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 OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENTS WITH DEFENDANTS FOSTER FARMS, PERDUE, CASE, CLAXTON, WAYNE FARMS, AGRI STATS, AND SANDERSON FARMS; AND APPROVAL OF NOTICE PLAN

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I. INTRODUCTION

From the time this case was filed in 2016 through today, the Direct Purchaser Plaintiff Class ("DPPs" or "DPP Class") has secured over $284 million in settlements with 13 defendants. As to the remaining seven defendants, in June 2023 the Court entered summary judgment in favor of six of them, and the DPP Class's trial against the remaining defendant, Sanderson Farms, resulted in a jury verdict in October 2023 in Sanderson's favor. Under applicable statutes and case law those seven prevailing defendants may seek to tax certain specified litigation costs against the DPP Class in the event summary judgment or the jury verdict (as the case may be) is upheld in post-trial proceedings or on appeal.

To eliminate this risk and the possibility of having to pay such litigation costs, the DPP Certified Class (as defined in III below) has entered into Settlements with those seven defendants: Foster Farms,[1] Perdue,[2] Case,[3] Claxton,[4] Wayne Farms,[5] Agri Stats,[6] and Sanderson Farms[7] (collectively referred to as the "Settling Defendants," and with DPPs as the "Parties"). Under the settlements (collectively, "Settlements" or "Settlement Agreements"), the DPPs and each of the Settling Defendants mutually agree to waive any rights to appeal or otherwise further adjudicate

[1] Defendants Foster Farms, LLC and Foster Poultry Farms LLC are collectively referred to herein as "Foster Farms." The Foster Farms Settlement Agreement is attached to the Declaration of Bobby Pouya in Support of Motion ("Pouya Decl.") as Exhibit 1.
[2] Defendants Perdue Farms, Inc. and Perdue Foods LLC are collectively referred to herein as "Perdue." The Perdue Settlement Agreement is attached to the Pouya Decl. as Exhibit 2.
[3] Defendants Case Foods, Inc., Case Farms Processing, Inc., and Case Farms, LLC are collectively referred to herein as "Case." The Case Settlement Agreement is attached to the Pouya Decl. as Exhibit 3.
[4] Defendant Norman W. Fries, Inc. d/b/a Claxton Poultry Farms is referred to herein as "Claxton." The Claxton Settlement Agreement is attached to the Pouya Decl. as Exhibit 4.
[5] Defendant Wayne Farms, LLC is referred to herein as "Wayne Farms." The Wayne Farms Settlement Agreement is attached to the Pouya Decl. as Exhibit 5.
[6] Defendant Agri Stats, Inc. is referred to herein as "Agri Stats." The Agri Stats Settlement Agreement is attached to the Pouya Decl. as Exhibit 6.
[7] Defendants Sanderson Farms, LLC (f/k/a Sanderson Farms, Inc.), Sanderson Farms Foods, LLC (f/k/a Sanderson Farms, Inc. (Foods Division)), Sanderson Farms Production, LLC (f/k/a Sanderson Farms, Inc. (Production Division)), and Sanderson Farms Processing, LLC (f/k/a Sanderson Farms, Inc. (Processing Division)) are collectively referred to herein as "Sanderson Farms." The Sanderson Farms Settlement Agreement is attached to the Pouya Decl. as Exhibit 7.

their claims against each other in *In re Broiler Chicken Antitrust Litigation*, and in exchange each Party agrees not to seek or assert any claim for costs, fees, attorney's fees or any other form of recovery against the other. The Settlements do not include any additional Class release provisions, do not provide for the recovery of additional attorneys' fees by DPP Class counsel, and will eliminate the DPP Class having to pay any recoverable costs to the Settling Defendants.

