

**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 SETTLEMENT WITH  
SIMMONS FOODS, INC. AND SIMMONS PREPARED FOODS, INC.**

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. INTRODUCTION .....	1
II. LITIGATION BACKGROUND .....	2
III. SUMMARY OF THE SETTLEMENT NEGOTIATIONS AND TERMS.....	4
IV. THE SETTLEMENT SATISFIES THE STANDARD FOR PRELIMINARY APPROVAL .....	6
A. The Settlement Resulted from Arm’s Length Negotiations .....	9
B. The Settlement Provides Substantial Relief to the Certified Class.....	9
V. THE SETTLEMENT IS ON BEHALF OF A CERTIFIED CLASS .....	10
VI. THE COURT SHOULD APPROVE THE SETTLEMENT AND NEED NOT PROVIDE AN ADDITIONAL EXCLUSION PERIOD .....	11
VII. THE COURT SHOULD APPROVE THE PROPOSED NOTICE PLAN .....	12
VIII. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING .....	16
IX. CONCLUSION.....	17

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Amchem Products, Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	13
<i>Armstrong v. Bd. of Sch. Dirs.</i> , 616 F.2d 305 (7th Cir. 1980) .....	6, 7
<i>In re AT&amp;T Mobility Wireless Data Servs. Sales Litig.</i> , 270 F.R.D. 330 (N.D. Ill. 2010).....	9
<i>City of Greenville v. Syngenta Crop Prot.</i> , No. 3:10-CV-188, 2012 WL 1948153 (S.D. Ill. May 30, 2012) .....	13, 16
<i>Class Plaintiffs v. City of Seattle</i> , 955 F.2d 1268 (9th Cir. 1992) .....	11
<i>DaSilva v. Esmor Correctional Servs. Inc.</i> , 215 F.R.D. 477 (D.N.J. 2003).....	11
<i>E.E.O.C. v. Hiram Walker &amp; Sons, Inc.</i> , 768 F.2d 884 (7th Cir. 1985) .....	6
<i>Gautreaux v. Pierce</i> , 690 F.2d 616 (7th Cir. 1982) .....	7
<i>Goldsmith v. Tech. Solutions Co.</i> , No. 92-CV-4374, 1995 WL 17009594 (N.D. Ill. Oct. 10, 1995) .....	8
<i>Isby v. Bayh</i> , 75 F.3d 1191 (7th Cir. 1996) .....	6, 7
<i>In re Linerboard Antitrust Litig.</i> , 292 F. Supp. 2d 631 (E.D. Pa. 2003) .....	8, 9
<i>In re Mid-Atlantic Toyota Antitrust Litig.</i> , 564 F. Supp. 1379 (D. Md. 1983).....	8
<i>In re NASDAQ Market-Makers Antitrust Litig.</i> , 176 F.R.D. 99 (S.D.N.Y. 1997) .....	7
<i>In re PaineWebber Ltd. Partnerships Litig.</i> , 171 F.R.D. 104 (S.D.N.Y. 1997) .....	11

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

*In re Warfarin Sodium Antitrust Litig.*,  
212 F.R.D. 231 (D. Del. 2002) .....7

**Other Authorities**

2 McLaughlin on Class Actions § 6:21 (19th ed.) .....12

2003 Report of the Judicial Conference, Committee on Rules of Practice and Procedure .....11

Fed. R. Civ. P. 23(c)(2)(B) .....13, 15

Fed. R. Civ. P. 23(e) .....7

Manual For Complex Litigation (Fourth) § 21.632 (2004) .....7

2 NEWBERG ON CLASS ACTIONS, §11.24 (3d ed. 1992).....7

2 NEWBERG ON CLASS ACTIONS, § 11.40 (2d ed. 1985).....8

4 NEWBERG ON CLASS ACTIONS, § 11.53 (4th ed. 2002) .....12

4 NEWBERG ON CLASS ACTIONS, § 13:18 (5th ed. 2011).....10

## 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 settlement with defendants Simmons Foods, Inc. and Simmons Prepared Foods, Inc. (collectively referred to as “Simmons”). Under the Settlement,<sup>1</sup> Simmons will pay \$8,018,991.00. The addition of this meaningful Settlement for the Certified Class (ECF No. 5644, *see* Section V below) brings the total recovery to date to over \$188 million. (*See* Declaration of Michael H. Pearson in Support of this Motion (“Pearson Decl.”) at ¶ 8.) In addition to this monetary relief, Simmons has also agreed to assist DPPs as they proceed toward the September 12, 2023 trial by authenticating and providing foundation for documents, which will assist DPPs in the prosecution of their claims against the remaining Defendants in the case.

