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

IN RE BROILER CHICKEN ANTITRUST LITIGATION, This Document Relates To: THE DIRECT PURCHASER PLAINTIFF ACTION	Case No.: 1:16-cv-08637 The Honorable Thomas M. Durkin

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

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. LITIGATION BACKGROUND 3

III. SUMMARY OF THE SETTLEMENT NEGOTIATIONS AND TERMS 6

A. Simmons 6

B. Mountaire 6

C. O.K. Foods 7

D. Terms of the Settlement Agreements 7

IV. THE COURT-APPROVED NOTICE PROGRAM SATISFIED DUE PROCESS AND HAS BEEN FULLY IMPLEMENTED 9

V. THE SETTLEMENTS ARE FAIR, REASONABLE, AND ADEQUATE, AND SHOULD BE GRANTED FINAL APPROVAL 11

A. The Settlements Provide a Substantial Recovery to the Class 13

B. The Settlements Eliminated Significant Risk to the Class 14

C. The Settlements Resulted from Hard-Fought Arm's Length Negotiations and Experienced Counsel Recommend Approval 15

D. The Stage of the Proceedings and Amount of Discovery Supports Final Approval 16

E. No Class Members Objected to the Mountaire and O.K. Foods Settlements, and Only One Group of DAPs Objected to the Simmons Settlement 17

VI. THE CERTAIN RESTAURANT DAPS' OBJECTION TO THE SIMMONS SETTLEMENT AGREEMENT SHOULD BE OVERRULED 19

A. Relevant Background to the Objection 19

B. The Certain Restaurant DAPs' Objection to the Simmons Settlement Based on the Claimed Value of Their Individual Bid Rigging Claims is Without Merit 22

C. The Certain Restaurant DAPs Challenge to the Simmons Release is Without Merit and Should be Rejected 25

1. The Scope of the Simmons Class Release is Proper and Conforms With Applicable Law 25

2. The Certain Restaurant DAPs Cannot Overcome the Sound Legal and Factual Support For the Scope of the Simmons Release 30

D. The Certain Restaurant DAPs' Other Challenges are also Without Merit 33

1. There is No Intra-Class Conflict Under the Simmons Settlement 33

2. The Court Approved Notice Was Adequate 34

3. Waiver of the Restaurant DAPs' Right to Object 38
4. The Certain Restaurant DAPs' Transactions 38
VII. CONCLUSION 39

TABLE OF AUTHORITIES

Page(s)

Cases

In re "Agent Orange" Prod. Liab. Litig.,
818 F.2d 145 (2d Cir. 1987).....9

Agretti v. ANR Freight Sys., Inc.,
982 F.2d 242 (7th Cir. 1992) 13

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997).....9, 34

Arandell Corp. v. Xcel Energy, Inc.,
No. 07-cv-076-wmc, 2022 WL 2314717 (W.D. Wis. Dec 27, 2022).....29

Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee,
616 F.2d 305 (7th Cir. 1980) 11

In re AT&T Mobility Wireless Data Servs. Sales Litig.,
270 F.R.D. 330 (N.D. Ill. 2010).....24, 33, 35

In re Brand Name Prescription Drugs Antitrust Litig.,
94 C 897, 1996 WL 167347 (N.D. Ill. Apr. 4, 1996) 26, 27, 36, 37

Bynum v. Dist. Of Columbia,
412 F. Supp. 2d 73 (D.D.C. 2006).....18

In re Cathode Ray Tube (CRT) Antitrust Litig.,
No. 14-CV-2058 JST, 2015 WL 9266493 (N.D. Cal. Dec. 17, 2015).....16, 18

City of Greenville v. Syngenta Crop Prot., Inc.,
No. 3:10-CV-188, 2012 WL 1948153 (S.D. Ill. May 30, 2012) 9

Class Plaintiffs v. City of Seattle,
955 F.2d 1268 (9th Cir. 1992) 37

Continental Ore Co. v. Union Carbide & Carbon Corp.,
370 U.S. 690 (1962).....31

Culver v. City of Milwaukee,
277 F.3d 908 (7th Cir. 2002) 34

DaSilva v. Esmor Correctional Servs. Inc.,
215 F.R.D. 477 (D.N.J. 2003).....37

Depoister v. Mary M. Holloway Found.,
36 F.3d 582 (7th Cir. 1994) 12

Digital Music Antitrust Litig.,
812 F. Supp. 2d 390 (S.D.N.Y. 2011).....29

In re Domestic Air Transp. Antitrust Litig.,
148 F.R.D. 297 (N.D. Ga. 1993).....24, 33

E.E.O.C. v. Hiram Walker & Sons, Inc.,
768 F.2d 884 (7th Cir. 1985) 11

Elna Sefcovic, LLC v. TEP Rocky Mountain, LLC,
807 F. App'x 752 (10th Cir. 2020) 26, 35

Gehrich v. Chase Bank USA, N.A.,
316 F.R.D. 215 (N.D. Ill. 2016).....17

Great Neck Cap. Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.,
212 F.R.D. 400 (E.D. Wis. 2002) 15

Isby v. Bayh,
75 F.3d 1191 (7th Cir. 1996) 11, 12, 13

Kaufman v. Am. Express Travel Related Servs. Co., Inc.,
877 F.3d 276 (7th Cir. 2017) 27

Kleen Prod. LLC v. Int'l Paper Co.,
No. 1:10-CV-05711, 2017 WL 5247928 (N.D. Ill. Oct. 17, 2017) 16

Kolinek v. Walgreen Co.,
311 F.R.D. 483 (N.D. Ill. 2015).....16

Larsen v. Trader Joe's Co.,
No. 11-cv-05188-WHO, 2014 WL 3404531 (N.D. Cal. July 11, 2014) 14

In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.,
733 F. Supp. 2d 997 (E.D. Wis. 2010).....15

Mangone v. First USA Bank,
206 F.R.D. 222 (S.D. Ill. 2001) 9

Mata v. Manpower Inc.,
No. 14-CV-03787, 2016 WL 948997 (N.D. Cal. March 14, 2016).....29

Nat'l Super Spuds Inc. v. New York Mercantile Exch.,
660 F.2d 9 (2d Cir. 1981).....34

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999).....34

Oswald v. McGarr,
620 F.2d 1190 (7th Cir. 1980) 25, 26

Pallas v. Pac. Bell,
No. C-89-2373 DLJ, 1999 WL 1209495 (N.D. Cal. July 13, 1999).....18

Petrovic v. Amoco Oil Co.,
200 F.3d 1140 (8th Cir. 1999) 9

Richards Lumber and Supply Co. v. United States Gypsum,
545 F.2d 18 (7th Cir. 1976) 25, 26

Rodriguez v. West Publ'g Corp.,
563 F.3d 948 (9th Cir. 2009) 15

Schulte v. Fifth Third Bank,
805 F. Supp. 2d 560 (N.D. Ill. 2011) 17, 18, 24

Smith v. Sprint Commc'ns Co. L.P.,
No. 99 C 3844, 2003 WL 103010 (N.D. Ill. Jan. 10, 2003) 26

U.S. v. Fenzl,
670 F.3d 778 (7th Cir. 2012) 29

Uhl v. Thoroughbred Tech. & Telecomms., Inc.,
309 F.3d 978 (7th Cir. 2002) 12

In re VMS Sec. Litig.,
No. 89 C 9448, 1993 WL 105423 (N.D. Ill. Apr. 6, 1993).....27

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.,
396 F.3d 96 (2d Cir. 2005).....14, 26

Westinghouse Elec. Corp. v. Gulf Oil Corp.,
588 F.2d 221 (7th Cir. 1978) 29

Other Authorities

4 Newberg on Class Actions, §§ 13:39, *et seq*. Final Judicial Approval of
Proposed Class Action Settlements (5th ed.).....11

4 Newberg on Class Actions, § 13:43 Presumptions governing approval
process—Generally (5th ed.) 15

Fed. R. Civ. P. 23(c)(2)(B) 9

Fed. R. Civ. P. 23(e) 11, 12

I. INTRODUCTION

The Direct Purchaser Plaintiffs ("DPPs") hereby seek final approval of the settlements with defendants Simmons,[1] Mountaire,[2] and O.K. Foods[3] (collectively referred to as the "Settling Defendants"). Under the settlements (collectively, "Settlements" or "Settlement Agreements"), Simmons paid $8,018,991, Mountaire paid $15,899,826, and O.K. Foods paid $4,856,333, collectively providing an additional $28,775,150 to the Certified Class[4] from Settling Defendants and bringing the total recovery to date to $284,651,750, including the preliminarily approved settlements with Defendants Koch and House of Raeford. (*See* Declaration of Bobby Pouya in Support of Motion ("Pouya Decl.") at ¶ 8.)

In granting preliminary approval of these Settlements, the Court found they fell within the range of reasonableness and ordered notice to be provided to the Class members. (*See* Mountaire and O.K. Foods Preliminary Approval Order, Sept. 5, 2023, ECF No. 6830; Simmons Preliminary Approval Order, June 12, 2023, ECF No. 6615 (hereinafter collectively referred to as "Preliminary Approval Orders").) Co-Lead Class Counsel[5] and A. B. Data Ltd., the Court-appointed claims

[1] Defendants Simmons Foods, Inc. and Simmons Prepared Foods, Inc. are collectively referred to herein as "Simmons."

