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 MAR-JAC AND HARRISON POULTRY DEFENDANTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

The Direct Purchaser Plaintiffs ("DPPs") hereby seek final approval of the settlements with defendants Mar-Jac[1] and Harrison Poultry[2] (collectively referred to as the "Settling Defendants"). Under the settlements (collectively, "Settlements" or "Settlement Agreements"), Mar-Jac will pay $7,975,000 and Harrison Poultry will pay $3,300,000, collectively providing an additional $11,275,000 to the Settlement Class[3] from Settling Defendants and bringing the total recovery to date to $180,876,600. (*See* Declaration of Brian D. Clark in Support of Motion ("Clark 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* Preliminary Approval Order, Oct. 5, 2021, ECF No. 5086 (hereinafter referred to as "Preliminary Approval Order") at 1.) Interim Co-Lead Counsel[4] and A. B. Data Ltd., the Court-appointed claims administrator (*id.* at 3), have executed the Notice Plan in accordance with the Court's Preliminary

[1] Defendants Mar-Jac Poultry, Inc., Mar-Jac Poultry MS, LLC, Mar-Jac Poultry AL, LLC, Mar-Jac AL/MS, Inc., Mar-Jac Poultry, LLC and Mar-Jac Holdings, Inc. (Mar-Jac Holdings, Inc. is incorrectly named in the Complaint as Mar-Jac Holdings, LLC) are collectively referred to as "Mar-Jac."

[2] Defendant Harrison Poultry, Inc. is referred to herein as "Harrison Poultry."

[3] The term "Class" or "Settlement Class" is consistent with the definition of the term in the Court's Preliminary Approval Order: "All persons who purchased Broilers directly from any of the Defendants or any co-conspirator identified in this action, or their respective subsidiaries or affiliates for use or delivery in the United States from at least as early as January 1, 2008 until December 20, 2019. Specifically excluded from the Settlement Class are the Defendants; the officers, directors or employees of any Defendant; any entity in which any Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any Defendant. Also excluded from this Settlement Class are any federal, state, or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action."

[4] Interim Co-Lead Counsel are Lockridge Grindal Nauen P.L.L.P. ("LGN") and Pearson, Simon & Warshaw, LLP ("PSW"). *See* Order of October 14, 2016 (ECF No. 144).

Approval Order. (*Id*. at 3-4; *see generally* Declaration of Eric Schachter ("Schachter Decl."); Clark Decl. ¶ 19.) This process has confirmed that the settlements with Mar-Jac and Harrison Poultry are fair, reasonable, and adequate, and should be granted final approval by the Court. The reaction of the Class members has been uniformly positive, with no member of the Settlement Class objecting to the Settlements, and the vast majority of commerce that opted out of the Settlements is on behalf of direct action plaintiffs who are represented by counsel, know about the status of the litigation, are aware of the current and prior settlements, and had filed their own lawsuits prior to the Court's preliminary approval order. (*See* Section IV.A *infra*.) DPPs do not seek attorneys' fees, costs (other than the costs of notice)[5] or incentive awards, from these Settlements at this time. 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.[6]

The Settlements provide over $11 million in relief to the Class members while eliminating the risk, uncertainty, and expense of continuing litigation, and preserving DPPs' right to obtain additional settlements or judgments against the numerous remaining Defendants. DPPs therefore respectfully request that the Court grant final approval to the Settlements and enter final judgment.

[5] Each Settlement further provides for the use of up to $250,000 (as authorized by each Settlement Agreement, § 6.c) of Settlement proceeds for the cost of notice without seeking further approval from the Court.

[6] The Mar-Jac and Harrison Poultry Settlements were not included in the now-completed claims process. Class members may submit a claim at an appropriate time whether they submitted a claim previously or not and the deadline to submit such a claim will be communicated in a future notice.

II. LITIGATION BACKGROUND

This is an antitrust class action against certain producers of Broilers.[7] 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 Liaison Counsel. (ECF No. 144.) After extensive briefing by the parties, on November 20, 2017 the Court denied Defendants' Motions to Dismiss the DPPs' First Consolidated Amended Complaint. (ECF No. 541.) DPPs added Mar-Jac and Harrison Poultry as defendants in DPPs' Third Consolidated Amended Complaint on February 7, 2018. (ECF No. 709.) DPPs filed their operative Fifth Consolidated Amended Complaint on October 23, 2020. (ECF No. Nos. 3919 (Redacted) and 3935 (Unredacted).) DPPs' motion for class certification was filed on October 30, 2020 (ECF No. 3962).