As detailed in this Motion and the supporting documents, these Settlements were the product of separate and extensive arm's length negotiations. The Settling Defendants have agreed to the Settlements to avoid the cost and burden of continuing litigation and eliminate the risk of a ruling in favor of the DPPs on appeal. Similarly, the DPPs believe they could prevail on appeal, but have agreed to the Settlements to eliminate the risk of having to pay any recoverable costs and the cost and burden of continuing litigation. Accordingly, these Settlements are the product of compromise and reflect the independent decisions of the DPPs' Co-Lead Class Counsel, on the one hand, and each Settling Defendant, on the other hand, to resolve this matter. Settlements of this nature are common practice following a trial or summary judgment. *See, e.g.*, *Downing v. Abbott Laboratories*, No. 23-1440, 2023 WL 6173468, at *3 (7th Cir. 2023) ("a party which prevails at the end of a lengthy and hard-fought trial and then attempts to settle to avoid the attorneys' fees and costs of an appeal acts rationally. Such an offer is not uncommon in civil litigation practice.").

As described below, the impact of the Settlements is limited to the ramifications of the summary judgment order and the trial verdict, and any related post-trial and appellate proceedings. DPPs respectfully submit that the Court can preliminarily determine in this Motion that, on final approval, each Settlement will be found to be fair, reasonable, and adequate, and thus it is worthwhile to notify the Certified Class of the proposed Settlements at this time.

II. LITIGATION BACKGROUND

The Court is very familiar with this case, and thus DPPs will dispense with a detailed recitation of its background.

On June 30, 2023, the Court granted summary judgment in favor of defendants Agri Stats, Case, Foster Farms, Claxton, Perdue, and Wayne Farms, and against all Plaintiffs' claims regarding the manipulation of the Georgia Dock. (*See* ECF No. 6641.)[8] Prior to that time, the DPPs had settled with nine defendants for a total of $188,895,591. (*See* Pouya Decl. ¶ 13.) Following the Court's summary judgment order, DPPs settled with four more defendants for a grand total of $284,650,750 from all settling defendants, and went to trial against Sanderson Farms, the remaining defendant. In October 2023 the jury returned a verdict in Sanderson's favor. (*See* ECF Nos. 7014, 7015.)

III. THE SETTLEMENTS ARE ON BEHALF OF THE CERTIFIED CLASS

On May 27, 2022, the Court 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.) Each of the Settlements are entered into on behalf of the previously certified DPP Class. On January 4, 2023, the court approved notice to the DPP Class under Federal Rule of Civil Procedure 23, and directed notice to all potential members of the DPP Class. (ECF No. 6195.) "If the court has certified a class prior to settlement, it does not need to re-certify it for settlement purposes." 4 NEWBERG ON CLASS ACTIONS, § 13:18 (5th ed. 2011). Here, as with the Simmons,

[8] The Court also granted summary judgment in favor of defendant Fieldale as to claims by other Plaintiffs. Because DPPs previously settled with Fieldale, Fieldale is not a party to any of the Settlements presented in this Motion and is not a subject of this Motion.

Mountaire, O.K. Foods, HRF, and Koch settlements (ECF Nos. 6615, 6830 (Mountaire and O.K. Foods), and 7070 (HRF and Koch)), the parties do not request any changes to the Certified Class, so the Court need not re-certify it.

IV. SUMMARY OF THE SETTLEMENT TERMS AND NEGOTIATIONS

A. Terms of the Settlement Agreements

Each Settlement Agreement contains nearly identical terms and resolves claims with prejudice in *In re Broiler Chicken Antitrust Litigation* between the DPP Certified Class and each Settling Defendant. The Settlement Agreements each set forth mutual waivers of costs and attorneys' fees (*see* Settlement Agreements, ¶ 3) in exchange for each Party agreeing to cease all litigation activities against the other, including but not limited to appealing the Order on Settling Defendants' motions for summary judgment (ECF No. 6641) or the verdict in favor of Sanderson Farms at trial (*see* Settlement Agreements, ¶ 2). Notably, the Settlement Agreements do not contain any release language and are narrowly tailored. The relief they provide is limited to the ramifications of the summary judgment order and the trial verdict, and any related post-trial and appellate proceedings. In exchange the Settling Defendants will not seek to recover any litigation expenses from the DPP Class. The settlement with Agri Stats includes an added benefit to Class members – an option for Class Members to receive free access to 6 months of price reporting services from Agri Stats subsidiary Express Markets Inc. (EMI). Class members can obtain this service by emailing dppsettlement@expressmarketsinc.com by a date set forth in the notice proposed in Section VII.A below.

