UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SANDEE'S BAKERY d/b/a SANDEE'S CATERING BAKERY & DELI AND GNEMI, LLC d/b/a LOGAN FARMS, Plaintiffs, v. AGRI STATS, INC., et al., Defendants.	No. 1:20-cv-02295 Hon. Virginia M. Kendall

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT BETWEEN COMMERCIAL AND INSTITUTIONAL INDIRECT PURCHASER PLAINTIFFS AND DEFENDANT TYSON

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I. INTRODUCTION

Commercial and Institutional Indirect Purchaser Plaintiffs Sandee's Bakery and Gnemi, LLC ("CIIPPs") have reached a proposed "icebreaker" settlement of their claims with Tyson Foods, Inc., Tyson Fresh Meats, Inc., Tyson Prepared Foods, Inc., and the Hillshire Brands Company (collectively "Tyson").[1] *See* Commercial and Institutional Indirect Purchaser Plaintiffs' Notice of Settlement with Tyson Defendants (ECF No. 181). Pursuant to the parties' Settlement Agreement, within fourteen days of the Court granting Preliminary Approval, Tyson will pay the sum of $1,750,000 into an escrow account for the benefit of the Settlement Class. *See* Settlement Agreement § 9. In addition to this monetary relief, Tyson will provide meaningful cooperation, which will assist CIIPPs in the prosecution of their claims against the remaining Defendants. *Id.* at § 10.

CIIPPs now move the Court to preliminarily approve the parties' Settlement Agreement, certify the proposed Settlement Class, appoint Putative Interim Co-Lead Counsel as co-lead counsel for the Settlement Class. In a separate motion, CIIPPs will ask the Court to approve a proposed plan for disseminating notice to the Settlement Class and to schedule a Final Fairness Hearing for the proposed settlement.

II. LITIGATION BACKGROUND

CIIPPs are purchasers of Turkey that purchased other than directly from Defendants or Co-conspirators in the United States and bring this action under Section 1 of the Sherman Act and various state antitrust, consumer protection, and unjust enrichment laws to redress alleged

[1] The Long-Form Settlement Agreement is attached here to as Exhibit A to the Declaration of Blaine Finley (hereinafter, "Settlement" or "Settlement Agreement"). The capitalized terms in this memorandum are defined in the Settlement Agreement.

anticompetitive conduct by the leading Turkey suppliers in the United States.[2] CIIPPs allege that Defendants and their Co-Conspirators entered into an information exchange agreement that reduced or suppressed competition in the market for Turkey.

On March 30, 2020, CIIPPs filed a class action lawsuit on behalf of themselves individually and on behalf of all commercial and institutional indirect purchasers of Turkey in the United States. (ECF No. 1.) On June 16, 2020, Defendants moved to dismiss CIIPPs' complaint. (ECF Nos. 34, 35, 36, and 37) CIIPPs opposed these motions on July 16, 2020 (ECF No. 64, 65), and Defendants replied on August 7, 2020 (ECF Nos. 75, 76). On October 19, 2020, the Court denied Defendants' Joint Motion to Dismiss, except with respect to the *per se* allegation, granted Kraft's Motion to Dismiss, and denied Farbest's and Cooper's Motion to Dismiss, and initially dismissed CIIPPs' unjust enrichment claims, most of which were later allowed to proceed. (ECF Nos. 88, 153) CIIPPs filed their operative Second Amended Class Action Complaint (ECF No. 133) ("Compl.") on February 9, 2021. On April 21, 2021, the Court denied Tyson's motion for judgment on the pleadings. (ECF No. 171.)

Since filing their initial class action complaint, CIIPPs have continued to investigate the conspiracy they allege and have vigorously litigated this case. (*See* Finley Decl. ¶ 4.)

III. SUMMARY OF THE SETTLEMENT AGREEMENT

CIIPPs reached the Settlement Agreement with Tyson after hard fought and arm's length

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[2] Consistent with the Complaint, the term Turkey is defined in the Settlement Agreement, as "turkey meat, which may be sold in a variety of forms, including fresh or frozen, ground or parts, and raw or cooked. "Turkey" includes, but is not limited to: breasts, wings, drums, legs, thighs, tenderloins, necks, tails, gizzards, feet, trim, tenders, mechanically separated turkey ("MST"), ground turkey, and further processed and value added turkey products. Turkey includes, but is not limited to, products containing turkey such as lunch meat, deli meat, sausage, franks, bacon, and corn dogs." See Settlement Agreement § 1(c).