[2] Defendants Mountaire Farms Inc., Mountaire Farms of Delaware, Inc., and Mountaire Farms, LLC are collectively referred to herein as "Mountaire."

[3] Defendants O.K. Foods, Inc., O.K. Farms, Inc., and O.K. Industries, Inc. are collectively referred to herein as "O.K. Foods."

[4] The term "Class" or "Certified Class" is consistent with Court's May 27, 2022 Order granting DPPs' motion for class certification: "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.)

[5] Co-Lead Class Counsel are Lockridge Grindal Nauen P.L.L.P. and Pearson Warshaw, LLP. (*See* ECF No. 5644.)

administrator (*id.* at 3), have executed the Notice Plan in accordance with the Court's Preliminary Approval Orders. (*Id*. at 3-4; *see generally* Declaration of Eric Schachter ("Schachter Decl."); Pouya Decl. ¶ 3.)

The reaction of the Class members has been overwhelmingly positive. No Class member objected to either the Mountaire or O.K. Foods settlements. As set forth below, there has been a single objection to the Simmons settlement, based on the unique circumstances of a group of direct action plaintiffs which the Court found did not file a timely and valid request to opt out of the Certified Class. (*See* ECF No. 6872.) Through this objection and other motion practice, the real relief they seek is to salvage their individualized bid rigging allegations against defendant Simmons, which the Court has expressly held were waived by the Class as part of the Track 1 case. But having failed to preserve their bid rigging claims through a valid opt out, their objection to the Simmons settlement based on the value of these Track 2 bid rigging claims has no basis. The objectors' alternative argument—that the DPP Class's release of claims against Simmons should carve out bid rigging claims—also fails because it violates Seventh Circuit precedent regarding the scope of class action releases and this Court's orders regarding the scope and effect of Track 1 selection by the DPP Class.

DPPs respectfully request that the Court grant final approval and enter final judgment pursuant to each of the Settlements, which collectively provide over $28 million in relief to Certified Class members. DPPs do not seek attorneys' fees from these Settlements at this time, but do have a separate pending motion for an interim reimbursement of litigation expenses.[6] (*See* ECF

[6] The pending motion for reimbursement of litigation expenses requests payment *pro rata* from the Mar Jac, Harrison Poultry, Simmons, Mountaire, and O.K. Foods settlement proceeds. (*See* ECF No. 6963.) There have been no Class member objections to the motion for reimbursement of litigation expenses. (*See* ECF No. 7043.)

No. 6963.) DPPs will make a motion and provide notice for distribution of settlement proceeds, and attorneys' fees and costs at an appropriate date in the future.[7]

II. LITIGATION BACKGROUND

This is an antitrust class action against certain producers of Broilers.[8] DPPs allege that Defendants combined and conspired to fix, raise, maintain, or stabilize prices of Broilers sold in the United States, in violation of the Sherman Act. 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, 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 Nos. 3919 (Redacted) and 3935 (Unredacted).)

DPPs thoroughly investigated the case and engaged in extensive discovery prior to reaching any of the settlements. These efforts commenced prior to the filing of DPPs' initial complaint and included pre-litigation investigation into Defendants' conduct that formed the basis

[7] DPPs intend to move the Court to approve a notice plan in the near future. Included in that notice plan will be (1) notice of the House of Raeford and Koch settlements and an opportunity to object to either or both of the settlements; (2) notice of the outcome of the Class trial; (3) notice of Co-Lead Class Counsel's second request for attorney's fees (not to exceed 33⅓%), third request for reimbursement of litigation expenses, and second request for Class Representative service awards (not to exceed $15,000 per Class Representative); and (4) notice informing the Certified Class of the second claims process and *pro rata* distribution. (*See* ECF No. 6927 at 1-2.)

[8] Consistent with the operative Fifth Consolidated Amended 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* ECF Nos. 3919 (Redacted) and 3935 (Unredacted).)

of the DPPs' complaints. (*See* Pouya 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 at 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* Pouya 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* Pouya 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* Pouya 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* Pouya Decl. ¶ 8.) The Court granted final approval to 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* Pouya Decl. ¶ 8.) The Court granted final approval to the Mar Jac and Harrison settlements on January 27, 2022. (*See* ECF No. 5397.) Next, DPPs secured a settlement with

Simmons in the amount of $8,018,991. (*See* Pouya Decl. ¶ 8.) The Court granted preliminary approval to the Simmons settlement on June 12, 2023. (*See* ECF No. 6615.) DPPs then settled with Mountaire and O. K. Foods in the amount of $15,899,826 and $4,856,333, respectively. (*See* Pouya Decl. ¶ 8.) The Court granted preliminary approval to the Mountaire and O.K. Foods settlements on September 5, 2023. (*See* ECF No. 6830.) Most recently, DPPs secured settlements with House of Raeford and Koch in the amount of $27,500,000 and $47,500,000, respectively. (*See* Pouya Decl. ¶ 8.) The Court granted preliminary approval to the House of Raeford and Koch settlements on October 13, 2023. (*See* ECF No. 6979.) The total settlements obtained by DPPs to date is $284,650,750. (*See* Pouya Decl. ¶ 7.)

On May 27, 2022, the Court granted DPPs' motion for class certification and certified the DPP Class. (*See* ECF No. 5644.) On December 21, 2022 DPPs filed a Motion for an Order Approving Notice of Contested Class Certification (ECF No. 6177), wherein they presented a notice plan and proposed notice documents relating the Certified Class to the Court for approval. On January 4, 2023, the Court entered an Order Approving Notice of Contested Class Certification (ECF No. 6195), in which it approved the form and manner of the class notice in accordance with Federal Rule of Civil Procedure 23. (*See id.* at ¶ 3.) The notice order further provided, "In the event of any further pretrial settlement(s), the Class members may not be permitted an additional opportunity to opt out." (*Id.* at ¶ 8.)

On June 30, 2023, the Court granted in part and denied in part Defendants' motions for summary judgment. (*See* ECF No. 6641.) Specifically, the Court granted the motions for summary judgment by Defendants Agri Stats, Case, Fieldale, Foster, Fries-Claxton, Perdue, and Wayne, as well as claims regarding the manipulation of the Georgia Dock and supply restraints during the

2015-2016 time period. (*Id.*) Thereafter, the Class trial proceeded with a verdict in favor of the sole remaining defendant, Sanderson Farms, in October 2023. (*See* ECF No. 7015.)

III. SUMMARY OF THE SETTLEMENT NEGOTIATIONS AND TERMS

A. Simmons

The Settlement Agreement with Simmons was reached through confidential, protracted, arm's length negotiations. (*See* Pouya Decl. ¶ 9.) Those negotiations commenced in April 2023. (*Id*.) As this litigation has been pending for nearly seven years, the parties had ample opportunity to assess the merits of DPPs' claims and Simmons' 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 May 24, 2023, approximately five weeks prior to the issuance of the Court's summary judgment order. (*See id*. ¶ 9; *see also* Simmons Settlement Agreement, ECF No. 6597-1.)

B. Mountaire

The Settlement Agreement with Mountaire was reached through confidential, protracted, arm's length negotiations. (*See* Pouya Decl. ¶ 10.) Those negotiations commenced in July 2023. (*Id*.) As with the preceding settlements, the parties 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*. ¶ 10; *see also* Mountaire Settlement Agreement, ECF No. 6814-1.)

C. O.K. Foods

The Settlement Agreement with O.K. Foods was reached through confidential, protracted, arm's length negotiations. (*See* Pouya Decl. ¶ 11.) Those negotiations commenced in April 2023, and ultimately culminated after a mediation with highly experienced mediators Professor Eric Green and Mr. Fouad Kurdi. (*Id*.) As with the preceding settlements, the parties 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*. ¶ 11; *see also* O.K. Foods Settlement Agreement, ECF No. 6814-2.)

D. Terms of the Settlement Agreements

Under the Settlements, Simmons paid $8,018,991, Mountaire paid $15,899,826, and O.K. Foods paid $4,856,333 into separate interest-bearing escrow accounts. (*See* Pouya Decl. ¶ 8.) The Settlement Agreements do not contain any reduction or termination provisions. In addition to monetary relief, the Settling Defendants agreed to engage in reasonable efforts to authenticate or provide foundation to admit 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 releases in the Settlement Agreements are substantially identical to one another and to the releases in prior settlements in this case, and provide, in relevant part:

> For the avoidance of doubt, "Released Claims" includes all claims that have been asserted, or could have been asserted, in the Action against the Simmons Released Parties, including all claims in any way arising out of or relating to the direct purchase of Broilers produced, processed or sold by Simmons or any of the other Defendants or their alleged co-conspirators. Notwithstanding the above, however,

> "Released Claims" does not include (i) claims asserted against any Defendant or co-conspirator other than the Simmons Released Parties or (ii) any claims wholly unrelated to the allegations in the Action that are based on breach of contract, negligence, personal injury, bailment, failure to deliver lost goods, damaged or delayed goods, product defect, securities claim, breach of warranty, or product defect.[9]

(*Id.*)

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 Co-Lead 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. (Pouya Decl. ¶¶ 13-14.)

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 accounts for proceeds from the Settlements; (3) make a distribution to Certified Class members in accordance with a plan of distribution to be filed in the future; (4) pay attorneys' fees to Class Counsel (subject to a separate, not-yet-filed motion), as well as costs and expenses (*see* ECF No. 6963), that may be awarded by the Court; 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).