The Simmons Settlement brings the total amount recovered by DPPs from settling Defendants to date to \$188,895,591. 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.) As with the Mar Jac and Harrison settlements, DPPs do not intend to distribute the proceeds of the Simmons Settlement at this time.

As detailed in this Motion for Preliminary Approval of the Settlement (“Motion”) and the supporting documents, this Settlement was the product of the DPPs’ efforts in litigating this case and extensive arm’s length negotiations among the parties. Simmons has not admitted any liability and continues to deny the legal claims alleged in DPPs’ Complaint, but has agreed to the Settlement to avoid the cost and burden of litigation and eliminate the risk of an adverse judgment.

---

<sup>1</sup> The Settlement Agreement is attached as Exhibit “A” to the Pearson Declaration.

Similarly, the DPPs believe they would have prevailed at trial, but have agreed to the Settlement to obtain a meaningful recovery for the Class, obtain cooperation from Simmons, and avoid the risk of an adverse outcome as to Simmons during litigation or trial. Accordingly, this Settlement is the product of compromise and reflects the independent decisions of the DPPs, on the one hand, and Simmons, on the other hand, to resolve this matter.

Moreover, as described below, the Settlement is fair, reasonable, and adequate, and satisfies all the factors for preliminary approval. The DPPs respectfully request that the Court grant their Motion, approve the proposed notice plan, and set a schedule for final approval of the Settlement.

## **II. LITIGATION BACKGROUND**

This is an antitrust class action against certain producers of Broilers.<sup>2</sup> 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.

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

---

<sup>2</sup> Consistent with the Complaint, the term Broilers is defined in the Settlement Agreement 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 Agreement § 1.d.) Simmons agrees to this definition only for purposes of approving the Settlement and otherwise reserves all rights, arguments and defenses with respect to this definition.

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 ("FCAC"). (ECF No. 541.) DPPs filed their operative Fifth Consolidated Amended Complaint on October 23, 2020. (ECF No. Nos. 3919 (Redacted) and 3935 (Unredacted).)

DPPs performed a thorough investigation 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.)

On June 21, 2019, the United States Department of Justice ("DOJ") moved to intervene in the civil case and stay the depositions of Defendants, pending the DOJ's criminal investigation into the Broiler industry. (ECF No. 2268.) On June 27, 2019, the Court granted an initial stay on the depositions of Defendants until September 27, 2019. (ECF No. 2302.) On October 16, 2019, the Court extended the stay on the depositions of Defendants (with certain exceptions) until June 27, 2020. (ECF No. 3153.) The Court again extended (in part) the stay on April 19, 2021. (ECF No. 4557.)

Prior to the Court’s ruling on Defendants’ motions to dismiss, Plaintiffs 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.) Plaintiffs later reached settlements 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.) Most recently, DPPs secured significant settlements 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.)

On May 27, 2022, the Court granted DPPs’ motion for class certification and certified the DPP Class (as defined in Section V below). (*See* ECF No. 5644.) Expert discovery is complete and summary judgment motions are pending. This matter is set for trial on September 12, 2023.

### **III. SUMMARY OF THE SETTLEMENT NEGOTIATIONS AND TERMS**

The Settlement Agreement with Simmons 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 April 2023. (*Id.* ¶ 9.) As this litigation has been pending for nearly seven years and is nearing trial in a few months, the parties have 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. (*See id.* ¶ 11; *see also* Settlement Agreement.)

In addition to monetary relief, Simmons will make reasonable efforts to provide declarations, affidavits, or deposition testimony relating to the authentication or foundation for admissibility of documents for DPPs' use at trial. (*See* Settlement Agreement § 10.)

In exchange, the DPPs and the Certified Class will separately release certain Released Claims (as defined in the Settlement Agreement) against the Released Parties (as defined in the Settlement Agreement). (*See id.* §§ 14, 15.) The narrowly tailored release does not extend to other Defendants or to unrelated claims that are not the subject matter of the lawsuit. (*Id.*) The Settlement Agreement does not contain any reduction or termination provisions. Finally, consistent with a judgment-sharing agreement among certain Defendants, the Settlement removes an amount reflecting Simmons' 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. (*Id.* § 39.) Thus, any other such Defendant against whom DPPs obtain a verdict and judgment would not be jointly and severally liable for Simmons' share of damages.