negotiations. (*See* Finley Decl. ¶ 6.) Tyson has agreed to pay $1,750,000 into escrow for the benefit of the Settlement Class and to cooperate with CIIPPs in their ongoing investigation and prosecution of their claims. (*See* Settlement Agreement §§ 9-10.) Tyson's cooperation includes providing CIIPPs with (a) documents and data related to Tyson's sales of Turkey during the relevant time period, (b) documents from two mutually agreed-upon document custodians responsive to the parties' agreed upon search terms, (c) direct communications between competitors relating to Turkey from two mutually agreed-up document custodians, (d) any documents it produces to any other party in connection with this litigation, including any documents it produced to a State Attorney General or the U.S. Department of Justice regarding an investigation into the Turkey industry, and (e) any information or proffers given to any plaintiff in matters substantially similar to this one. (*See id.* at § 10.)

In consideration, CIIPPs and the proposed Settlement Class agree, among other things, to release claims against Tyson that were, or could have been, brought in this litigation arising from the conduct alleged in the Complaint. The release does not extend to any other Defendants. (*See id.* at §§ 14-15.)

Subject to the approval and direction of the Court, the settlement amount (with accrued interest) will be used to: (1) pay for 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 for proceeds from the Settlement; and (3) fund costs and expenses in the prosecution of this matter in order to create value for Class Members via future settlements and verdicts.[3] Putative

[3] Courts have regularly approved the award of substantial sums of money as future expenses for use in prosecuting antitrust class actions. ECF No. 1165 in *In Re Disposable Contact Lens Antitrust Litig.*, No. 3:15-md-2626-HES-JRK (M.D. Fla. March 4, 2020) (awarding $664,206 for future expenses); *In re Automotive Parts Antitrust Litig.*, No. 12-md-02311, 2018 WL 7108072, at *1

Interim Co-Lead Counsel does not intend to request legal fees in connection with the Tyson settlement. Instead, subject to final approval by the Court, the settlement funds will be used to pay for, *inter alia*, the substantial expert witness fees that are expected to be incurred in prosecuting this action on behalf of the CIIPPs, with the aim of generating future verdicts and settlements benefitting the CIIPP class.

IV. STANDARDS APPPLICABLE TO PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT

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."); *see also E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985), *cert. denied*, 478 U.S. 1004 (1986) (noting that there is a general policy favoring voluntary settlements of class action disputes); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312 (7th Cir. 1980) ("It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement."), *overruled on other grounds; Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). Class action settlements minimize the litigation expenses 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. Before the court may give that

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(E.D. Mich. Nov. 5, 2018) (awarding $3.4 million for future expenses); *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, MDL No. 2328, 2016 WL 235781, at *12 (E.D. La. Jan. 20, 2016) (awarding $633,212 for future expenses); *In re Automotive Parts Antitrust Litig.*, No. 12-md-02311, 2015 WL 13715591, at *2 (E.D. Mich. Dec. 7, 2015) (awarding $2.9 million for future expenses); *In re Transpacific Passenger Air Transp. Ass'n*, No. C-07-05634 CRB, 2015 WL 3396829, at *3 (N.D. Cal. May 26, 2015) (awarding $3 million for future expenses); ECF No. 2474 in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827 SI (N.D. Cal. Feb. 17, 2011) (awarding $3 million for future expenses); *In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2011 WL 717519, at *14 (E.D. Mich. Feb. 22, 2011) (awarding $750,000 for future expenses).

approval, all class members must be given notice of the proposed settlement in the manner the court directs. Fed. R. Civ. P. 23(e).

Generally, before notice is given to the class members, the court makes a preliminary evaluation of the proposed class action settlement. 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.

See also 2 NEWBERG ON CLASS ACTIONS, §11.24 (3d ed. 1992); *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) ("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.'"); *see also Armstrong*, 616 F.2d at 314. The standard for final approval of a class action settlement is whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2); *see Uhl v. Thoroughbred Tech. & Telecomms, Inc.*, 309 F.3d 978, 986 (7th Cir. 2002); *Isby*, 75 F.3d at 1198-99.