B. Summary of Settlement Negotiations

This litigation has been pending for seven years, through summary judgment and a trial, and thus the Parties have had ample opportunity to assess the merits of their respective claims and defenses and to weigh the relative benefits of continued litigation or settlement. Each Settlement

Agreement was the product of an independent negotiation process that commenced with each Settling Defendant in December 2023. (*See* Pouya Decl. ¶¶ 14.) Each of the settlement negotiations involved multiple exchanges between the parties as well as drafts that ultimately resulted in the final settlement agreements. (*See id.*; *see also* Settlement Agreements attached to the Pouya Decl. as Exhibits 1 (Foster Farms), 2 (Perdue), 3 (Case), 4 (Claxton), 5 (Wayne Farms), 6 (Agri Stats), and 7 (Sanderson Farms).)

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. 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. ¶ 17.)

V. THE SETTLEMENTS SATISFY THE STANDARD FOR PRELIMINARY APPROVAL

There is an overriding public interest in settling litigation, and this is particularly true in class actions. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985), *cert. denied*, 478 U.S. 1004 (1986) (noting that there is a general policy favoring voluntary settlements of class action disputes); *Armstrong v. Bd. of Sch. Dirs. 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).

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

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

A proposed settlement falls within the "range of possible approval" when it is conceivable that the proposed settlement will meet the standards applied for final approval. *See* Newberg, § 11.25, at 38-39 (quoting Manual for Complex Litig., § 30.41 (3d ed.)). The standard for final approval of a class action settlement is whether the proposed settlement is fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e); *see also Uhl v. Thoroughbred Tech. & Telecomms, Inc.*, 309 F.3d 978, 986 (7th Cir. 2002); *Isby*, 75 F.3d at 1198-99. 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; (3) an evaluation of the amount of opposition to settlement among affected parties (*i.e.*, 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.

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.

A. The Settlements Resulted from Arm's Length Negotiations

There is usually an initial presumption that a proposed settlement is fair and reasonable when it is 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).

In this case, the proposed Settlements satisfy the standard for preliminary approval. As detailed in this Motion and supporting declarations, the Settlements were the product of arm's length negotiations by experienced and knowledgeable counsel. (*See* Section III above; *see also* Pouya Decl. ¶¶ 15-17.) The hard-fought negotiations with each of the Settling Defendants necessitated numerous conferences, written exchanges between counsel during which they negotiated the material terms of the Settlements, and finalizing the Settlement Agreements. (*Id*.) In these settlement discussions, counsel for DPPs focused on obtaining the best possible result for the Certified Class. (*Id*.)

These arm's length settlement negotiations support approval of the Settlements by demonstrating they are free from collusion. *See, e.g.*, *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 640. Moreover, the fact that the negotiations occurred over several weeks, and were supported by an extensive record in this litigation, demonstrate that DPPs worked to achieve the best possible result on behalf of the DPP Class given the circumstances. *Id.*

B. The Settlements Provide Substantial Benefits to the Certified Class

Even though such a finding is not required at the preliminary approval stage, the fairness, reasonableness, and adequacy of the Settlements is also supported by the relief obtained on behalf of the Certified Class. As the Seventh Circuit recognized, "the relative strength of plaintiffs' case on the merits as compared to what the defendants offer by way of settlement, is the most important consideration." *See Isby*, 75 F.3d at 1198-99. In deciding whether to continue post-trial and appellate efforts, DPP Co-Lead Class Counsel considered the strength of Plaintiffs' claims and the Settling Defendants' defenses, and the substantial benefits that the Settlements will provide to the

Class. (Pouya Decl. ¶ 3.) The Settlements take into account the fact that six Settling Defendants prevailed on summary judgment and the seventh prevailed at trial. As a result, The DPP Class's only path to litigation victory against the Settling Defendants was by prevailing on post-trial motions or appeal, and subsequently winning at any new trial. The DPPs believe in their case and appellate arguments, but the burden of overturning verdicts and summary judgments is significant.

