: whole birds (with or without giblets), whole cut-up birds, or parts (boneless or bone in) derived from the front half of the whole bird, for use or delivery in the United States from December 1, 2008 until July 31, 2019.

(*See* ECF No. 5644.) "If the court has certified a class prior to settlement, it does not need to re-certify it for settlement purposes." 4 NEWBERG ON CLASS ACTIONS, § 13:18 (5th ed. 2011). Here, as with the Simmons settlement (ECF No. 6615), the parties do not request any changes to the Certified Class, so the Court need not re-certify it.

VI. THE COURT SHOULD APPROVE THE SETTLEMENTS AND NEED NOT PROVIDE AN ADDITIONAL EXCLUSION PERIOD

The Court previously certified the Class on May 27, 2022. (*See* ECF No. 5644). Thereafter, on January 4, 2023, the Court approved a notice program that provided a final opportunity for

Certified Class Members to exclude themselves. (See ECF No. 6195.) Specifically, the long form class notice provided the following notice to Certified Class Members:

The notice provides Class Members with an opportunity to opt out of the Certified Class defined above. **If you exclude yourself from the Certified Class, you may not be able to recover any award from any future settlements or judgments** obtained by the lawyers for the Class, if settlements or judgments occur. ... (emphasis added)

As Certified Class Members have already been provided an opportunity to exclude themselves, there is no need to provide an additional opportunity here. The Court recognized this in granting preliminary approval to the Simmons settlement without providing class members with an additional opportunity to opt-out. (See ECF No. 6615).

While Rule 23(e)(4) grants district courts the discretion to afford members of a previously-certified class an additional opt-out opportunity, it is often unnecessary⁹ and the Rules Committee has urged district courts to exercise their discretion to allow additional opt-out opportunities with caution,¹⁰ as “a second opt-out opportunity might inject additional uncertainty into settlement and create opportunities unrelated to the purpose of the second opt-out, potentially defeating some

⁹ See *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1289 (9th Cir. 1992) (holding that where “Class Members were given notice of the action and afforded an opportunity to opt-out [when litigation class was certified and] also were given notice of the proposed settlement and afforded the opportunity to object. This is all that Rule 23 requires.”); *DaSilva v. Esmor Correctional Servs. Inc.*, 215 F.R.D. 477, 483 (D.N.J. 2003), *aff’d*, 167 Fed. Appx. 303 (3d Cir. 2006) (“In class action litigation ‘potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation “as soon as practicable after the commencement” of the action when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class.’ ”) (quoting *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 549 (1974)); *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 126 n.41 (S.D.N.Y. 1997), *aff’d*, 117 F.3d 721 (2d Cir. 1997) (S.D.N.Y.) (noting that in evaluating fairness of settlement reached after litigation class was certified “the number of opt-out requests is not an appropriate factor to consider in the fairness evaluation, because the exclusion deadline ... expired more than a year before the terms of the proposed settlement were known to the Class Members”).

¹⁰ See 2003 Report of the Judicial Conference, Committee on Rules of Practice and Procedure (commentary on amended Rule 23(e)(3)) [now (e)(4)].

settlements and making others more costly.” *See* Certification of a settlement class—No additional opportunity to opt-out at settlement stage if class already certified, 2 McLaughlin on Class Actions § 6:21 (19th ed.) (quoting and citing Manual for Complex Litigation (4th) § 22.611 at 313; *In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 1:15-md-2627, 2022 WL 2128630, *6 n.9 (E.D. Va. 2022)).

This class action lawsuit has been litigated for nearly seven years, including through seven rounds of settlements with several opportunities for class members to opt out and, most recently, notice to the Certified Class of the Court’s order granting class certification. Now, as the case is mere weeks away from trial in September 2023, the litigation, its progress, and its prospects are well known to members of the DPP Class. Co-Lead Class Counsel respectfully submit that an additional opportunity to opt out is unnecessary and the Settlements before the Court now should be approved with only an objection period.

VII. THE COURT SHOULD APPROVE THE PROPOSED NOTICE PLAN

Rule 23(e) requires that prior to final approval, notice of a proposed settlement be given in a reasonable manner to all class members who would be bound by such a settlement. For a class proposed under Rule 23(b)(3), whether litigated or by virtue of a settlement, Rule 23(c)(2)(B) states:

The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; [...] and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

The form of notice is “adequate if it may be understood by the average class member.” 4 NEWBERG ON CLASS ACTIONS, § 11.53 (4th ed. 2002).