[9] These specific references to Simmons are contained in the Simmons Settlement Agreement release. The Mountaire and O.K. Foods settlement releases are similarly limited to those Settling Defendants.

IV. THE COURT-APPROVED NOTICE PROGRAM SATISFIED DUE PROCESS AND HAS BEEN FULLY IMPLEMENTED

The Court-approved Notice Plan related to the Settlements has been successfully implemented and Class members have been notified of the Settlements. When a proposed class action settlement is presented for court approval, the Federal Rules require "the best notice that is practicable under the circumstances," and that certain specifically identified items in the notice be "clearly and concisely state in plain, easily understood language." Fed. R. Civ. P. 23(c)(2)(B). A settlement notice is a summary, not a complete source, of information. *See, e.g.*, *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *Mangone v. First USA Bank*, 206 F.R.D. 222, 233 (S.D. Ill. 2001).

The Notice Plan approved by this Court (*see* Preliminary Approval Order, ECF No. 6830 ¶¶ 3-7)—which relies primarily on direct notice to Class members but is supplemented by publication notice to maximize the likelihood of actual notice—is commonly used in class actions like this one. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Fed. R. Civ. P. 23(c)(2)); *City of Greenville v. Syngenta Crop Prot., Inc.*, No. 3:10-CV-188, 2012 WL 1948153, at *4 (S.D. Ill. May 30, 2012) (same); Fed. R. Civ. P. 23(c)(2)(B). It constitutes valid, due, and sufficient notice to Class members, including in many instances their counsel, and is the best notice practicable under the circumstances.

The content of the Court-approved notice complies with the requirements of Rule 23(c)(2)(b). (*See* ECF No. 6830 ¶ 7.) Both the summary and long-form notice clearly and concisely explained in plain English the nature of the action and the terms of the Settlements. (*See* Schachter Decl. ¶ 7.) The notices provided a clear description of who is a member of the Class and the binding effects of Class membership. (*Id.*) They also explained how to object to the Settlements, and how

to contact Co-Lead Class Counsel. (*Id.*) The notices also explained that they provided only a summary of the Settlements, and that the Settlement Agreements, as well as other important documents related to the litigation, are available online at www.broilerchickenantitrustlitigation.com. (*See id.*) In addition, the information from that website, as well as the toll-free call-in number for the Settlements, were available in both English and Spanish. (*See id.* ¶¶ 8, 9.)

The Notice Plan was implemented by the Court-appointed settlement administrator, A. B. Data Ltd. (*See* Preliminary Approval Order at 3.) Specifically, using customer information obtained from Defendants, A. B. Data mailed 25,126 print notices and emailed 6,183 electronic class notices. (*See* Schachter Decl. ¶¶ 3, 5.) A. B. Data also published notice as banner advertisements in digital media from September 13, 2023 through October 12, 2023 on the following industry websites: www.ProgressiveGrocer.com, www.MeatPoultry.com, www.PoultryTimes.com, www.SuperMarketNews.com, www.WinsightGroceryBusiness.com, www.FastCasual.com, and www.ShelbyReport.com. (*See id.* ¶ 6.) In addition, A. B. Data continues to maintain the case website, where Class members can view and print important documents and obtain other information related to the litigation. (*See id.* ¶ 8.) The Settlement Notice documents also informed Class members of the pending motion for reimbursement of litigation expenses (which was also posted on the website and received no objections), and the separate, yet-to-be-field motion for attorneys' fees and service awards that would be sought by the Class Representatives and Co-Lead Class Counsel at a later date. A. B. Data also continues to maintain a toll-free call-in number to answer Class members' questions. (*See id.* ¶ 9.)

V. THE SETTLEMENTS ARE FAIR, REASONABLE, AND ADEQUATE, AND SHOULD BE GRANTED FINAL 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. of City of Milwaukee*, 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 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).

Any dismissal, compromise, or settlement of a class action is subject to court approval. Rule 23 jurisprudence has led to a defined procedure and specific criteria for class action settlement approval, namely: certification of a settlement class (or prior certification of a litigated class, as in the case of the three settlements offered for final approval in this motion) and preliminary approval of the proposed settlement; dissemination of notice of the settlement to all affected class members, including an opportunity to object to the proposed settlement; and a fairness hearing at which class members may be heard regarding the settlement, and counsel may present evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement. *See* 4 Newberg on Class Actions, §§ 13:39, *et seq*. Final Judicial Approval of Proposed Class Action Settlements (5th ed.). This procedure safeguards class members' due process rights and enables the Court to fulfill its role as the guardian of class interests. *See id*.

The standard for final approval of a class action settlement is whether the settlement is fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e); *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 986 (7th Cir. 2002); *Isby*, 75 F.3d at 1198-99. Evaluation and approval of a class action settlement are committed to the sound discretion of the Court. *See Isby*, 75 F.3d at 1197. The proper focus "is upon 'the general principles governing approval of class action settlements' and not upon the 'substantive law governing the claims asserted in the litigation.'" *Id.* (quoting *Armstrong*, 616 F.2d at 315). As part of the Court's wide latitude in making its determination, there is "no requirement that an evidentiary hearing be conducted as a precondition to approving a settlement in a class action suit." *Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 586 (7th Cir. 1994).

In evaluating the fairness of a proposed class action settlement, courts typically consider the following factors: (1) the strength of plaintiffs' case compared to the amount of defendants' settlement offer; (2) an assessment of the likely complexity, length and expense of the litigation; an evaluation of the amount of opposition to settlement among affected parties; (3) the reaction of the class members; (4) the opinion of competent counsel; and, (5) the stage of the proceedings and the amount of discovery completed at the time of settlement. *See Isby*, 75 F.3d at 1198-99.

The Court already found that a number of these factors were satisfied in granting preliminary approval to the Settlements (*see generally* Preliminary Approval Orders, ECF Nos. 6615, 6830), but at that time Class members themselves had yet to weigh in. Now that Class members have received notice and an opportunity to be heard, their reaction has been universally positive, with one exception. As set forth herein, out of the thousands of Class members, none have objected to the Mountaire or the O.K. Foods settlements. The only objection to the Simmons

settlement is by the Certain Restaurant DAPs,[10] a group of direct action plaintiffs who failed to timely opt out of the Certified Class and who have consequently asserted a meritless objection to the Simmons settlement arising exclusively from their unique circumstances and their desire to adjudicate their individual bid rigging claims. (*See* ECF No. 5307.) The Court should not permit the Certain Restaurant DAPs' desire to preserve their bid rigging claims to upend or nullify the millions of dollars in settlements secured on behalf of the DPP Class in a case that presented substantial litigation risk. Thus, each of these factors support granting final approval to the Settlements.

A. The Settlements Provide a Substantial Recovery to the Class

The consideration from Settling Defendants for the Settlements (*i.e.*, "the amount of defendants' settlement offer" (*Isby*, 75 F.3d at 1199)) is significant—totaling $28,775,150—and provide considerable benefits to the Class, including but not limited to meaningful cooperation. This is a significant amount of money recovered for the Class from three relatively small Defendants. The Settlements thus constitute an excellent result for the Class,[11] fall well within the range of possible approval, and should be granted final approval by the Court. As this Circuit has recognized, "[i]n complex litigation with a plaintiff class, 'partial settlements often play a vital role in resolving class actions.'" *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247 (7th Cir.

[10] The "Certain Restaurant DAPs" or "Objectors" are: Boston Market Corporation, Bojangles' Restaurants, Inc. and Bojangles' Opco, LLC, Golden Corral Corp., El Pollo Loco, Inc., Zaxby's Franchising LLC, Domino's Pizza LLC and Domino's Pizza Distribution LLC, Cracker Barrel Old Country Store, Inc., CBOCS Distribution, Inc., Barbeque Integrated, Inc. d/b/a Smokey Bones Bar & Fire Grill, Shamrock Foods Company, United Food Service, Inc., FIC Restaurants, Inc. d/b/a Friendly's, The Johnny Rockets Group, Inc., WZ Franchise Corp., Captain D's LLC, and White Castle Purchasing Co. (*See* ECF No. 7040 at n.1.)

[11] As more fully discussed below, the objectors do not dispute that the recovery obtained is sufficient as to the Track 1 claims at issue. (*See* Section VI.B below.)

1992) (quoting 1–Part A Manual for Complex Litigation Second, Moore's Federal Practice § 30.46 (1986)).

B. The Settlements Eliminated Significant Risk to the Class

The Settlements eliminated significant risks the Class would face if the action were to proceed against the Settling Defendants. As reflected in the extensive docket, this case is seven years old and the DPPs have expended significant effort to defeat motions to dismiss, conduct extensive discovery, obtain class certification, defeat most motions for summary judgment, and plan, prepare, and complete a trial. The Settlements allowed Class members to recover a significant sum from three relatively small Defendants. Absent settlement, the DPPs may have recovered less or nothing from these Defendants at trial. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("'Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal.'") (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998)). While the DPPs' recent trial against Sanderson Farms is not an entirely apt comparison, as DPPs' case against each Defendant varied to some extent, nonetheless the defense verdict in that trial illustrates the risks the DPP Class faced in going to trial. Continued litigation against the Settling Defendants would have also involved significant additional expenses and protracted legal battles up to and including at trial.