The relief provided by the Settlements is substantial, especially when accounting for the aforementioned risks. The Settlements eliminate the possibility that the Settling Defendants as prevailing parties could recover taxable litigation costs from the DPP Class. As reflected in the extensive docket, this case is seven years old, with over 7,000 entries, hundreds of depositions, and millions of documents exchanged. As a result, the costs associated with the litigation are significant. Indeed, the Settling Defendants have provided estimates of their potentially recoverable costs which collectively exceed $1 million. (*See* Pouya Decl. ¶ 3.) While the DPP Class would challenge any costs petitions if these Settlements are not approved, the potential sum is substantial and Co-Lead Class Counsel believe that the Settlements are in the best interest of the Class. (*See* Pouya Decl. ¶¶ 3, 17.)

In exchange for the Settling Defendants forgoing the right to seek costs, the DPP Class will forgo further post-trial proceedings and an expensive and time-consuming appeal, which would pose risks to both sides. Such settlements have been recognized as commonplace and rational. *See, e.g.*, *Downing*, 2023 WL 6173468, at *3 ("a party which prevails at the end of a lengthy and hard-fought trial and then attempts to settle to avoid the attorneys' fees and costs of an appeal acts rationally. Such an offer is not uncommon in civil litigation practice.").

Thus, the Settlements provide significant recovery from the Settling Defendants. The Settlements fall well within the range of possible final approval, and should be preliminarily approved by the Court. *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.").

C. Continuing Litigation Would Have Resulted in Significant Expenses, Delay and Administrative Burdens on the Class

In addition to ensuring that DPPs' existing settlement funds can be preserved and distributed without the encumbrance of potential cost awards against the DPP Class, the Settlements will end continued litigation against the Settling Defendants which would have involved significant expenses and protracted legal battles up to and including a potential new trial. Therefore, the complexity, length and expense of further litigation, which the Settlements will eliminate, also favor 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….").

D. Co-Lead Class Counsel Believe the Settlements are in the Best Interest of the Class

The Court in *Isby* noted that in deciding whether to approve a proposed settlement the court should consider the opinion of competent counsel. *See Isby*, 75 F.3d at 1198-99; *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."); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-CV-2058 JST, 2015 WL 9266493, at *6 (N.D. Cal. Dec. 17, 2015) ("The recommendations of plaintiffs' counsel should be given a presumption of reasonableness.") (quoting *In re Omnivision Techs., Inc*., 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008)). DPP Co-Lead Class Counsel (who the Court knows to have handled several major antitrust class actions and litigated this case through trial) fully endorse these proposed Settlements, based on their extensive experience and deep familiarity with this case. (*See* Pouya Decl. ¶¶ 3, 17.)

E. The Stage of the Proceedings and Amount of Discovery Support Final Approval

The stage of the case strongly supports approval of the Settlements. Namely, the Settlements were entered into after summary judgment on a well-developed record (ECF No. 6641) and the jury verdict in favor of Sanderson Farms (ECF No. 7014, 7015.) As set forth herein, 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. ¶ 12.) These facts ensured that DPP Class Counsel made informed decisions to approve and recommend

the Settlements to the Class and the Court. Therefore, the procedural posture and status of the case support granting approval to the Settlements.

VI. THE PROPOSED SETTLEMENTS SHOULD BE APPROVED WITHOUT AN ADDITIONAL OPPORTUNITY TO OPT OUT

This litigation is very advanced. Over the course of the case, the Class has received many notices of case developments. Up through and including the class notice of the Court's certification of the litigated class, Class members were given many opportunities to opt out. DPP Co-Lead Class Counsel submit that at this stage fairness no longer requires giving Class members yet another opportunity to opt out. While Rule 23(e)(4) grants district courts the discretion to afford members of a previously-certified class an additional opportunity to opt out of the proposed settlement, it is often unnecessary and not required. *See 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)). Indeed, "a second opt-out opportunity might inject additional uncertainty into settlement and create opportunities unrelated to the purpose of the second opt-out, potentially defeating some settlements and making others more costly." *See* Manual for Complex Litigation (Fourth), § 22.611 (2004) 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).