DPPs performed a thorough investigation and engaged in extensive discovery prior to reaching the Settlements. These efforts commenced prior to the filing of DPPs' initial complaint

[7] 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 No. Nos. 3919 (Redacted) and 3935 (Unredacted); Mar-Jac and Harrison Poultry Settlement Agreements § 1.d, ECF No. 5052-1.)

and included pre-litigation investigation into Defendants' conduct that formed the basis of the DPPs' complaints. (*See* Clark 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.) In discovery, 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* Clark 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 certain 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 those depositions of Defendants until September 27, 2019 (ECF No. 2302) and has extended the stay through February 2022 (*see* ECF Nos. 3153, 4557, 5246.)

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* Clark 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* Clark 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).) More recently, DPPs secured significant settlements with Pilgrim's and Tyson in the amount of $75 million and $79,340,000, respectively. (*See* Clark Decl. ¶ 8.) The Court granted final approval of the Pilgrim's and Tyson settlements on June 29, 2021. (*See* ECF No. 4789.)

The Settlement Agreements with Mar-Jac and Harrison Poultry constitute the fourth set of DPP settlements in this case, and a third "step up" by market share point.[8] (*See* Clark Decl. ¶ 8.)

III. SUMMARY OF THE SETTLEMENT NEGOTIATIONS AND TERMS

The Settlement Agreement with Mar-Jac was reached through confidential, protracted, arm's length settlement negotiations. (*See* Clark Decl. ¶¶ 9-11.) The Settlement was the product of a negotiation process that commenced in Spring 2021. (*Id.* ¶ 9.) As this litigation has been pending for over 5 years (three and a half years against Mar-Jac), the parties have had ample opportunity to assess the merits of DPPs' claims and Mar-Jac's defenses, through investigation, discovery, research, settlement discussions and contested motion practice; and to balance the value of Settlement Class members' claims against the substantial risks and expense of continuing litigation. The parties ultimately executed the Settlement Agreement on August 18, 2021. (*See id.* ¶ 12; *see also* Mar-Jac Settlement Agreement.)

The Settlement Agreement with Harrison Poultry was reached through confidential, arm's length settlement negotiations. (*See* Clark Decl. ¶¶ 13-14.) The Settlement was the product of a negotiation process that commenced in August 2021. (*Id.* ¶ 13.) As this litigation has been pending for over 5 years (three and a half years against Harrison Poultry), the parties have had ample

[8] At the hearing on preliminary approval of these Settlements, the Court asked Interim Co-Lead Counsel for an estimate of the Class remaining in the case. After a review of the Direct Actions and the opt outs to these Settlements, as well as the prior six settlements, Interim Co-Lead Counsel estimates that slightly less than half of the Class remains.

opportunity to assess the merits of DPPs' claims and Harrison Poultry's defenses, through investigation, discovery, research, settlement discussions and contested motion practice; and to balance the value of Settlement Class members' claims against the substantial risks and expense of continuing litigation. The parties ultimately executed the Settlement Agreement on September 11, 2021. (*See id.* ¶ 15; *see also* Harrison Poultry Settlement Agreement.)

The core terms of both Settlements are substantially similar to each other and to the prior settlements, and the Settlement amounts reflect the size and other factors affecting these Settling Defendants. Once again, these Settlements represent an increase—on a proportionate and gross basis—from the prior settlements. These Settlements provide $11,275,000 in recovery to the Settlement Class, and bring the total amount recovered by DPPs to $180,876,600. (*See* Settlement Agreements § 9; Clark Decl. ¶ 8.)

In addition to monetary relief, the Settling Defendants will make reasonable efforts to provide declarations, affidavits, or deposition testimony relating to the authentication or foundation for admissibility of documents. (*See* Settlement Agreements § 10.)

In exchange, the DPPs and the proposed Settlement 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 do not extend to other Defendants or to unrelated claims that are not the subject matter of the lawsuit. (*Id*.) The Settlement Agreements contain a termination provision based on opt-outs exceeding 50% of each Settling Defendant's total Broiler sales for the Class Period (January 1, 2008 through December 20, 2019). (*See id.* §§ 21.) The deadline for class members to opt out of either Settlement has passed, and neither the Mar-Jac Settlement nor the Harrison Poultry Settlement were terminated pursuant to this provision. (Clark Decl. ¶ 20.) Finally, the Settlements refer to a judgment-sharing agreement

among certain Defendants and, consistent with that agreement (per the Settling Defendants), each Settlement removes from the calculation of a damages award resulting from any verdict and Final Judgment DPPs may obtain against any other Defendant who is a signatory to Defendants' judgment-sharing agreement certain amounts intended to reflect the Settling Defendant's approximately proportionate sales of Broilers. (*Id*. § 40.) Thus, any other such Defendant against whom DPPs obtain a verdict and judgment would not be jointly and severally liable for either Settling Defendant's share of damages removed pursuant to the judgment-sharing agreement resulting from sales to the DPP Class.