Notice to class members must be “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Fed. R. Civ. P. 23(c)(2)); *City of Greenville v. Syngenta Crop Prot.*, No. 3:10-CV-188, 2012 WL 1948153, at *4 (S.D. Ill. May 30, 2012) (same). Individual notice should be sent to members who can be identified through reasonable effort. Such notice may be by United States mail, electronic means, or other appropriate means. Fed. R. Civ. P. 23(c)(2)(B). Other members may be notified by publication. *City of Greenville*, 2012 WL 1948153 at *4.

DPPs respectfully request that to administer this notice plan the Court appoint A.B. Data Ltd., an experienced national class action notice provider and claims administrator and current administrator of the Mar Jac, Harrison Poultry, and Simmons settlements. (*See* Declaration of Eric Schachter (“Schachter Decl.”) ¶¶ 3-4, Ex. A.) Further, in the interest of efficiency and to avoid confusion by Class Members, DPPs propose combining the notice for the Mountaire and O.K. Foods settlements with the previously-approved notice for the Simmons settlement (*see* ECF No. 6615).

The proposed notice plan satisfies the requisite criteria, and this Court approved essentially identical plans in connection with the prior settlements (*see* Order Approving Fieldale Notice Plan, ECF No. 980; Peco, George’s and Amick Preliminary Approval Order, ECF No. 3394 (approving the proposed notice plan); Pilgrim’s and Tyson Preliminary Approval Order, ECF No. 4341 (approving the proposed notice plan); Mar Jac and Harrison Poultry Preliminary Approval Order, ECF No. 5086 (approving the proposed notice plan); and Simmons Preliminary Approval Order, ECF No. 6615)), and following the certification of the DPP Class (*see* ECF No. 6195). DPPs

propose to the Court a plan of notice that comports with due process and provides reasonable notice to known and reasonably identifiable customers of Defendants pursuant to Rule 23.¹¹

The class notice documents consist of the long form, email, and publication notices, as well as the claim form, and comply with the requirements of Rule 23(c)(2)(B). (The proposed long form, short form, and publication notices are attached to the Schacter Decl. as Exhibits “B,” “C,” and “D,” respectively, with redline changes from the documents recently approved for the Simmons settlement.) The notice documents define the Certified Class, describe the nature of the action, summarize the class claims, and explain the procedure for objecting to the proposed Settlements. The notice documents describe the terms of the Settlement Agreements, and also inform the Class members that DPPs will move for reimbursement of litigation expenses (not to exceed \$6 million).¹² The notice documents will provide the date, time, and place of the final approval hearing (once that hearing is set by the Court, but proposed to coincide with the Simmons final approval hearing set for December 12, 2023), and inform Certified Class members that they do not need to enter an appearance through counsel, but may do so if they choose. The notice documents also inform Certified Class members how to exercise their rights to participate in or object to the proposed Settlements, and how to make informed decisions regarding the proposed Settlements.

¹¹ For the purposes of the proposed notice, Certified Class members and Settlement Class members for the Mar Jac, Harrison Poultry, and Simmons settlements will be notified as DPPs must be notified regarding (1) the Mountaire settlement, (2) the O.K. Foods settlement, and (3) Co-Lead Class Counsel’s request for reimbursement of litigation expenses. Co-Lead Class Counsel will work with the Claims Administrator to ensure that all DPPs subject to the five settlements are notified as required by Rule 23.

¹² The Settlements each provide for the use of up to \$250,000 (as authorized by the Settlement Agreements, § 6.c) of Settlement proceeds for the cost of notice without seeking further approval from the Court.

DPPs' proposed notice plan also comports with due process and Rule 23. The plan includes: (1) direct notice by U.S. mail or email to Class members who can be identified by reasonable effort, including but not limited to Defendants' customer lists; (2) publication of the summary notice in industry-related mailed and digital media; and (3) the posting of notice on the existing case website, <http://www.broilerchickenantitrustlitigation.com>. Since the Class members in this case directly purchased Broilers from Defendants, DPPs have obtained mailing addresses for the vast majority of Class members from Defendants' customer lists, and will rely predominantly on direct mail and email to Class members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B).