In accordance with this authority, this Court preliminarily approved the Simmons, Mountaire, O.K. Foods, HRF, and Koch settlements without allowing an additional opportunity

for the Class members to opt out of the Certified Class. (*See* ECF Nos. 6615 (Simmons), 6830 (Mountaire and O.K. Foods), 7070 (HRF and Koch).) The Court further held in ruling on Certain Restaurant DAPs' Motion to Confirm Track Two Opt-Out Status that "No further opt-outs will be permitted for any reason." (ECF No. 6872.) The circumstances and facts favoring approval without an additional opt-out period are even stronger with the Settlements at issue in this Motion. As courts have recognized, the purpose of providing class members with notice and an opportunity to opt out is to ensure that due process is satisfied and they can be bound by the judgment in the case, whether good or bad. *See DaSilva*, 215 F.R.D. at 483. But to allow Class members to opt out after summary judgment and trial, the Court would invite Class members to make their opt-out decisions based on after-the-fact assessments of rulings and developments in the case and in a manner that permits them to avoid judgment. Such a result is contrary to the principles of Rule 23 and this Court's prior orders.

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).

Rule 23 requires that 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." Fed. R. Civ. P. 23(c)(2)(B); *see also Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617 (1997); *Hughes v. Kore of Indiana Enterprise, Inc*., 731 F.3d 672, 676 (7th Cir. 2013); *Hossfeld v. Lifewatch, Inc*., No. 13 C 9305, 2021 WL 1422779, at *1 (N.D. Ill. March 4, 2021); *City of Greenville v. Syngenta Crop. Prot*., No. 3:10-CV-188, 2012 WL 1948153, at *4 (S.D. Ill. May 30, 2012). 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.

Notice plans like the present one, which rely on direct notice to class members, supplemented by publication or other similar means of notice, are commonly used in class actions like this one. *See Amchem Prods*., 521 U.S. at 617; *City of Greenville*, 2012 WL 1948153, at *4.

DPPs respectfully request the Court's approval of their Notice Plan. Such approval is significant at this point because this notice helps bring finality to this now seven-year-old lawsuit.

A. The Content and Form of the Proposed Notices are Fairly Balanced, Easy to Read, and Contain All Rule 23 Notice Requirements

Rule 23(c)(2) requires that certain specifically named items in the notice be "clearly and concisely state[d] in plain, easily understood language[.]" Fed. R. Civ. P. 23(c)(2)(B). Class notice is intended as a summary, rather than a complete source of information. *See Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999); *Mangone v. First USA Bank*, 206 F.R.D. 222, 233 (S.D. Ill. 2001). The class notice's form and content are committed to a district court's sound discretion. *See Mangone*, 206 F.R.D. at 231.

The notice documents define the Class, describe the nature of the action, summarize the Class claims, and provide direct purchasers of Broilers notice of:

- The terms of the HRF and Koch settlements, which were preliminarily approved on December 6, 2023 (ECF No. 7070), and the procedures for objecting thereto;

- The terms of the post-trial Settlements with the Settling Defendants discussed above, and the procedures for objecting thereto;
- Co-Lead Class Counsel's second request for attorney's fees (not to exceed 33⅓% of the Mar Jac, Harrison Poultry, Simmons, Mountaire, O.K. Foods, HRF, and Koch settlement proceeds plus interest, net of costs),[9] third request for reimbursement of litigation expenses (not to exceed $4 million), payment of up to $250,000 for ongoing and future litigation expenses,[10] and second request for Class Representative service awards (not to exceed $15,000 per Class Representative), and the procedures for objecting thereto;[11] and
- The claims distribution and participation process for the settlements with Mar Jac, Harrison Poultry, Simmons, Mountaire, O.K. Foods, HRF and Koch (which total $115,050,150).[12]
- The date, time, and place of the final approval hearing (once that hearing is set by the Court), and the fact that Class members do not need to enter an appearance through counsel, but may do so if they choose.