V. THE COURT IS LIKELY TO APPROVE THE SETTLEMENT UNDER RULE 23(E)(2)

To determine whether to approve a proposed settlement under Federal Rule of Civil Procedure ("Rule") 23(e)(2), courts look to the factors in the text of Rule 23(e)(2), which a court must consider when weighing final approval. *See* Fed. R. Civ. P. 23(e)(2) ("If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering" the factors set forth in Rule 23(e)(2).); *see, e.g.*, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 28

(E.D.N.Y. 2019) ("*Payment Card*"). Rule 23(e)(2) requires courts to consider whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). Factors (A) and (B) under Rule 23(e)(2) constitute the "procedural" analysis factors, and examine "the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. Factors (C) and (D) under Rule 23(e)(2) constitute the "substantive" analysis factors, and examine"[t]he relief that the settlement is expected to provide to class members...." *Id*.

Because the proposed settlement meets all factors under Rule 23(e)(2), CIIPPs respectfully submit that the Court will likely grant final approval of the proposed settlement, and thus the proposed settlement should be preliminarily approved.

A. The Class Representatives and Class Counsel Have Adequately Represented the Class

Rule 23(e)(2)(A) requires that "the class representatives and class counsel have adequately represented the class." Adequacy is measured by a two-part test: (i) the named plaintiffs cannot have claims in conflict with other class members, and (ii) the named plaintiffs and proposed class counsel must demonstrate their ability to litigate the case vigorously and competently on behalf of named and absent class members alike. *See Kohen v. Pacific Inv. Mgmt., Co. LLC*, 571 F.3d 672, 679 (7th Cir. 2009).

Both requirements are satisfied here. The interests of the Settlement Class members are aligned with those of CIIPPs' Named Plaintiffs. Named Plaintiffs, like all Settlement Class members, share an overriding interest in obtaining the largest possible monetary recovery and as fulsome cooperation as possible. *See, e.g.*, *In re Community Bank of N. Virginia Mortg. Lending Practices Litig.*, 795 F.3d 380, 394 (3d Cir. 2015) (no fundamental intra-class conflict to prevent class certification where all class members pursuing damages under the same statutes and the same theories of liability); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982) (certifying settlement class and holding that "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes"). CIIPPs' named plaintiffs are not afforded any special compensation by this proposed Settlement and all Settlement Class Members similarly share a common interest in obtaining Tyson's early and substantial cooperation to prosecute this case. (*See* Finley Decl. ¶ 8.) Putative Interim Co-Lead Counsel may seek representative service awards for the Representative Plaintiffs by moving the Court in connection with the settlement approval process. *Id.*

Further, CIIPPs and their counsel will continue to litigate this case vigorously and competently. As they demonstrated when they sought appointment, Putative Interim Co-Lead counsel are qualified, experienced, and thoroughly familiar with antitrust class action litigation.[4] As they respectfully submit, and as has been demonstrated, Putative Interim Co-Lead Counsel

[4] *See* ECF No. 168 (Memorandum of Law in Support of Motion to Appoint Cuneo Gilbert & LaDuca, LLP and Barrett Law Group, P.A. Interim Co-Lead Counsel for Commercial and Institutional Indirect Purchaser Plaintiffs Pursuant to Federal Rule of Civil Procedure 23(g)).

have diligently represented the interests of the class in this litigation and will continue to do so. Accordingly, the Named Plaintiffs and Putative Interim Co-Lead counsel have adequately represented the class.

B. The Settlement is Fair and Resulted from Arm's Length Negotiations

Rule 23(e)(2)(B) requires that "the proposal was negotiated at arm's length." 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-C-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 proposed by experienced counsel and which 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 the 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).

The proposed Settlement plainly meets the standards for preliminary approval. The Settlement Agreement is the product of extensive arm's-length settlement negotiations, which included several rounds of give-and-take between Putative Interim Co-Lead Counsel and Tyson's

counsel with the assistance of an experienced and nationally renowned mediator, the Hon. Daniel Weinstein (Ret.). (*See* Finley Decl. ¶ 6.) Based on CIIPPs' extensive factual investigation to date, the cooperation provisions negotiated as part of the settlement enable CIIPPs to obtain additional information regarding the allegations in the Complaint. Therefore, based on both the monetary and cooperation elements of the Settlement Agreement, Putative Interim Co-Lead Counsel believe this is a fair settlement for the Class. (*Id.* at ¶ 11.)