Each of these important hurdles present time, expense, and risk, which supports the security provided by the $28,775,150 in settlement proceeds provided by the Settlements. Therefore, the complexity, length and expense of further litigation, which the Settlements mitigate as to the Settling Defendants, also favor final approval. *See Larsen v. Trader Joe's Co.*, No. 11-cv-05188-WHO, 2014 WL 3404531, at *4 (N.D. Cal. July 11, 2014) ("Avoiding such unnecessary and unwarranted expenditure of resources and time would benefit all parties, as well as conserve

judicial resources…. Accordingly, the high risk, expense, and complex nature of the case weigh in favor of approving the settlement.") (cited authority omitted); *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1008 (E.D. Wis. 2010) ("The 'complexity, length and expense of further litigation' factor strongly favors this settlement….").

C. The Settlements Resulted from Hard-Fought Arm's Length Negotiations and Experienced Counsel Recommend Approval

The fact that the Settlements are the product of arm's length negotiations strongly supports a presumption that the Settlements are fair, reasonable and adequate. *See* 4 Newberg on Class Actions, § 13:43 Presumptions governing approval process—Generally (5th ed.); *Great Neck Cap. Appreciation Inv. P'ship, L.P. v. PricewaterhouseCoopers, L.L.P.*, 212 F.R.D. 400, 410 (E.D. Wis. 2002); *see also Rodriguez v. West Publ'g Corp*., 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution.").

As detailed in this Motion and supporting declaration, each of the Settlements was the product of extensive arm's length negotiations. (*See* Sections II and III above; *see also* Pouya Decl. ¶¶ 9-11.) The separate, hard-fought negotiations with each Settling Defendant were kept confidential, and coincided with all parties vigorously litigating the case. (Pouya Decl. ¶¶ 9-12.) The negotiations necessitated numerous conferences as well as written exchanges between counsel during which they negotiated the material terms of the Settlements, as well as the final Settlement Agreements. (*Id*.) In engaging in these separate settlement discussions, counsel for DPPs were focused on obtaining the best possible result for the DPP Class. (*Id*. ¶ 12.)[12]

Moreover, it is well established that the judgment and opinion of experienced and competent counsel should be considered when assessing whether a settlement is fair, reasonable

[12] At the time each Settlement was reached, the parties had conducted years of discovery and the parties were well into preparing for trial.

and adequate. "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-CV-2058 JST, 2015 WL 9266493, at *6 (N.D. Cal. Dec. 17, 2015) (quoting *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008)); *see also Kleen Prod. LLC v. Int'l Paper Co.*, No. 1:10-CV-05711, 2017 WL 5247928, at *3 (N.D. Ill. Oct. 17, 2017) ("The Settlement was negotiated by highly skilled and experienced antitrust and class action lawyers, who have held leadership positions in some of the largest class actions around the country."). Therefore, the endorsement of the Settlements by Co-Lead Class Counsel (which the Court knows to have handled several major antitrust class actions), is yet another factor that supports final approval. (*See* Pouya Decl. ¶¶ 13, 14, 16.)

D. The Stage of the Proceedings and Amount of Discovery Supports Final Approval

The fact that each Settlement was reached close to trial strongly supports granting final approval to the Settlements. Namely, the Simmons Settlement was entered into weeks before the Court's ruling on Defendants' motions for summary judgment and less than three months before trial commenced, and the Mountaire and O.K. Foods settlements were entered into less than one month before trial.

The completeness of the factual and legal record allowed Co-Lead Class Counsel to thoroughly assess the strength of Plaintiffs' claims and the Settling Defendants' defenses, and the substantial benefits that the Settlements would provide to the Class. (Pouya Decl. ¶ 13.) The Settlements took into account Defendants' motions for summary judgment, in the case of Simmons, and the Court's summary judgment order, in the case of O.K. Foods and Mountaire, as well as the prospects of the then-upcoming trial. *See, e.g.*, *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 494 (N.D. Ill. 2015) ("Although Kolinek withstood Walgreens's motion to dismiss on both

grounds, the Court observed in its written orders as to both [defense] issues that further factual development might prove that plaintiffs did indeed consent or that the calls were made for emergency purposes."); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 582 (N.D. Ill. 2011) ("While Plaintiffs maintain that their claims would ultimately succeed, the above discussion establishes that Fifth Third has a number of potentially meritorious defenses. Absent settlement, Class Members would face the real risk that they would win little or no recovery."); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 229 (N.D. Ill. 2016) ("In light of Chase's potential defenses, the legal uncertainty concerning the application of the TCPA, and the time and expense inherent to litigation, proceeding to trial, and obtaining relief posed risks to Plaintiffs, and a possibility existed that they would have recovered nothing.").

Moreover, the voluminous discovery and investigation performed before the Settlements were entered ensured that DPPs and their counsel made informed decisions to approve and recommend the Settlements to the Class and the Court. The Settlements were entered into after DPPs had the opportunity to take dozens of depositions, analyze millions of documents, and engage in extensive written discovery. (*See* Pouya Decl. ¶¶ 4-7.) Therefore, the procedural posture and status of the case supports granting final approval to the Settlements.

E. No Class Members Objected to the Mountaire and O.K. Foods Settlements, and Only One Group of DAPs Objected to the Simmons Settlement

Pursuant to the Court's Preliminary Approval Order, more than 31,309 direct class notices were sent by the settlement administrator (25,126 via U.S. mail, 6,183 via email), which was in addition to giving publication notice in industry trade press and the settlement administrator maintaining both an informational website and toll-free call-in center. (Schachter Decl. ¶¶ 3, 5, 6, 8, 9.) As these Settlements were on behalf of the Certified Class and the exclusion deadline for the Certified Class had passed, no additional opportunity to opt out of these proposed Settlements was

permitted. (*See* Preliminary Approval Orders, ECF Nos. 6615, 6830; *see also* ECF No. 6195 ¶ 8.)[13]

After this thorough outreach to the thousands of Class members, there were no objections to the Mountaire or O.K. Foods settlements, and only one uniquely situated objection to the Simmons settlement (*see* ECF No. 7040; *see* Section VI below). The overwhelmingly positive response of the Class supports finding that all three Settlements are fair, reasonable, and adequate. *See Bynum v. Dist. Of Columbia*, 412 F. Supp. 2d 73, 77 (D.D.C. 2006) ("The low number of opt-outs and objectors (or purported objectors) supports the conclusion that the terms of the settlement were viewed favorably by the overwhelming majority of class members."); *Schulte*, 805 F. Supp. 2d at 586 ("A very small percentage of affected parties have opposed the settlement…. Only 342 [of more than 100,000] Class Members excluded themselves from the settlement and only 15 Class Members submitted documents that could be considered objections."); *Pallas v. Pac. Bell*, No. C-89-2373 DLJ, 1999 WL 1209495, at *8 (N.D. Cal. July 13, 1999) ("The small percentage—less than 1%—of persons raising objections is a factor weighing in favor of approval of the settlement.").

The overwhelmingly positive response of the Class especially favors approval of the Settlements when, as here, "much of the class consists of sophisticated business entities." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2015 WL 9266493, at *7 (citing *In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 629 (E.D. Pa. 2004)).

[13] Two groups of Direct Action Plaintiffs (the SGA and L. Hart DAPs) moved this Court for permission to opt out late from the Certified Class. The Court held that those entities would be subject to the Simmons settlement, but not future settlements (including but not limited to Mountaire and O.K. Foods). (*See* ECF No. 6729.) The exclusion list for each of the Settlements is attached to the Schacter Declaration as Exhibits A (Simmons), B (Mountaire), and C (O.K. Foods).

VI. THE CERTAIN RESTAURANT DAPS' OBJECTION TO THE SIMMONS SETTLEMENT AGREEMENT SHOULD BE OVERRULED

As set forth above, no Class member objected to the Mountaire or O.K. Foods Settlements. The only objection to the Simmons settlement is by the Certain Restaurant DAPs, and their objection stems not from the merits of the settlement, but entirely from their failure to file a timely and valid opt out. As the Certain Restaurant DAPs have made clear in their prior filings, the primary relief they seek is to preserve the right to assert bid rigging claims against Simmons. (*See* ECF Nos. 6930, 7030.) But as the Court held in ruling on the Certain Restaurant DAPs' recent motion: "The movants should have met the required deadlines and followed the procedures set forth in Rule 23 and the Court's orders for opting out of the class." (ECF No. 6872.)

Having failed to do so, the Certain Restaurant DAPs have lodged a self-serving objection that has nothing to do with the merits of the Simmons settlement or its benefit to the DPP Class.

For the reasons set forth herein, as well as in the DPPs' prior briefs on this matter (*see* ECF Nos. 6864, 6999), the Court should deny the Certain Restaurant DAPs' attempt to upend the Simmons settlement and deny the benefit of that settlement to all other members of the DPP Class. The Simmons settlement is in the best interest of the Certified Class and is fair, reasonable, and adequate.