Class members who submitted a qualified claim in the first claims process will not be required to take any additional steps to receive their *pro rata* portion of the net settlement proceeds if they and have no further documentation to submit. Class members who did not participate in the first claims process have the opportunity to submit Claim Forms via mail, email or using the Settlement Website. Class members will be able to review their Broilers purchase records, based on defendants' records, on the settlement website. Class members will be able to submit

[9] On December 1, 2021, the Court awarded interim attorney's fees equal to 33⅓% of the Fieldale, Amick, Peco, George's, Tyson, and Pilgrim's settlements. (*See* ECF No. 5229.) Therefore, Co-Lead Class Counsel's forthcoming fee request will be limited to the Mar Jac, Harrison Poultry, Simmons, Mountaire, O.K. Foods, HRF, and Koch settlements.

[10] On December 1, 2021 the Court ordered reimbursement of $4.5 million in incurred litigation expenses from the Fieldale, Amick, Peco, George's, Tyson, and Pilgrim's settlements. (*See* ECF No. 5229.) On December 12, 2023 the Court ordered reimbursement of $4,469,346.65 in Litigation Fund costs from the Mar Jac, Harrison Poultry, Simmons, Mountaire, and O.K. Foods settlements. (*See* ECF No. 7086.) Therefore, Co-Lead Class Counsel's forthcoming request for reimbursement of litigation expenses and payment of ongoing and future litigation expenses will be limited to litigation costs incurred after January 1, 2021 (for individual Class Counsel expenses) and after October 1, 2023 (for Litigation Fund expenses) and paid from the HRF, and Koch settlements.

[11] On December 1, 2021 the Court awarded service awards of $15,000 to each of the five Class Representatives from the Fieldale, Amick, Peco, George's, Tyson, and Pilgrim's settlements. (*See* ECF No. 5229.) Therefore, Co-Lead Class Counsel's forthcoming second request for Class Representative service awards will be limited to the Mar Jac, Harrison Poultry, Simmons, Mountaire, O.K. Foods, HRF, and Koch settlements.

[12] Proceeds from the Fieldale, Amick, Peco, George's, Tyson, and Pilgrim's settlements have already been distributed to qualified claimants. (*See* ECF No. 5791.) Therefore, the second claims process and distribution will be limited to the Mar Jac, Harrison Poultry, Simmons, Mountaire, O.K. Foods, HRF, and Koch settlements (which total $115,050,150).

documentation to correct or update their purchase amounts if they choose to do so.[13] (*See* Schachter Decl. ¶ 12.) In the event that after the distribution (and any redistribution, if appropriate) insufficient settlement proceeds remain to support a further distribution, the proposed notice also includes the disclosure of two potential *cy pres* recipients, the American Antitrust Institute[14] and No Kid Hungry.[15] While DPPs will explain and set forth the parameters of any such distribution(s) in a yet-to-be-filed motion, disclosure of these entities at this time is appropriate so that the Class has time to comment, if necessary. By disclosing these organizations at this time, it is DPPs' intention that further notice regarding the distribution, including the potential *cy pres* recipients, will not be required.

The notice avoids legalese in favor of modern language and provides a toll-free number and website link to direct Class members to additional sources of information, including pleadings and orders from the case. Accordingly, the proposed notice provides the best written notice practicable to Class members.

[13] The Purchase Audit Request form will be available to Class members on the Settlement Website should any claimant wish to provide additional information. The Purchase Audit Request form and any supporting documentation will then be reviewed by the Settlement Administrator and, if necessary, Co-Lead Class Counsel.

[14] The American Antitrust Institute (AAI) is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. The AAI serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information, please visit https://www.antitrustinstitute.org/.
W. Joseph Bruckner, Co-Lead Class Counsel, has been active in the AAI throughout his career and currently serves on both its Advisory Board and its Board of Directors. While he was involved in the selection of the organization as a potential *cy pres* recipient in this lawsuit, neither he nor his firm (Lockridge Grindal Nauen P.L.L.P.) will benefit from the award. *See* Pouya Decl. ¶ 22.