Moreover, this Settlement does not affect the potential full recovery of damages for the Class under the antitrust laws because the remaining Defendants will be jointly and severally liable for injuries incurred as a result of the conspiracy CIIPPs allege. *See Paper Sys. Inc. v. Nippon Paper Indus. Co., Ltd.*, 281 F.3d 629, 632 (7th Cir. 2002) ("[E]ach member of a conspiracy is liable for all damages caused by the conspiracy's entire output."). In addition to not affecting the overall damages, the Settlement should hasten and improve the Class' recovery by providing CIIPPs access to information that likely would otherwise only be obtainable through protracted discovery. *See In re Ampicillin Antitrust Litig.*, 82 F.R.D. 652, 654 (D.D.C. 1979) (approving settlement where class will "relinquish no part of its potential recovery" due to joint and several liability and where settling defendant's "assistance in the case against [a non-settling defendant] will prove invaluable to the plaintiffs").

In addition to a monetary payment, Tyson will provide material cooperation to the Class, as provided in the Settlement Agreement, to help streamline discovery and trial. (*See* Settlement Agreement § 10.) Courts have recognized the value of such cooperation:

> [F]rom a pragmatic standpoint, the value of . . . [cooperating defendants] in litigation, as opposed to the specter of hundreds of uncooperative opponents, is significant. The [settling defendants] know far better than the plaintiff classes precisely what occurred in the [relevant] period . . . and their willingness to open their files . . . may ease the plaintiffs' discovery burden enormously.

In re IPO Sec. Litig., 226 F.R.D. 186, 198-99 (S.D.N.Y. 2005) (footnote omitted). This cooperation here is even more valuable in light of the applicability of joint and several liability to CIIPPs' claims. While CIIPPs believe that their case is strong, any complex antitrust litigation is inherently costly and risky, and this Settlement mitigates that risk and protects the Class.

Conversely, Tyson believes its case is strong and that it would achieve success on the merits. Tyson denies that it entered into an agreement to reduce or suppress competition in the market for Turkey with Defendants and their Co-conspirators. Indeed, Tyson maintains that it did nothing wrong. (*See* Settlement Agreement, Recitals, p. 3.) But in the interests of avoiding the risk and uncertainty of trial, Tyson has agreed to settle. (*Id.*) Tyson's documents and data will give CIIPPs critical and unique insight into the conspiracy CIIPPs allege.

In sum, the Settlement Agreement: (1) provides substantial benefits to the class; (2) is the result of extensive good faith negotiations between knowledgeable and skilled counsel; (3) was entered into after extensive factual investigation and legal analysis; and (4) in the opinion of experienced Class Counsel, is fair, reasonable, and adequate to the Class. Accordingly, Putative Interim Co-Lead Counsel believe that the Settlement Agreement is in the best interests of the Class Members and should be preliminarily approved by the Court.

C. The Relief Provided for the Class is Substantial and Tangible

In assessing whether the settlement provides adequate relief for the putative class under Rule 23(e)(2)(C), the Court should consider: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3). Fed. R. Civ. P. 23(e)(2)(C)(i–iv).

"Settlement is favored if settlement results in substantial and tangible present recovery, without the attendant risk and delay of trial." *See, e.g.*, *Payment Card*, 330 F.R.D. at 36 (citations omitted). Here, for the reasons described above in Section V(B), the settlement is fair and resulted from arm's-length negotiations. Putative Interim Co-Lead Counsel thoroughly evaluated the relative strengths and weaknesses of the respective litigation positions, and determined that the Settlement brings substantial benefits to the proposed Class at an early stage in the litigation, and avoids the delay and uncertainty of continuing protracted litigation with Tyson. (*See* Finley Decl. ¶¶ 5-6 and 11.) In addition, during negotiations, there was no discussion, let alone agreement, regarding the amount of attorneys' fees CIIPPs' counsel ultimately may ask the Court to award in this case, and CIIPPs' counsel are not seeking fees at this time. (Finley Decl. ¶ 7.) The benefits of settlement outweigh the costs and risks associated with continued litigation with Tyson, and weigh in favor of granting final approval.

D. <u>The Proposal Treats Class Members Equitably Relative to Each Other</u>

Consideration under this Rule 23(e)(2) factor "could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment.

Here, Named Plaintiffs are treated the same as all other Class members in this proposed Settlement, and all Class members similarly share a common interest in obtaining Tyson's early and substantial cooperation to prosecute this case. (*See* Finley Decl. ¶ 8.) The release applies uniformly to putative class members, and does not affect the apportionment of the relief to class members. (*See* Settlement Agreement §§ 14-15.) Accordingly, this factor will likely weigh in favor of granting final approval. *See, e.g.*, *Payment Card*, 330 F.R.D. at 47.