A. Relevant Background to the Objection

On December 20, 2021, the Court held a hearing with all counsel, including the classes and all direct action plaintiffs ("DAPs"), to discuss the structure of the litigation and clarify its October 15, 2021 Order (ECF No. 5128). At that hearing, the Court presented all plaintiffs with a choice to elect to proceed on either Track 1 or Track 2. (*See* ECF No. 5305.) The Court clearly set forth the subject matter for each Track:

> "Track One is going to be supply reduction and Georgia Dock claims." (12/20/2021 Hearing Transcript 11:9-10.) "No bid rigging claims are going to be tried in Track

> One either as stand-alone claims or with bid rigging as an element or component of a broader conspiracy claim premised on market manipulation claims." (*Id.* 11:5-8.) "**Track One will not get another bite at the apple after a Track One trial, meaning you can't try a -- if you're in Track One, that will be your only trial. If you want to allege bid rigging as part of an overall conspiracy or as some other type of your case in chief, go to Track Two**." (*Id*. 11:15-19 (emphasis added.)

DPPs elected to "proceed on Track One to try their claim under Section 1 of the Sherman Act against Defendants." (*See* ECF No. 5307.) The Certain Restaurant DAPs elected to proceed on Track 2. (*See* ECF No. 5334.) But at no point did the Court state that the "unusual management structure of the case" (*see* ECF 6729 at 3) vitiated any class member's obligation to follow simple rules and procedures and to opt out of any class to which it did not wish to belong.[14]

On May 27, 2022, the Court granted DPPs' motion for class certification and certified the DPP Class (*See* ECF No. 5644.) On January 4, 2023 the Court approved the DPP Class notice plan under Rule 23, and directed notice to all potential members of the DPP Class—including the Certain Restaurant DAPs. (ECF No. 6195). The Court's notice order contemplated that there would be no additional right for DPP Class members to opt out of future settlements. (*Id.* at ¶ 8.) The Court-approved notice to the DPP Class was also clear:

> **Unless you exclude yourself … you will remain in the Certified Class**, which means that you cannot sue, **continue to sue**, or be part of any other lawsuit against the Non-Settling Defendants and their affiliates that pertains to the claims in this case.
>
> …if you wish to pursue your own separate lawsuit against the Non-Settling Defendants, **you must exclude yourself by submitting a written request to the Notice Administrator** stating your intent to exclude yourself from the Certified Class…
>
> Unless you exclude yourself, you give up the right to sue the Non-Settling Defendants for the claims set forth in the litigation. **If you have a pending lawsuit**

[14] Prior to the December 20, 2021 hearing, DPPs had secured settlements with Fieldale, Amick, Peco, George's, Pilgrim's, Tyson, Mar Jac, and Harrison Poultry. The Certain Restaurant DAPs opted out of the Pilgrim's, Tyson, Mar Jac, and Harrison Poultry settlements. (*See* ECF No. 4789, 5397.)

> **against one or more of the Defendants, speak to your lawyer in that lawsuit immediately to determine whether you must exclude yourself from this Class to continue your own lawsuit against the Non-Settling Defendants**.

(ECF No. 6195 at 8-9 (emphasis added).) The deadline to opt out of the Certified Class was April 4, 2023, a deadline that all but three groups of DAPs met. Two DAP groups (SGA and the L. Hart group) realized their error and promptly moved the Court to allow them to opt out of the Certified Class late, which the Court permitted but required those DAPs to be subject to the Simmons settlement that was reached after the April 4, 2023 deadline. (*See* ECF No. 6729.)

Although the Certain Restaurant DAPs clearly were made aware of the issue by the motion practice and order regarding the SGA and L. Hart DAPs, inexplicably they failed to heed the Court's order as to those DAPs, rejected the path those DAPs took, and took no formal action even though it was clear that Defendants disagreed with their position. (*See* ECF No. 6999-2.) It was not until DPPs reached four additional settlements with Mountaire, O.K. Foods, House of Raeford, and Koch that the Certain Restaurant DAPs moved the Court to confirm their Track 2 opt out status. (*See* ECF No. 6841.) In that motion they asserted the position that because they filed a Track 2 complaint, they were not required to follow the clear opt-out procedure described above in the notice they admittedly received. The Court denied their motion in part and held that the Certain Restaurant DAPs were bound by the Simmons, Mountaire, O.K. Foods, House of Raeford, and Koch settlements. (*See* ECF No. 6872.) Unhappy with that ruling, the Certain Restaurant DAPs filed a motion to clarify (ECF No. 6930) which both the DPPs and Simmons, House of Raeford, and Koch opposed (ECF Nos. 6997 and 6999, respectively). That motion is fully briefed and pending before the Court. The Certain Restaurant DAPs have indicated that they may withdraw their objection to the Simmons settlement depending on the outcome of that motion. (*See* ECF No. 7040 at 1.)

B. The Certain Restaurant DAPs' Objection to the Simmons Settlement Based on the Claimed Value of Their Individual Bid Rigging Claims is Without Merit

Despite their aggressive rhetoric, the Certain Restaurant DAPs assert an extremely narrow objection to the DPP Class settlement with Simmons. Notably, the Certain Restaurant DAPs do not dispute that the DPP Class appropriately chose to pursue claims based on supply restraints and manipulation of the Georgia Dock by electing Track 1. Indeed, the Certain Restaurant DAPs opine that the bid rigging claims could not be the proper subject of class adjudication because they were too individualized (a moot point never advanced by the parties or adjudicated by the Court).(*See* ECF No. 7040 at 13-14.)[15] Nor do the Certain Restaurant DAPs dispute that the DPP Class settlement with Simmons secures a sufficient recovery to compensate the Class members for the Track 1 claims at issue in the DPP Class. (*See id*. at 20.) In this respect it is telling that the Certain Restaurant DAPs do not object to the O.K. Foods and Mountaire settlements, despite the fact that they provide comparably similar relief and releases as the Simmons settlement. The reason for this compartmentalized approach is confirmed in the Certain Restaurant DAPs' objection, which reinforces their desire to preserve their individual bid rigging claims against Simmons, Koch, and House of Raeford.(*See* ECF No. 7040 at 4.)[16]

[15] Although the objection includes a lengthy discussion regarding class certification, that discussion is not directly relevant to the issue before the Court regarding the fairness, reasonableness, and adequacy of the Simmons settlement. (*See* ECF No. 7040 at 11.) The Certain Restaurant DAPs do not dispute that the Court appropriately certified the DPP Class and their objection does not arise from the class certification order. As detailed herein, the Certain Restaurant DAPs' argument that the Simmons settlement could not apply to or release bid rigging claims because they were not certified is fundamentally flawed, and other courts have repeatedly rejected similar objections. (*See, e.g.,* Section VI.C.1 below).

[16] The Court has not ordered notice or scheduled a fairness hearing for the Koch and House of Raeford settlements, which were preliminarily approved on October 13, 2023. (*See* ECF No. 6979.) However, the Certain Restaurant DAPs have indicated their intent to assert similar objections to those settlements. (*See, e.g.,* ECF No. 7040 at 4.)

The Certain Restaurant DAPs' primary objection to the value of the Simmons settlement is therefore unique and individualized, *i.e.*, they claim the Simmons settlement does not obtain sufficient recovery for their Track 2 bid rigging claims against Simmons. (*See, e.g.*, ECF No. 7040 at 18 (complaining that "bid-rigging claims were not considered in connection with the negotiation of the Settlement").) This assertion is directly at odds with the Court's demarcation between the Track 1 and Track 2, issued long before the Simmons settlement was reached and which held: "Track One is going to be supply reduction and Georgia Dock claims." (12/20/2021 Hearing Transcript 11:9-10.) "No bid rigging claims are going to be tried in Track One either as stand-alone claims or with bid rigging as an element or component of a broader conspiracy claim premised on market manipulation claims." (*Id.* 11:5-8.) Thus, when the DPP Class was certified and Class members were notified, the playing field was clear to the putative DPP Class members—particularly to direct action plaintiffs who were represented by sophisticated counsel—that having elected Track 1 the DPP Class would focus on supply restraints and Georgia Dock manipulation.

The fact that following the Court's directive the Track 1 proceedings and settlement did not focus on individual bid rigging recovery was no surprise to the Certain Restaurant DAPs. As Certain Restaurant DAPs expressly admitted in their "opt out confirmation" motion, "'The Class elected to proceed on Track 1 and, pursuant to the Court's directives, expressly dropped its bid-rigging/price-fixing claim. And, as you also know, the Bilzin DAPs separated from the Class by electing to proceed on Track 2.'" (*See* ECF No. 6841 at 2.) The Certain Restaurant DAPs went on to argue (a step too far in DPPs' view) that the waiver of bid rigging claims by the Class was so clear by the time they received notice of certification of the DPP Class, that it absolved them of the need to formally opt out (contrary to the clear direction of the Court-approved notice). (*See id.* at 3-5.) It is disingenuous for the Certain Restaurant DAPs to now argue that the Class settlement

with Simmons is not fair, reasonable, and adequate solely because it does not obtain separate consideration for their individual Track 2 bid rigging claims.

If Class members such as the Certain Restaurant DAPs wanted to preserve their bid rigging claims, they had to opt out just as every other direct action plaintiff in this case did to preserve their individual claims. *See In re Domestic Air Transp. Antitrust Litig*., 148 F.R.D. 297, 346-47 (N.D. Ga. 1993) ("The proposed settlements are intended to settle all claims against the Settling Defendants under federal or state law that members of the class have alleged or could have alleged in the lawsuit or that arise out of any alleged act in furtherance of the alleged antitrust conspiracy…. The Chicago plaintiffs could have opted out of these settlements. Not having done so, it is not unfair to limit their recovery to the settlement proceeds.") (citing *Nat'l Super Spuds Inc. v. New York Mercantile Exch*., 660 F.2d 9 (2d Cir. 1981)); *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 351 (N.D. Ill. 2010) ("'[W]hen damages are sought, it is quite likely that some individual class members will want to sue on their own (provided that the potential damages per class member are substantial) rather than participate in a class-wide award, because they may have greater than average damages.'") (quoting *In re Allstate Ins. Co.*, 400 F.3d 505, 507 (7th Cir. 2005)); *Schulte*, 805 F. Supp. 2d at 595 (objector objected to a proposed settlement because it did not take into account "emotional and financial hardship." The Court dismissed the objection because it essentially argued that the amount awarded should be increased, and therefore it was "tantamount to complaining that the settlement should be 'better,' which is not a valid objection.").