[15] No Kid Hungry is a national campaign run by Share Our Strength, a nonprofit working to solve problems of hunger and poverty in the United States and around the world. No Kid Hungry helps feed children healthy, nutritious meals both at school and at home by providing funding for school, advocating for kids, and working to research major issue and train those who can help. For more information, please visit https://www.nokidhungry.org/.

B. The Notice Plan is Tailored to This Class Action and Constitutes the Best Practicable Notice Under These Circumstances.

Federal case law on notice requires "only the best notice that is practicable." *Birchmeier v. Caribbean Cruise Line, Inc*., 302 F.R.D. 240, 255 (N.D. Ill 2014) (quoting *Hughes*, 731 F.3d at 676-77). Where names and addresses of known class members are reasonably available, Rule 23(c)(2) and due process require "individual notice to all members who can be identified through reasonable effort.'" *Amchem Prods.*, 521 U.S. at 617; *Hughes*, 731 F.3d at 676; *City of Greenville*, 2012 WL 1948153, at *4. For class members with identifiable addresses, "individual notice is clearly the 'best notice practicable'" within the meaning of Rule 23(c)(2) and due process case law. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974). If names and addresses cannot be identified by reasonable effort then other methods may be substituted. *See Hughes*, 731 F.3d. at 677; *Birchmeier*, 302 F.R.D. at 255 (If reaching each person individually is impracticable, then "broad-based forms of notice" are appropriate). All that Rule 23 requires is that notice be provided "to the class by the most practicable means available." *Mangone*, 206 F.R.D. at 233. Such notice may be by U.S. mail, electronic means, or other appropriate means. Fed. R. Civ. P. 23(c)(2)(B).

Here, A.B. Data is very familiar with the DPP Class members from working with multiple settlements with notice, settlement claims, and distribution. The target audience for this Notice Plan is businesses and individuals that directly purchased Broilers. The proposed notice plan is designed to provide notice to these Class members consistent with the due process requirements of Rule 23. Defendants produced records showing addresses for the vast majority of Class members. Accordingly, A.B. Data has developed a multi-method campaign for the Notice Plan based on and similar to notice campaigns the Court approved for earlier settlements, most recently for the Simmons, Mountaire, and O.K. Foods settlements.

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.

1. Direct-Mailed Notice to Claimants with Known Street Addresses

DPPs propose to send paper long-form notices to addresses associated with potential class members that are reasonably accessible based on records produced by defendants. (Schacter Decl. Ex. B.) The long-form notice will be sent to approximately 25,000 addresses associated with potential class members in this manner. (Schachter Decl. ¶ 7.) A.B. Data will also post the long-form notice on the existing case website, www.broilerchickenantitrustlitigation.com. (*Id.*) A.B. Data will track mail that the post office returns as undeliverable, and where feasible will resend using third-party information providers. (*Id.* ¶ 8.)

2. Direct-E-Mailed Notice to Claimants with Known E-Mail Addresses

Rule 23 states that notice may be given by one or more methods, including electronic mail. Fed. R. Civ. P. 23(c)(2)(B). A.B. Data will send an email notice (Schacter Decl. Ex. C) to the approximately 6,300 email addresses associated with potential class members. (*Id.* ¶ 7.) A.B. Data implements certain best practices to increase deliverability and determine how many emails are successfully delivered. (*Id*. ¶ 8.)

The email notice will provide Class members with an electronic link to the case website, www.broilerchickenantitrustlitigation.com. The website provides more detailed information including case documents, the long form notice, purchase totals, and claim related information and documents. (*Id*.)