In sum, the Settlement Agreements: (1) are the result of extensive good-faith and hard-fought negotiations between knowledgeable and skilled counsel; (2) were entered into after extensive factual investigation and legal analysis; and (3) in the opinion of experienced class counsel, are fair, reasonable, and adequate. Based on both the monetary and cooperation elements of the Settlement Agreements, Interim Co-Lead Class Counsel believes the Settlement Agreements are in the best interests of the Settlement Class members and should be approved by the Court. (Clark Decl. ¶ 22.)

Subject to the approval and direction of the Court, the settlement amounts (with accrued interest) will be used to: (1) pay for notice costs and costs incurred in the administration and distribution of the Settlements; (2) pay taxes and tax-related costs associated with the escrow account for proceeds from the Settlements; (3) make a distribution to Settlement Class members in accordance with a plan of distribution to be filed in the future; (4) pay attorneys' fees to Counsel for the Settlement Class, 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). DPPs do not seek attorneys'

fees, costs (other than the costs of notice)[9] or incentive awards, from these Settlements at this time. 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.[10]

IV. THE SETTLEMENTS SATISFY THE STANDARD FOR 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 and preliminary approval of the proposed settlement; dissemination of notice of the settlement to all affected class members, including an

[9] Each Settlement further provides for the use of up to $250,000 (as authorized by each Settlement Agreement, § 6.c) of Settlement proceeds for the cost of notice without seeking further approval from the Court.

[10] The Mar-Jac and Harrison Poultry Settlements were not included in the now-completed claims process. Class members may submit a claim at an appropriate time whether they submitted a claim previously or not and the deadline to submit such a claim will be communicated in a future notice.

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*.

A. The Court-Approved Notice Program Satisfies 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. 5086 at 1)—which relies primarily on direct notice to Class members, but is supplemented by publication notice in order to maximize the likelihood of actual notice—is commonly used in class actions like this one.[11] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting Fed.

[11] The notice plan implemented here is substantially similar to that previously disseminated in this case with 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

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, and 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). 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. ¶ 8.) The notices provided a clear description of who is a member of the Settlement Class and the binding effects of Class membership. *Id.* They also explained how to exclude oneself from the Settlement Class, how to object to the Settlement, and how to contact Interim Co-Lead Counsel for the Settlement Class. *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.* ¶¶ 9, 10.)

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 24,960 print notices and emailed 9,914 electronic notices to potential class members. (*See* Schachter Decl. ¶¶ 4, 6.) A. B. Data also published notice in the following industry print publications (or banner advertisements in digital media) on the dates indicated: the October editions of *Progressive Grocer*, *Meat & Poultry*, *Poultry Times*, *Frozen & Refrigerated Buyer*, *Supermarket News*, and *Winsight Grocery Business*; and the following

plan); Pilgrim's and Tyson Preliminary Approval Order, ECF No. 4341; *see also* Clark Decl. ¶ 19.)

industry websites: www.ProgressiveGrocer.com, www.MeatPoultry.com, www.PoultryTimes.com, www.SuperMarketNews.com, www.WinsightGroceryBusiness.com, www.FastCasual.com, and www.ShelbyReport.com running from October 25, 2021, through November 23, 2021. (*See id.* ¶ 7.) 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.* ¶ 9.) The Settlement Notice documents informed Class members regarding the attorneys' fees, costs, and incentive awards that would be sought by the class representatives and Interim Co-Lead 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.* ¶ 10.)

The Settlement Administrator reviewed and processed all requests for exclusion. (*See id.* ¶¶ 11-13.) This process included determining the timeliness and validity of any requests for exclusion, identifying the entities that fell within the scope of valid requests for exclusion, conducting appropriate follow-ups with requested opt-outs to determine the scope and value of any assignments or partial assignments, and assisting the parties in determining the opt-out calculations. (*See id.*) As a result of this process, the Administrator has come up with a final recommended list of valid opt-outs, which is set forth at Exhibits A (Mar-Jac) and B (Harrison Poultry) of the Schachter Declaration. This recommended list of opt-outs includes certain partial assignments which are set forth at Exhibit C to the Schachter Declaration.