The Certain Restaurant DAPs' objections to the Simmons settlements based on the absence of a separate assessment of their bid rigging claims is without merit. The Simmons settlement obtained millions of dollars in recovery in a case that presented risk at summary judgment and

trial. The DPP Class should not be deprived of the significant benefits provided by the Simmons settlement on account of their impact on the Track 2.

C. The Certain Restaurant DAPs Challenge to the Simmons Release is Without Merit and Should be Rejected

1. The Scope of the Simmons Class Release is Proper and Conforms With Applicable Law

The Certain Restaurant DAPs' alternative objection is that the release in the Simmons settlement must not apply to their bid rigging claims because they were not specifically at issue as part of Track 1. In other words, the Certain Restaurant DAPs are attempting to preserve through their objection a right that they waived by failing to timely and validly opt out of the DPP Class. If the Certain Restaurant DAPs' interpretation of the law and the releases is right (it is not), the bid rigging claims of *all Class members* (not just the Certain Restaurant DAPs) would not be released by the Class settlements. And under that scenario, all Class members must preserve any antitrust claims that they may have against those settled Defendants other than those based on supply restraints that were a part of Track 1. (*See* ECF No. 7040 at 13.) This argument fails because it directly contravenes controlling precedent regarding the scope of class action releases, and this Court's orders regarding the scope and impact of Track 1 selection.

As courts in this district and others have repeatedly recognized, the scope of a class settlement need not be limited to only the facts and claims that are presented at trial, and class action releases can and almost always do include claims not yet adjudicated or then directly before the court. *See, e.g.*, *Oswald v. McGarr*, 620 F.2d 1190, 1198 (7th Cir. 1980) ("[I]t is entirely proper for the offer to include a release for claims not yet adjudicated. A settlement offer is a compromise and may include release of claims not before the Court"); *Richards Lumber and Supply Co. v. United States Gypsum*, 545 F.2d 18, 20-21 (7th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977) (rejecting contention that class settlement release cannot constitutionally release claims beyond

those that would be barred by res judicata); *Elna Sefcovic, LLC v. TEP Rocky Mountain, LLC*, 807 F. App'x 752, 765 (10th Cir. 2020) (unpublished) ("[A] court may release not only those claims alleged in the complaint and before the court, but also claims which 'could have been alleged by reason of or in connection with any matter or fact set forth or referred to in' the complaint") (quoting *In re Corrugated Container Antitrust Litig*., 643 F.2d 195, 221 (5th Cir. 1981)), *cert. denied*, 456 U.S. 998 (1982))); *Wal-Mart Stores, Inc.*, 396 F.3d at 106 ("Plaintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief."); *In re Brand Name Prescription Drugs Antitrust Litig.*, 94 C 897, 1996 WL 167347, at *2-3 (N.D. Ill. Apr. 4, 1996).

In accordance with this framework, courts have rejected objections to class action settlements based on the argument that the class action release could not release claims and theories not specifically before the Court. *Id.*; *Smith v. Sprint Commc'ns Co. L.P.*, No. 99 C 3844, 2003 WL 103010, at *1 (N.D. Ill. Jan. 10, 2003) ("Intervenors claim that class settlements can never provide relief outside the pleadings. We reject this notion because a class settlement can provide for the broad release of claims, including claims not stated in the complaint.") (citing *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375 (1996), and *Uhl*, 309 F.3d 978); *Richards Lumber and Supply Co.*, 545 F.2d at 20-21 (rejecting contention that class settlement release cannot constitutionally release claims beyond those that would be barred by res judicata); *Oswald*, 620 F.2d at 1198 ("[I]t is entirely proper for the offer to include a release for claims not yet adjudicated. A settlement offer is a compromise and may include release of claims not before the Court"); *Elna Sefcovic, LLC*, 807 F. App'x at 765 (Rejecting objectors' argument that a class action release could not apply to various methods of underpaying the natural gas royalties other than those specifically at issue in the class complaint because, it "'takes an overly narrow view of the factual predicate of

[plaintiffs'] claims.'") (citing *In re Literary Works in Elec. Databases Copyright Litig*., 654 F.3d 242, 248 (2d Cir. 2011)).

In *In re Brand Name Prescription Drugs Antitrust Litigation*, the court was faced with a nearly identical issue as the Certain Restaurant DAPs now raise, where a class settled Sherman Act claims, and the exchanged release included:

> "without limitation, claims which have been asserted or could have been asserted in any litigation against the Released Parties or any one of them, or which arise under or relate to any federal or state antitrust, unfair competition, unfair practices, price discrimination, unitary pricing or trade practice law, or other law or regulation, or common law, including, without limitation, the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. and the Robinson-Patman Act, 15 U.S.C. § 13(a) et seq.

In re Brand Name Prescription Drugs Antitrust Litig., 1996 WL 167347, at *2). The objecting class members argued that a class release can be no broader than the scope of issue or claim preclusion that would result from a judgment on the merits under the principles or res judicata. *Id.* However, the court rejected that argument holding, "the release of all claims was within the authority of the class representatives and was not therefore inappropriate" *Id.*, at *3; *see also Kaufman v. Am. Express Travel Related Servs. Co., Inc*., 877 F.3d 276, 287 (7th Cir. 2017). The court further recognized that settlement releases applicable to claims that were alleged or could have been alleged "have been found to be 'reasonable and customary, and without them settlement of large antitrust actions would not be desirable.'" *In re Brand Name Prescription Drugs Antitrust Litig.*, 1996 WL 167347, at *2 (citing *In re Corrugated Container Antitrust Lit*., 643 F.2d at 222, and *McDermott, Inc. v. AmClyde*, 114 S.Ct. 1461, 1467 (U.S. 1994) (noting that defendants have no incentive to settle unless settlement precludes the possibility of further liability)); *see also In re VMS Sec. Litig*., No. 89 C 9448, 1993 WL 105423, at *2 (N.D. Ill. Apr. 6, 1993) (finding "[b]road release provisions are essential to encourage settlement of class litigation.") (citing *TBK Partners, Ltd. v. Western Union Corp*., 675 F.2d 456, 460 (2d Cir. 1982)).

In accordance with the aforementioned controlling authority, the Simmons settlement release applies to "the claims that have been asserted, or could have been asserted, in the Action against the Simmons Released Parties, including all claim in any way arising out of or relating to the direct purchase of Broilers." (*See* Simmons Settlement Agreement, ECF No. 6597-1.) The release also clearly states that "notwithstanding the above, . . . 'Released Claims' does not include: (i) claims asserted against any Defendant or co-conspirator other than the Simmons Released Parties or (ii) any claims wholly unrelated to the allegations in the Action that are based on breach of contract, negligence, personal injury, bailment, failure to deliver lost goods, damaged or delayed goods, product defect, securities claim, breach of warranty, or product defect." (*See Id.* at ¶ 14.) The language of the Simmons release is also materially identical to those in earlier settlements in the case which have received final approval, as well as in the concurrently pending O.K. Foods and Mountaire settlements.[17] No DPP Class member (including but not limited to the Certain Restaurant DAPs) objected to the earlier settlements on the ground that their release was overbroad or may release bid rigging claims.

There is no disputing the fact that bid rigging claims at issue *could have* been alleged in the *In re Broiler Antitrust Litigation*, because they actually were. Prior to their Track 1 selection, the DPP Class included bid rigging allegations in violation Sherman Act allegations as part of the Fifth Consolidated Amended Complaint. (*See* ECF Nos. 3919 (Redacted), 3935 (Unredacted), ¶¶

[17] *Compare* Simmons Settlement Agreement, ECF No. 6597-1 at ¶ 14, *with* Mountaire Settlement Agreement, ECF No. 6814-1 at 16-17; O.K. Foods Settlement Agreement, ECF No. 6814-2 at 16-17; Fieldale Settlement Agreement, ECF No. 447-2 at pp. 16-17; Amick Settlement Agreement, ECF No. 3324 at pp. 72-74; Peco Settlement Agreement, ECF No. 3324 pp. 16-18; George's Settlement Agreement, ECF No. 3324 pp. 42-46; Pilgrim's Settlement Agreement, ECF No. 4259-1 at pp. 20-22; Tyson Settlement Agreement, ECF No. 4259-1 at pp. 50-52; Mar Jac Settlement Agreement, ECF No. 5052-1 at pp. 21-23; Harrison Poultry Settlement Agreement, ECF No. 5052-1 at pp. 50-52. The Certain Restaurant DAPs opted out of the Pilgrim's, Tyson, Mar Jac, and Harrison Poultry settlements. (*See* ECF No. 4789, 5397.)