In sum, the Settlement Agreement: (1) is the result of extensive good-faith and hard-fought negotiations between knowledgeable and skilled counsel; (2) was entered into after extensive factual investigation and legal analysis; and (3) in the opinion of experienced class counsel, is fair, reasonable, and adequate. Based on both the monetary and cooperation elements of the Settlement

Agreement, Co-Lead Class Counsel submits that the Settlement Agreement is in the best interests of the Certified Class members and should be approved by the Court. (Pearson Decl. ¶ 15.)

Subject to the approval and direction of the Court, the settlement amount (with accrued interest) will be used to: (1) pay notice costs and costs incurred in the administration and distribution of the Settlement; (2) pay taxes and tax-related costs associated with the escrow account<sup>3</sup> for proceeds from the Settlement; (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 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 incentive awards to the named Plaintiffs that may be awarded by the Court (subject to a separate, not-yet-filed motion).

Also, in the near term DPPs will move the Court to reimburse DPP's incurred litigation expenses (not to exceed \$3.5 million) from these settlement funds. DPPs will file their motion at least 30 days before the last date to object to the Settlement.<sup>4</sup>

#### **IV. THE SETTLEMENT SATISFIES 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

---

<sup>3</sup> Plaintiffs respectfully request that the Court appoint US Bank as the Escrow Agent.

<sup>4</sup> This forthcoming second petition for costs will be limited to the settlement proceeds from the Mar Jac, Harrison Poultry, and Simmons settlements, which total \$19,293,991.00. The notice will be sent to members of the Mar Jac, Harrison, and Simmons settlements.

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).

“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 Litigation, § 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 Settlement Resulted from Arm's Length Negotiations**

In this case, the proposed Settlement satisfies the standard for preliminary approval. As detailed in this Motion and supporting declarations, the Settlement was 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 Simmons 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.*) 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 Settlement 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 weeks, 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.*<sup>5</sup>

**B. The Settlement Provides 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 Settlement is also supported by the relief obtained on behalf of the Certified Class including \$8,018,991 in monetary relief. This is a significant monetary

---

<sup>5</sup> At the time the Settlement was reached, the parties had conducted years of discovery, excluding the hiatus in discovery upon the intervention by the Department of Justice.

recovery on behalf of the Certified Class and brings the total amount of settlements to over \$188 million, with 11 Defendants remaining in the case. Thus, the Settlement provides a significant recovery from Simmons, while increasing DPPs' ability to maximize their recovery from the remaining Defendants. Prior to the Settlement, 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 stage of the proceedings, the strength of Plaintiffs' claims and Simmons' defenses, and the substantial benefits that the Settlement will provide to the Certified Class. (*Id.*)

Further, this is a very significant amount of money recovered for the Certified Class by a relatively small Defendant, and sets the standard for the remainder of the litigation. The Settlement thus falls well within the range of possible approval, and should be preliminarily approved by the Court.

#### **V. THE SETTLEMENT IS 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, 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 SETTLEMENT 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, an additional opportunity should not be permitted here.

While Rule 23(e)(4) grants district courts the discretion to afford class members of a previously-certified class an additional opt-out opportunity, it is often unnecessary<sup>6</sup> and the Rules Committee has urged district courts to exercise their discretion to allow additional opt-out opportunities with caution,<sup>7</sup> as “a second opt-out opportunity might inject additional uncertainty

---

<sup>6</sup> *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”).

<sup>7</sup> *See* 2003 Report of the Judicial Conference, Committee on Rules of Practice and Procedure (commentary on amended Rule 23(e)(3)) [now (e)(4)].

into settlement and create opportunities unrelated to the purpose of the second opt-out, potentially defeating some 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 five rounds of settlements with several opportunities 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 months 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 Settlement 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.

Plaintiffs 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 and Harrison Poultry settlements. (*See* Declaration of Eric Schachter (“Schachter Decl.”) ¶¶ 3-4, Ex. A.) The proposed notice plan in this case 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); and Mar Jac and Harrison Poultry Preliminary Approval Order, ECF No. 5086 (approving the proposed notice plan)), 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.<sup>8</sup>

---

<sup>8</sup> For the purposes of the proposed notice, both Certified Class members and Settlement Class members for the Mar Jac and Harrison Poultry settlements will be notified. Co-Lead Class Counsel do not anticipate that these Classes are different, but will work with the Claims Administrator to insure that all DPPs subject to the three settlements are notified of all proceedings regarding the settlements.