B. The Settlements Are Fair, Reasonable, and Adequate, and Should Be Granted Final Approval

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. There is an overriding public interest in settling litigation, and this is particularly true in class actions. *See Isby*, 75 F.3d at 1196

("Federal courts naturally favor the settlement of class action litigation."); *accord Redman v. RadioShack Corp.*, No. 11-C-6741, 2014 WL 497438, at *3 (N.D. Ill. Feb. 7, 2014); *Armstrong*, 616 F.2d at 312. Class action settlements minimize the litigation expenses of the parties and reduce the strain such litigation imposes upon already scarce judicial resources. *See Armstrong*, 616 F.2d at 313.

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 having 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.

In addition, there is an initial presumption that a proposed class action settlement is fair, reasonable and adequate when the settlement was the result of arm's-length negotiations. *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).

The Court already found that a number of these factors were satisfied in granting preliminary approval to the Settlements (*see generally* Preliminary Approval Order, ECF No. 5086), 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 extremely favorable (*see* Section IV.B.3 *infra*). Thus, each of these factors support granting final approval to the Settlements, which were the product of extensive arm's-length negotiations.

1. The Settlements Provide a Substantial Recovery to the Settlement Class

The consideration from Mar-Jac and Harrison Poultry for the Settlements (*i.e.*, "the amount of defendants' settlement offer" (*Isby*, 75 F.3d at 1199)) is significant—totaling $11,275,000—and provides considerable benefits to the Class, including but not limited to meaningful cooperation.

Further, the Settlements provide proportionally more monetary relief to Class members than the prior settlements, which have been granted final approval. The Fieldale settlement was for $2.25 million representing approximately $1 million per market share point. The Peco, George's, and Amick settlements totaled $13,011,600, representing approximately $2 million per market share point. The Pilgrim's and Tyson settlements totaled $169,610,600, representing approximately $4 million per market share point. By comparison, the proposed Settlements with Mar-Jac and Harrison Poultry provide substantially more recovery on both a gross and proportional basis. In evaluating the Settlements, the DPPs considered the recoveries from Mar-Jac and Harrison Poultry based on numerous factors, including a percentage of market share excluding current and anticipated opt-outs. (*See* Clark Decl. ¶¶ 11, 14.) Based on this criteria, Mar-Jac constitutes approximately 1.5% and Harrison Poultry constitutes approximately 0.5% of commerce sold to DPPs. (*Id.* ¶ 8) Accordingly, the recovery for DPPs from the Settlements is approximately $5.5 million per market share point. This is a very significant amount of money

recovered for the Settlement Class by two relatively small Defendants, and continues DPPs' goal of increasing the stair-step for each subsequent settlement. (*Id.*) The Settlements thus constitute an excellent result for the Class, fall well within the range of possible approval, and should be granted final approval by the Court.

These factors satisfy the standard for settlements that both allow the DPPs to continue their prosecution against the remaining Defendants, and will enable the DPPs to maximize their recovery from the remaining Defendants. 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. 1992) (quoting 1–Part A Manual for Complex Litigation Second, Moore's Federal Practice § 30.46 (1986)).

2. <u>The Settlements Eliminate Significant Risk to a Class Facing Complex, Lengthy and Expensive Litigation</u>

While the DPPs believe their case is strong, the Settlements eliminate significant risks they would face if the action were to proceed against Mar-Jac and Harrison Poultry, including the complexity, length and expense of this type of litigation. Indeed, as reflected in the extensive docket, this case is five years old and the DPPs have expended significant effort to defeat motions to dismiss, conduct extensive discovery, thoroughly brief class certification (which is ongoing), and plan and prepare for trial. The Settlements allow Class members to recover a significant sum from two relatively small Defendants, which will undoubtedly put pressure on, and allow the DPPs to maximize future recoveries from, the remaining Defendants. Absent settlement, the DPPs would need to successfully obtain class certification, go to trial, and bear the burden of establishing liability, impact and damages before obtaining any recovery from Mar-Jac and Harrison Poultry. *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)). Continued litigation against the remaining Defendants, absent future settlements, will involve significant additional expenses and protracted legal battles. Therefore, the complexity, length and expense of further litigation, which the Settlement mitigates at least 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….").