391-399, 436, 442.) Similarly, the Track 2 Plaintiffs, including the Certain Restaurant DAPs, have also included allegations of supply restraints and Georgia Dock manipulation in a single consolidated amended complaint. (*See* Track Two Second Amended Consolidated Complaint, ECF No. 5455, ¶ 973.) The case law also confirms the relationship between supply restrained and bid rigging, which are both recognized as *per se* methods of price fixing in violation of the Sherman Act. *See U.S. v. Fenzl*, 670 F.3d 778, 780 (7th Cir. 2012) (bid rigging is "a form of price fixing in which bidders agree to eliminate competition among them, as by taking turns being the low bidder"); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 226 (7th Cir. 1978) (holding that an agreement to restrict production of product "unquestionably is a price fixing arrangement"). The supply restraints, Georgia Dock manipulation, and bid rigging at issue in this case therefore involve various means to fix price of the same products, purchased from the same Defendants, during the same time periods, in violation of the Sherman Act. As the aforementioned case law has repeatedly affirmed, the application of class action releases to such closely related the claims in the context of class action settlements.[18]

The scope of the release and its application to bid rigging claims is further supported by the Court's orders regarding the impact of Track 1 selection and its impact on the preservation of

[18] The facts and circumstances of the release in this case are therefore distinguishable from the cases cited by the Certain Restaurant DAPs, which analyzed class action releases arising from different claims and transactions that were asserted in completely separate cases. *Arandell Corp. v. Xcel Energy, Inc.*, No. 07-cv-076-wmc, 2022 WL 2314717 at *4-5 (W.D. Wis. Dec 27, 2022) (Holding that a release in class action alleging violations of the Commodity Futures Exchange Act arising from natural gas futures contracts in, did not apply to distinct class claims alleging violations of the Kansas Restraint of Trade Act arising from direct retail gas purchases); *Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 399-400 (S.D.N.Y. 2011) (Holding that a settlement of antitrust claims arising from the sale and marketing of compact discs, could not apply to an antitrust claims arising from the pricing of online music downloads); and *Mata v. Manpower Inc.*, No. 14-CV-03787, 2016 WL 948997 at *7 (N.D. Cal. March 14, 2016) (Relying on Ninth Circuit authority and the terms of the settlement to hold that a class action release did not apply to claims that were not alleged a previous class action settlement.

the bid rigging claims at trial. During the December 20, 2021 hearing, the Court made clear that: "Track One will not get another bite at the apple after a Track One trial, meaning you can't try a -- if you're in Track One, that will be your only trial. If you want to allege bid rigging as part of an overall conspiracy or as some other type of your case in chief, go to Track Two." (*See* ECF No. 5305, 11:15-19.) The finding that Certain Restaurant DAPs ask the Court to make – that the releases in the Class settlements must preserve bid rigging claims – would directly contravene the Court's order regarding the scope and impact of Track 1 selection. In other words, while the aforementioned case law allows settlements to release claims beyond those that would be barred by res judicata, the release of bid rigging claims in the Simmons settlement has the same impact as any judgment in the Track 1 case. There is simply no merit to the Certain Restaurant DAPs accusations that Class Counsel or the Class Representatives bargained for a unduly broad release that improperly bargained away bid rigging claims that could have otherwise been preserved at trial.

2. The Certain Restaurant DAPs Cannot Overcome the Sound Legal and Factual Support For the Scope of the Simmons Release

The Certain Restaurant DAPs objection fails to overcome the strong legal and factual basis supporting application of the Simmons settlement release to their bid rigging claims. As set forth below, while their objection strains to establish foundational distinctions regarding their bid rigging claims, their arguments are all contravened by the facts and the law.

First, while the Certain Restaurant DAPs point to the creation of Track 2 as proof of fundamental difference of bid rigging claims, this is not supported by the procedural history. On September 22, 2020, the Court issued an order denying Defendants' request to strike or sever the claims arising from bid rigging. (*See* ECF No. 3835.) That Order ruled that the bid rigging allegations were related to the existing claims under Rule 42(a) and were thus subject to joint

management options, (*id.* at 3, 8), and further ruled that the bid rigging allegations should be included in a consolidated complaint. (*Id.* at 9.) Nonetheless, the Court bifurcated the case into separate market manipulation and bid rigging claims and then stayed the latter. (*Id.*) However, thereafter numerous plaintiffs filed motions for reconsideration of that bifurcation order, including the Certain Restaurant DAPs, on grounds that the order "improperly split apart this overarching conspiracy claim in violation of well-established law…" (*See* ECF No. 4980 (the Certain Restaurant DAPs joinder in Chick-Fil-A's motion to reconsider, ECF No. 4651 (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (quoting *United States v. Patten*, 226 U.S. 525, 544 (1913) ("the character and effect of [an antitrust] conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.").) In reconsidering the facts and circumstances, the Court reversed its position because it could not compartmentalize the methods of the anticompetitive activity alleged. (*See* ECF No. 5128.) Rather than formally bifurcate bid rigging claims and split apart the antitrust conspiracy in conflict with *Continental Ore*, the Court then allowed the parties to select whether to proceed on Track 1 or 2 of the action. (*Id.* at 4 ("the Court finds that its decision to bifurcate this case was premature and must be vacated.")) Importantly, Track 2 plaintiffs have been permitted to assert their bid rigging, supply restriction, and Georgia Dock and other methods of price fixing Broilers against the Defendants in a single action. (*See* Track Two Second Amended Consolidated Complaint, ECF No. 5455.)

Second, the Certain Restaurant DAPs mischaracterize and misconstrue the Court's orders on motions in limine and evidentiary holdings excluding bid rigging evidence from the Track 1 trial. (ECF 7040 at 9-10.) This argument fails because those evidentiary rulings were made and apply in the context of a Track 1 trial, for Plaintiffs who had voluntarily waived their bid rigging

claims. (*See* ECF No. 5305, at 11:15-19 ("[I]f you're in Track One, that will be your only trial. If you want to allege bid rigging as part of an overall conspiracy or as some other type of your case in chief, go to Track Two.").) They do not provide any insight on the issue of whether bid rigging claims could be alleged in the same case.[19]

Finally, the Certain Restaurant DAPs' attempt to distinguish the transactions impacted by bid rigging based on a time period between 2012 and 2019 is misleading and unpersuasive. The Certified Class definition (and the Simmons settlement) is clear that it includes purchases between 2008 through 2019, and directly overlaps with the time period Certain DAPs claim is at issue for their bid rigging allegations. (*See* n.4 above (citing Certified Class definition, ECF No. 5644).)

* * *

The Court should reject the Certain Restaurant DAPs ex post facto attempt to carve out their bid rigging claims from the Simmons settlement. The procedural history of this dispute makes it clear that the appropriate means to protect that interest was to opt out of the DPP Class. Indeed, that is the relief that the Certain Restaurant DAPs sought prior to the Court's order rejecting their constructive opt-out argument. (*See* ECF No. 6841; *see also* ECF No. 6999-2 (emails from counsel for Certain Restaurant DAPs seeking to confirm opt out status).) The reason they sought to confirm their opt-out status was to preserve their bid rigging claims. The factual underpinning of their argument is the implicit recognition that they needed to formally opt out (either through specific election or action) in order to preserve those claims. Indeed, that is exactly what counsel for Certain Restaurant DAPs did in previous settlements with Pilgrim's, Tyson, Mar Jac, and Harrison Poultry

[19] The Restaurant DAPs cite to a single reference to the motion in limine transcript to imply that their bid rigging claims were "bifurcated." (*See* ECF 7040 at 9.) However, the Court's Orders and the case history make it clear that there was not bifurcation of the bid rigging claims. (*See* ECF No. 5128, at 4 ("[T]he Court finds that its decision to bifurcate this case was premature and must be vacated.").

(*see* ECF No. 4789, 5397), but inexplicably not from the Certified Class. There is nothing unusual, improper, or impermissible regarding the scope of the Simmons release or its application to the Certain Restaurant DAPs bid rigging claims.

D. The Certain Restaurant DAPs' Other Challenges are also Without Merit

1. There is No Intra-Class Conflict Under the Simmons Settlement

There is no intra-class conflict under the Simmons settlement. As this Court held in its order granting class certification, there is no conflict between the DPP Class Representatives and the DPP Class. (*See* ECF No. 5644 at 5-6 (determining the DPP Class Representatives were adequate and satisfied the two-part test, including "the class representatives must not have claims in conflict with other class members").) The Court has similarly recognized the adequacy of Class Counsel in representing the DPP Class members. (*Id.* at 6 (citing additional authority).)

Under the Simmons Settlement Agreement all members of the Class are permitted to participate in the Settlement and receive compensation, and the amount of their recovery is based on their individual *pro rata* portion of qualified claims by participating Class members. (*See, e.g.*, ECF No. 5434 (granting DPPs' motion to distribute over $100 million in settlement proceeds *pro rata* to qualified claimants).) In other words, the Simmons settlement provides all Class members with the same rights to participate and receive their portion of the Simmons settlement, without excluding or treating any Class members as different. The Certain Restaurant DAPs' desire to have their individualized bid rigging claims accounted for as part of the settlement or distribution is without merit. As set forth above, such bid rigging claims were waived by the Class as part of their Track 1 selection and cannot establish a reasonable basis for receiving additional compensation from the settlement fund. The proper and recognized manner for Certain Restaurant DAPs to preserve and seek recovery for their bid rigging claims was to opt-out. *See, e.g.*, *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 346-47; *In re AT&T Mobility Wireless Data Servs. Sales*

Litig., 270 F.R.D. 330 at 351. Conversely, treating certain Class members differently based on whether they were a victim of individualized Track 2 bid rigging conduct would *actually cause* the problems the Certain Restaurant DAPs complain of.