A.B. Data will mail the long form notice and claim form via First-Class U.S. Mail to Class members who can be identified through Defendants' records. (Schacter Decl. ¶¶ 6-8.) A.B. Data will also send the email notice to all Class members for whom email addresses are provided in the class list data. (*Id.* ¶¶ 8-9.) Class members for whom a physical mailing address and email address is provided will be sent both the mailed and emailed notices. (*Id.*) The email notice will provide Class members with an electronic link to the settlement website, where they can obtain more information including the long form notice and the Settlement Agreements. (*Id.*) This direct mail and email notice should reach the vast majority of Class members. (*Id.* ¶ 6.)

A.B. Data further plans to supplement the direct mail and email notice via publication notice. This will include both print and digital media components. Suggested print publications include *Progressive Grocer*, *Meat & Poultry*, *Poultry Times*, *Frozen & Refrigerated Buyer*, *Supermarket News*, and *Winsight Grocery Business/Grocery Headquarters*. (*Id.* ¶ 10.) The print ads are expected to be included in a single issue of each of the publications. Suggested digital media publications include *ProgressiveGrocer.com*, *MeatPoultry.com*, *PoultryTimes.com*,

SupermarketNews.com, Winsightgrocerybusiness.com, FastCasual.com and ShelbyReport.com.
(*Id.*)

A.B. Data will work with Co-Lead Class Counsel to maintain the existing settlement website and toll-free telephone number, provide additional information and documents, and respond to any and all inquiries regarding the Settlements. (*Id.* ¶¶ 11, 13.) The website and call center agents will be available in both English and Spanish.

This notice plan was successfully implemented for all prior settlements in this case as well as for Class notice following class certification, and satisfies Rules 23(c)(2) and 23(e). It constitutes the best notice practicable under the circumstances, and thus should be approved. *See City of Greenville*, 2012 WL 1948153, at *4 (quotation omitted); (Schacter Decl. ¶ 14).

VIII. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING

The last step in the settlement approval process is the final approval hearing, at which the Court may hear all evidence necessary to evaluate the proposed Settlements. At that hearing, proponents of the Settlements may explain and describe their terms and conditions and offer argument in support of the Settlements' approval, and members of the Certified Class or their counsel may be heard regarding the proposed Settlements if they choose. DPPs propose the following schedule of events necessary for a hearing on final approval of the Settlements, which will allow final approval of the Simmons, O.K. Foods and Mountaire settlements to be heard concurrently:

<u>DATE</u>	<u>EVENT</u>
On or before September 12, 2023 (concurrent with the last day to send notice of the Simmons settlement, <i>see</i> ECF No. 6615)	Settlement Administrator to provide direct mail and email notice, and commence the publication notice plan.
On or before October 12, 2023 (30 days after mailing of Notice)	Co-Lead Class Counsel to file their motion for payment of litigation expenses.
November 11, 2023 (60 days after the mailing of Notice)	Last day to object to the Settlements; and file notices to appear at the Fairness Hearing.
November 28, 2023 (14 days before Fairness Hearing)	Class Counsel shall file a motion for final approval of the Settlements and all supporting papers, and Class Counsel and Mountaire and/or O.K. Foods may respond to any objections to the proposed Settlements.
December 12, 2023 at 10:00 a.m. Central Time (30 days after last day to object to the Settlements) ¹³	Final Settlement Fairness Hearing for Simmons, O.K. Foods, and Mountaire settlements.

IX. CONCLUSION

For these reasons, Co-Lead Class Counsel respectfully request that the Court preliminarily approve the Mountaire and O.K. Foods Settlement Agreements, appoint US Bank as the Escrow Agent, appoint and direct A.B. Data Ltd. to distribute notice, and set a schedule for the final fairness hearing.

¹³ Under the Class Action Fairness Act, 28 U.S.C. § 1715 (“CAFA”), the Court may not issue an order giving final approval of a proposed settlement earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with notice of this proposed Settlement. *Id.* at § 1715(d). Under the Settlement Agreements, within ten days of the filing of this motion, Mountaire and O.K. Foods will serve upon the appropriate state officials and the appropriate federal official the CAFA notice required by Section 1715(b). This schedule will allow the Court to schedule a Fairness Hearing as DPPs propose in the schedule above, in conformance with CAFA’s requirements.

Date: August 25, 2023

/s/ Michael H. Pearson

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