VI. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS

In order to preliminarily approve the proposed settlement, the Court must also find that it will likely be able to certify the class for purposes of judgment on the proposal. Fed. R. Civ. P. 23(e)(1)(B)(i–ii).

Under Rule 23, class actions may be certified for settlement purposes only. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Certification of a settlement class must satisfy each requirement set forth in Rule 23(a), as well as at least one of the separate provisions of Rule 23(b). *Id.* at 613-14; *see also In re Cmty. Bank of N. Va.*, 418 F.3d 277, 299 (3d Cir. 2005) ("[C]ertification of classes for settlement purposes only [is] consistent with Fed. R. Civ. P. 23, provided that the district court engages in a Rule 23(a) and (b) inquiry[.]").

CIIPPs seek certification of a Settlement Class consisting of:

> All commercial and institutional purchasers in the United States and its territories that purchased turkey, once or more, other than directly from Defendants, entities owned or controlled by Defendants, or other producers of turkey, from January 1, 2010 to January 1, 2017. Excluded from the Nationwide Class are the Court and its personnel, and any Defendants and their parent or subsidiary companies.

Settlement Agreement § 5. This is the same class proposed in CIIPPs' Complaint. *See* Compl. ¶ 128. As detailed below, this proposed Class meets the requirements of Rule 23(a) as well as the requirements of Rule 23(b)(3).

A. The Requirements of Rule 23(a) are Satisfied

1. Numerosity

Rule 23(a)(1) requires that the class be so numerous as to make joinder of its members "impracticable." No magic number satisfies the numerosity requirement; however, "a class of more than 40 members is generally believed to be sufficiently numerous for Rule 23 purposes." *Schmidt v. Smith & Wollensky, LLC*, 268 F.R.D. 323, 326 (N.D. Ill. 2010) (citations omitted). The

proposed Settlement Class consists of commercial and institutional purchasers that purchased Turkey other than directly from the Defendants or their Co-conspirators during the period from January 1, 2010 through January 1, 2017. While the precise number of Class members is presently known only to Defendants, basedon their extensive investigation Co-Lead Counsel believe that, due to the nature of the trade and commerce of the Turkey market, there are thousands of Class Members geographically dispersed throughout the United States. Thus, joinder would be impracticable and Rule 23 (a)(1) is satisfied.

2. Common Questions of Law and Fact

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Plaintiffs must show that resolution of an issue of fact or law "is central to the validity of each" class member's claim and "[e]ven a single [common] question will" satisfy the commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).

A central allegation in the Complaint is whether Defendants and their Co-conspirators entered into an information exchange agreement that reduced or suppressed competition in the market for Turkey. Compl. ¶¶ 1-33. Proof of this will be common to all Class members. *See, e.g.*, *Thillens, Inc. v. Cmty. Currency Exch. Ass'n*, 97 F.R.D. 668, 677 (N.D. Ill. 1983) ("The overriding common issue of law is to determine the existence of a conspiracy."). In addition to that overarching question, this case is replete with other questions of law and fact common to the Settlement Class including: (1) the identities of the participants in the alleged agreement; (2) the duration of the alleged agreement and the acts performed by Defendants and Co-conspirators in furtherance of the agreement; (3) whether the conduct of Defendants and their Co-conspirators, as alleged in the Complaint, caused injury to the business or property of CIIPPs and other class members; (4) the effect of the alleged conspiracy on the prices of Turkey sold in the United Stated

during the Class Period; and (5) the appropriate class-wide measure of damages. Accordingly, the Settlement Class satisfies Rule 23(a)(2).

3. Typicality

Rule 23(a)(3) requires that the class representatives' claims be "typical" of class members' claims. "[T]ypicality is closely related to commonality and should be liberally construed." *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 479 (N.D. Ill. 2009) (citations omitted). Typicality is a "low hurdle," requiring "neither complete coextensivity nor even substantial identity of claims." *Owner-Operator Indep. Drivers' Ass'n v. Allied Van Lines, Inc.*, 231 F.R.D. 280, 282 (N.D. Ill. 2005). When the "[representative party's] claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and [all] claims are based on the same legal theory," factual differences among class members do not defeat typicality. *Id.* Courts generally find typicality in cases alleging a price-fixing conspiracy. *See, e.g.*, *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 185 (D.N.J. 2003) (finding that plaintiffs met the typicality requirement based on the fact that plaintiffs' main claim - that they were harmed by an illegal price-fixing conspiracy - was the same for all class members).