3. No Class Member Has Objected to Either of the Settlements

The unanimous and positive reaction of Class members to the Settlements supports final approval. Pursuant to the Court's Preliminary Approval Order, more than 34,874 notices were sent directly to potential Class members (24,960 via mail, 9,914 via email), which was in addition to giving publication notice in industry trade press (print and online) and the settlement administrator maintaining both an informational website and toll-free call-in center. (Schachter Decl. ¶¶ 4, 6, 9, 10.) After this outreach, and with 24,960 identified potential Class members, no Class member objected to either of the Settlements. (*Id.* ¶ 13.) The vast majority of Class members did not opt out of the Settlements.

As of the filing of this Motion, there were only 132 opt-out requests, three of which were deemed invalid.[12] (*Id.* ¶ 11.) There were 129 valid opt-out requests to the Mar-Jac Settlement, and 128 valid opt-outs to the Harrison Poultry Settlement. (*Id.* ¶ 11.) A number of the requests for exclusion were filed on behalf of multiple related entities. (*See Id*. Exs. A and B (listing the persons and entities who are subject to a valid request for exclusion to the Settlements).)

The opt-out percentage for the Settlements is consistent with what the parties anticipated when entering into the Settlements, and did not result in a termination of either the Mar-Jac or Harrison Poultry Settlement. (*See* Clark Decl. ¶ 20; *see also* Section III).

There were no objections to either of the Settlement Agreements.[13]

The unanimous and positive response of the Class supports finding that the 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 v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) ("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

[12] DPPs are aware of the Motion for Late Opt-Out of Settlements (ECF No. 5337) and take no position with regard to the movants' arguments regarding effective or permissive exclusion from the Settlements. However, for the reasons to be more fully set forth in DPPs' yet-to-be-filed response, DPPs oppose movants' argument that the notice program approved by the Court and fully implemented by the Settlement Administrator does not satisfy Rule 23 of the Federal Rules of Civil Procedure or due process.

[13] The Settlement Administrator received one objection to the Settlements. However, after Co-Lead Counsel investigated the objection, it was determined that the objection was invalid, because she did not purchase Broiler Chicken directly from the Defendants. (*See* Clark Decl. ¶ 21.) The objector agreed to withdraw the objection upon being informed of these facts. *Id.*

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."). In fact, the absence of objections to and limited opt-outs from the Settlements especially favor approval when, as here, "much of the class consists of sophisticated business entities." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-CV-2058 JST, 2015 WL 9266493, at *7 (N.D. Cal. Dec. 17, 2015) (citing *In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 629 (E.D. Pa. 2004)).

4. 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*, 212 F.R.D. at 410; *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 that took place over several months. (*See* Sections II and III *supra*; *see also* Clark Decl. ¶¶ 9-16.) The hard-fought negotiations with Mar-Jac were kept confidential, and often broke down as the parties vigorously litigated the case. (Clark Decl. ¶ 11.) 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 settlement discussions, counsel for DPPs were focused on obtaining the best possible result for the DPP class. (*Id*.)[14]

[14] At the time each Settlement was reached, the parties had conducted years of discovery, excluding the hiatus in discovery upon the intervention by the Department of Justice, and the parties were well into briefing DPPs' motion for class certification.

Moreover, it is well established that the judgment and opinion of experienced and competent counsel should be taken into account when assessing whether a settlement is fair, reasonable and adequate. "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2015 WL 9266493, at *6 (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 Settlement by Interim Co-Lead Counsel for the Settlement Class (which the Court knows to have handled several major antitrust class actions), is yet another factor that supports final approval.

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

While this case has been pending for some time, the stage of the case strongly supports granting final approval to the Settlements. Namely, the Settlements have been entered into prior to a ruling on DPPs' motion for class certification, Defendants' motions for summary judgment and summary adjudication, and trial on the merits. While Plaintiffs are confident in their case, each of these important hurdles present time, expense, and risk, which supports the security offered by the $11,275,000 in settlement proceeds provided by the Settlements.

Interim Co-Lead Counsel also considered the strength of Plaintiffs' claims and the Settling Defendants' defenses, and the substantial benefits that the Settlements will provide to the Settlement Class. (Clark Decl. ¶¶ 8, 22.) The Settlements take into account the fact that the agreement was entered into before the Court ruled on DPPs' pending motion for class certification, Defendants' anticipated motions for summary judgment, and 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*, 805 F. Supp. 2d at 582 ("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 amount of discovery and the 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. 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* Clark Decl. ¶¶ 4-7). Therefore, the procedural posture and status of the case supports granting final approval to the Settlements.

V. CONCLUSION

For these reasons, Interim Co-Lead Counsel respectfully request that the Court grant final approval to the Mar-Jac and Harrison Poultry Settlement Agreements.

Date: January 11, 2022

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