3. Media Publication Campaign

When not all Class members can be identified through reasonable effort, "there is no other requirement of mandatory individual notice, and the Court must exercise its discretion to provide

the best notice practicable under the circumstances." *In re Domestic Air Transp. Antitrust Litig*., 141 F.R.D. 534, 539, 539 (N.D. Ga. 1992); *Aranda v. Caribbean Cruise Line, Inc*., No. 12 C 4069, 2017 WL 818854 at *2 (N.D. Ill. March 2, 2017) (publication permissible if class members not reasonably identifiable), *affirmed sub nom. Birchmeier v. Caribbean Cruise Line, Inc*., 896 F.3d 792 (7th Cir. 2018) ("*Birchmeier II Appeal"*); *Birchmeier*, 302 F.R.D. at 255 ("making broad-based forms of notice appropriate"). For those Class members whose addresses and email addresses are not reasonably accessible, A.B. Data has developed a public awareness media campaign similar to campaigns used for settlements in this case.

This media campaign will include posting on multiple websites. A.B. Data will publish a banner ad. (*See, e.g.*, Schacter Decl. Ex. D.) The banner ad will run on several websites: ProgressiveGrocer.com; MeatPoultry.com; PoultryTimes.com; Winsightgrocerybusiness.com; FastCasual.com; and ShelbyReport.com. DPPs expect to run the ads for four weeks. (Schachter Decl. ¶ 9.)

4. Informational Website and Toll-Free Telephone Number

To provide detailed information about the case and specific information to Class members, including claim and purchase information, A.B. Data will update and continue to operate and monitor the toll-free telephone number and case website for this case at www.broilerchickenantitrustlitigation.com. (*See* Schachter Decl. ¶ 7.)

VIII. THE COURT SHOULD SET A HEARING FOR FINAL APPROVAL OF THE HRF AND KOCH SETTLEMENTS, AS WELL AS THE PROPOSED SETTLEMENTS, AND APPROVE A SCHEDULE FOR NOTICE

The last step in the settlement approval process is the final approval hearing, at which the Court may hear all evidence necessary to evaluate the proposed settlements. At that hearing, proponents of the settlements may explain and describe their terms and conditions and offer argument in support of the Settlements' approval, and members of the Class or their counsel may

be heard regarding the proposed settlements if they choose. DPPs propose the following schedule of events necessary for a hearing on final approval of the settlements with HRF, Koch, Foster Farms, Perdue, Case, Claxton, Wayne Farms, Agri Stats, and Sanderson Farms:

DATE	EVENT
April 1, 2024.	Settlement Administrator to provide direct mail and email notice, and commence the publication Notice Plan.
May 1, 2024 (30 days after the mailing of Notice).	Plaintiffs to file their Motion for Attorneys' Fees, Costs, and Service Awards.
June 1, 2024 (61 days after the mailing of Notice).	Last day for claimants to file additional claims or challenge calculated purchase amounts; last day to object to the HRF, Koch, Foster Farms, Perdue, Case, Claxton, Wayne Farms, Agri Stats, and Sanderson Farms settlements; object to the Motion for Attorneys' Fees, Costs, and Service Awards; and file notices to appear at the Fairness Hearing.
14 days before Fairness Hearing.	Co-Lead Class Counsel shall file a motion for final approval of the settlements with HRF, Koch, Foster Farms, Perdue, Case, Claxton, Wayne Farms, Agri Stats, and Sanderson Farms settlements, and respond to any objection to the settlements or the Motion for Attorneys' Fees, Costs, and Service Awards.
At least 30 days after last day to request exclusion from the Settlements.[16]	Final Settlement Fairness Hearing for the HRF and Koch settlements, as well as the proposed Settlements with the Settling Defendants, and hearing on Plaintiffs' Motion for Attorneys' Fees, Costs, and Service Awards, the Motion for Attorneys' Fees, Costs, and Service Awards.
August 1, 2024.	Plaintiffs to file a status update regarding the second claims process.

IX. CONCLUSION

For these reasons, Co-Lead Class Counsel respectfully request that the Court preliminarily approve the Settlement Agreements with the Settling Defendants, approve the form and content of the class notice, and appoint and direct A.B. Data Ltd. to distribute notice, and schedule a final fairness hearing.

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

Date: March 6, 2024

/s/ Bobby Pouya

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