The Objectors' far-fetched and not-well-taken accusation that Class Counsel are not acting in the best interests of the Class and each and every Class member (including the Certain Restaurant DAPs) falls flat. In negotiating the Simmons settlement, Class Counsel appropriately used their judgment, discretion, and negotiating skills to obtain a settlement which obtained a substantial recovery for the DPP Class, while eliminating the risks of summary judgment and trial. Because there is no conflict, the cited case law is inapplicable. (*See* ECF No. 7040 at 20 (citing cases where settlements were disallowed due to issues related to representation (*Amchem*, 521 U.S. at 627-28), breaches of fiduciary duty (*Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir. 2002)), and under compensation (*Nat'l Super Spuds, Inc.*, 660 F.2d at 19; *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 856 (1999)).)

2. The Court Approved Notice Was Adequate

In approving the Class Notice, the Court held that it satisfied and provided the necessary information under Rule 23(c)(2)(B) including: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; and the binding effect of a class judgment on members. (*See* Order Approving Notice of Contested Class Certification, ECF No. 6195.) The Class Notice properly advised Certified Class members that they would be waiving their antitrust claims against Defendants if they failed to opt out. (*See* Section VI.A above.) The notice plainly and clearly states: "Plaintiffs 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, with the intent and expected result of increasing prices of Broilers in the United States, in violation of federal antitrust laws." (ECF No.

6195 at 7.) As discussed above, the Class Notice also clearly informed putative Class members what they would give up if they did not exclude themselves:

> **Unless you exclude yourself … you will remain in the Certified Class, which means that you cannot sue, continue to sue**, or be part of any other lawsuit against the Non-Settling Defendants and their affiliates that pertains to the claims in this case.
>
> …if you wish to **pursue your own separate lawsuit** against the Non-Settling Defendants, you must exclude yourself by submitting a written request to the Notice Administrator stating your intent to exclude yourself from the Certified Class…
>
> Unless you exclude yourself, you give up the right to sue the Non-Settling Defendants for the claims set forth in the litigation. **If you have a pending lawsuit against one or more of the Defendants, speak to your lawyer in that lawsuit immediately to determine whether you must exclude yourself from this Class to continue your own lawsuit against the Non-Settling Defendants**.

(ECF No. 6195 at 8-9 (emphasis added).) Importantly, these warnings were broad to avoid any confusion as to what was and was not included; they advised Class members that they need to exclude themselves if they want to maintain the right to file their own lawsuit *or to continue a pending lawsuit*. (*See id.*; *see also* Section VI.A above.) There is nothing in the notice that would lead any Class member to believe they would preserve their bid rigging claims or any other antitrust claims by staying in the Class. The Objectors' assertion that more information was required is wrong—the notice was not required (nor would it be appropriate) to specifically set forth every claim that may be included (or not) and waived (or not), but rather that if a Class member had other claims that pertained to this case, they needed to exclude themselves. *See In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. at 352 ("The notice need not be unduly specific. The notice of the Proposed Settlement, to satisfy both Rule 23(e) requirements and constitutional due process protections, need only be reasonably calculated, under all of the circumstances, to apprize interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections.'") (quoting 4 Newberg on Class Actions § 11:53 (4th ed. 2010)); *Elna Sefcovic, LLC*, 807 F. App'x at 764 (rejecting objector's argument that

the notice was deficient by not detailing all potential effected claims, because no such level of specificity is required by Rule 23); *In re Brand Name Prescription Drugs Antitrust Litig.*, 1996 WL 167347, at *4 ("Class notice is not intended to serve as a complete source of information as to each and every alternative a class member may have in pursuing any potential claim against named defendants.").

Any claim of confusion is belied by the actions of the Class members, including numerous opt outs who nearly universally recognized their duty to opt out and take action in response to the Class Notice. The Class opt out list in this case comprises thousands of entities, represented by dozens of groups of attorneys. (*See* ECF No. 6915-1.) All but three groups of Track 2 plaintiffs filed timely and valid opt outs. Direct action plaintiffs SGA and L. Hart both conceded that their failure to timely opt out was inadvertent and that they should be bound by Simmons settlement, and the Court agreed. (*See* July 31, 2023 Order Regarding Late Opt Outs, ECF No. 6729.) And the Objectors themselves were well aware that their individual bid rigging claims did pertain to those in the Class case *because they specifically argued as much when they successfully sought reconsideration of the bifurcation order*. (*See* ECF No. 4980 (the Certain Restaurant DAPs joinder in DAP Chick-Fil-A's motion to reconsider, ECF No. 4651.) Indeed, the Certain Restaurant DAPs admitted that the lack of bid rigging claims in Track 1 was so clear that they did not need to file an opt out. *In re Brand Name Prescription Drugs Antitrust Litig.*, 1996 WL 167347, at *4 (Recognizing the fact that numerous putative class members successfully exercised their opt-out right as evidence of the sufficiency of the class opt-out notice) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985)). In sum, this is an argument that the Certain Restaurant DAPs have invented after the fact, even though this objection cannot provide the relief they truly seek.

Finally, the Certain Restaurant DAPs argue that the scope of the release needed to be disclosed in the Class Notice regarding the Certified Class. But this is impossible since *there was no release to disclose* at the time of the Class Notice or its April 4, 2023 opt-out deadline, which was before the Simmons settlement on May 24, 2023. As discussed, the Class Notice informed putative Class members that their claims could be barred by a settlement or judgment if they failed to opt out. Thereafter, once DPPs reached an agreement with Simmons, the Class was duly notified under Rule 23 of the scope and terms of the proposed settlement. (*See* ECF No. 6830, at 7-14 (Ex. A) (Court Approved Notice of Simmons Settlement)); *see also In re Brand Name Prescription Drugs Antitrust Litig.*, 1996 WL 167347, at *4 ("Neither Rule 23 nor due process requires that the objectors now be afforded a second opportunity to opt out simply because they now oppose settlements which did not exist at the time the original Notice of Class Determination was disseminated.").

As this Court and others have recognized, is not necessary to re-notice the Class and provide an additional opt-out period once settlements are reached. *See In re Brand Name Prescription Drugs Antitrust Litig*., 1996 WL 167347, at *4; *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)).

3. Waiver of the Restaurant DAPs' Right to Object

DPPs have never argued that the Certain Restaurant DAPs waived their right to object by failing to opt out. In fact, the only reason they can object is because they are members of the Certified Class. If they were not, they would not have standing to object. What DPPs have argued, however, is that the Certain Restaurant DAPs waived their right to have their individualized bid rigging claims separately adjudicated or evaluated based on their failure to opt out of the Certified Class that they knew was proceeding in Track 1. (*See* ECF No. 6999.) As set forth in detail herein, that argument is clearly supported by the Court's orders regarding the scope and impact of Track 1 selection by the DPP Class, and conceded by the Certain Restaurant DAPs in their prior filings. (*See* ECF No. 6841 at 2) ('The Class elected to proceed on Track 1 and, pursuant to the Court's directives, expressly dropped its bid-rigging/price-fixing claim.").

4. The Certain Restaurant DAPs' Transactions

The Certain Restaurant DAPs state in the Case History section of their objection that their transactions were not considered as part of the Simmons settlement because they previously filed an opt-out action. (ECF No. 7040 at 11-12.) This assertion has no bearing on the merits of their objection. Importantly, the Certain Restaurant DAPs are not objecting to the Simmons settlement based on the inadequacy of their *pro rata* share of the settlement as a percentage of either the overall class commerce or their own.[20] Rather, the Certain Restaurant DAPs' objection arises exclusively from their claim that the settlement failed to obtain additional recovery for Track 2 bid

[20] Tellingly the Certain Restaurant DAPs do not raise this issue in their argument section and have not argued that the O.K. Foods and Mountaire settlements are inadequate.

rigging claims. (ECF 7040 at 13-21 (Asserting objections exclusively focused on their bid rigging claims).) For the reasons detailed above, the Certain Restaurant DAPs' objections arising from their bid rigging claims are without merit and should be rejected. (*See* Section VI.B above).

To the extent that the Certain Restaurant DAPs take issue with the amount of their Class purchases, the settlement administration process permits Class members to provide additional evidence of their Class purchases, including evidence of any assignments and additional Class purchases.[21] This process ensures that Certain Restaurant DAPs will be able to receive their appropriate *pro rata* portion of the Simmons settlement. However, the relief they really seek, *i.e.*, the preservation of their bid rigging claims, could only be preserved by a timely and valid opt-out.

VII. CONCLUSION

For these reasons, DPPs and Co-Lead Class Counsel respectfully request that the Court overrule the Certain Restaurant DAPs' objection to the Simmons settlement and grant final approval to the Simmons, Mountaire, and O.K. Foods Settlement Agreements.

[21] The Certain Restaurant DAPs grossly overstate the volume and potential impact of their purchases because: (1) the calculation is based on assignments obtained by the Certain Restaurant DAPs from distributors used in connection with their purchases; and (2) their purchases are not limited to the DPP Class products.

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/s/ Bobby Pouya

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