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.) 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 Settlement. The notice documents describe the terms of the Settlement Agreement, and also inform the Class members that DPPs will move for reimbursement of litigation expenses (not to exceed \$3.5 million).<sup>9</sup> The notice documents will provide the date, time, and place of the final approval hearing (once that hearing is set by the Court), 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 Settlement, and how to make informed decisions regarding the proposed Settlement.

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

---

<sup>9</sup> The Settlement further provides for the use of up to \$250,000 (as authorized by the Settlement Agreement, § 6.c) of Settlement proceeds for the cost of notice without seeking further approval from the Court.

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 Agreement. (*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 Settlement. (*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 Settlement. At that hearing, proponents of the Settlement may explain and describe their terms and conditions and offer argument in support of the Settlement's approval, and members of the Certified Class or their counsel may be heard regarding the proposed Settlement if they choose. DPPs propose the following schedule of events necessary for a hearing on final approval of the Settlement:

<u>DATE</u>	<u>EVENT</u>
Within 90 days after preliminary approval	Settlement Administrator to provide direct mail and email notice, and commence the publication notice plan.
30 days after mailing of Notice	Co-Lead Class Counsel to file their motion for payment of litigation expenses.
60 days after the mailing of Notice	Last day to object to the Settlement; and file notices to appear at the Fairness Hearing.
14 days before Fairness Hearing	Class Counsel shall file a motion for final approval of the Settlement and all supporting papers, and Class Counsel and the Simmons may respond to any objections to the proposed Settlement.
30 days after last day to object to the Settlement <sup>10</sup>	Final Settlement Fairness Hearing.

<sup>10</sup> 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 Agreement, within ten days of the filing of this motion, Simmons will serve upon the appropriate state officials and the appropriate federal official the CAFA notice required by Section 1715(b). This schedule will allow

## IX. CONCLUSION

For these reasons, Co-Lead Class Counsel respectfully request that the Court preliminarily approve the Simmons Settlement Agreement, 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.

Date: June 1, 2023

/s/ Michael H. Pearson

Clifford H. Pearson (*Pro Hac Vice*)  
Daniel L. Warshaw (*Pro Hac Vice*)  
Bobby Pouya (*Pro Hac Vice*)  
Michael H. Pearson (*Pro Hac Vice*)  
PEARSON WARSHAW, LLP  
15165 Ventura Boulevard, Suite 400  
Sherman Oaks, CA 92403  
Telephone: (818) 788-8300  
Facsimile: (818) 788-8104  
cpearson@pwfirm.com  
dwarshaw@pwfirm.com  
bpouya@pwfirm.com  
mpearson@pwfirm.com

W. Joseph Bruckner (*Pro Hac Vice*)  
Brian D. Clark (*Pro Hac Vice*)  
Simeon A. Morbey (*Pro Hac Vice*)  
Kyle J. Pozan (#6306761)  
LOCKRIDGE GRINDAL NAUEN P.L.L.P.  
100 Washington Avenue South, Suite 2200  
Minneapolis, MN 55401  
Telephone: (612) 339-6900  
Facsimile: (612) 339-0981  
wjbruckner@locklaw.com  
bdclark@locklaw.com  
samorbey@locklaw.com  
kjpozan@locklaw.com

Bruce L. Simon (*Pro Hac Vice*)  
Jill M. Manning (*Pro Hac Vice*)  
PEARSON WARSHAW, LLP  
555 Montgomery Street, Suite 1205  
San Francisco, CA 94111  
Telephone: (415) 433-9000  
Facsimile: (415) 433-9008  
bsimon@pwfirm.com  
jmanning@pwfirm.com

*Direct Purchaser Plaintiffs Co-Lead Class Counsel*

Steven A. Hart (#6211008)  
Brian Eldridge (#6281336)  
HART MCLAUGHLIN & ELDRIDGE, LLC  
121 West Wacker Drive, Suite 1050  
Chicago, IL 60601  
Telephone: (312) 955-0545  
Facsimile: (312) 971-9243  
shart@hmelegal.com  
beldridge@hmelegal.com

*Direct Purchaser Plaintiffs Liaison Counsel*

---

the Court to schedule a Fairness Hearing as DPPs propose in the schedule above, in conformance with CAFA's requirements.