Here, CIIPPs allege Defendants and their Co-conspirators conspired to fix, maintain, and inflate the price of Turkey in the United States by exchanging competitively sensitive information. Compl. ¶ 145. The CIIPP Named Plaintiffs will have to prove the same elements that absent Settlement Class members would have to prove, *i.e.*, the existence and effect of the alleged conspiracy. Because the Named Plaintiffs' claims arise out of the same alleged illegal anticompetitive conduct and are based on the same alleged theories and will require the same types of evidence to prove those theories, the typicality requirement of Rule 23(a)(3) is satisfied.

4. Adequacy

For the reasons mentioned above in Section V(A), the CIIPP Named Plaintiffs and Putative Interim Co-Lead Counsel have adequately represented the class.

B. The Proposed Settlement Class Satisfies Rule 23(b)(3)

Once Rule 23(a)'s four prerequisites are met, Plaintiffs must show the proposed Settlement Class satisfies Rule 23(b)(3). The proposed Settlement satisfies Rule 23(b)(3) by showing that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." As to predominance, "[c]onsiderable overlap exists between the court's determination of commonality and a finding of predominance. A finding of commonality will likely satisfy a finding of predominance because, like commonality, predominance is found where there exists a common nucleus of operative facts." *Saltzman*, 257 F.R.D. at 484.

In antitrust conspiracy cases such as this one, courts consistently find that common issues of the existence and scope of the conspiracy predominate over individual issues. *Hughes v. Baird & Warner, Inc.*, No. 76 C 3929, 1980 WL 1894, at *3 (N.D. Ill. Aug. 20, 1980) ("Clearly, the existence of a conspiracy is the common issue in this case. That issue predominates over issues affecting only individual sellers."); *see also Amchem Prods., Inc.*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.").

Plaintiffs must also show that a class action is superior to individual actions, which is evaluated by four considerations:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and

> natureof any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D)the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Here, Putative Interim Co-Lead Counsel have no knowledge of any individual commercial and institutional indirect purchaser actions filed against Tyson regarding an agreement during the Class Period related to the sale of Turkey, and throughout this litigation, no class member has expressed an interest in individually controlling separate actions against Tyson. (*See* Finley Decl. ¶ 12.) Regardless, a Class Member's interest in individually controlling the prosecution of separate claims is outweighed by the efficiency of the class mechanism. Numerous entities purchased Turkey during the class period; settling these claims in the context of a class action conserves both judicial and private resources and hastens Class members' recovery. Finally, while CIIPPs see no management difficulties in this case, this final consideration is not pertinent to approving a settlement class. *See Amchem Prods.,Inc.*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a districtcourt need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

Accordingly, the proposed class action is superior to other available methods (if any) for the fair and efficient adjudication of the controversy relating to Tyson.

VII. THE COURT SHOULD ALLOW CIIPPS TO PROVIDE A PROPOSED NOTICE PLAN LATER

After receiving preliminary approval of a settlement agreement, class members must be notified of the settlement. Fed. R. Civ. P. 23(3)(1)(B). For a class proposed under Rule 23(b)(3), whether litigated or by settlement, the notice must:

> [C]learly 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; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

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

The notice of a class action settlement need only satisfy the broad "reasonableness" standards imposed by due process. *Shurland v. Bacci Cafe & Pizzeria on Ogden, Inc.*, 271 F.R.D. 139, 144 (N.D. Ill. 2010); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999). A notice is adequate if "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* (quoting *F.C.V., Inc. v. Sterling Nat. Bank*, 652 F. Supp. 2d 928, 944 (N.D. Ill. 2009)). To satisfy due process, the notice must reflect a desire to inform. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). The notice plan should take reasonable steps to update addresses before mailing and provide for re-mailing of notices to better addresses when returned as undeliverable. *Jones v. Flowers*, 547 U.S. 220, 226–27 (2006). The best notice practicable does not mean actual notice, nor does it require individual mailed notice where there are no readily available records of class members' individual addresses or where it is otherwise impracticable. *Shurland*, 271 F.R.D. at 144; *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 2012 WL 5055810, at *8. Furthermore, in addition to United States mail, notice may be by electronic means, or other appropriate means. Fed. R. Civ. P. 23(c)(2)(B).

Putative Interim Co-Lead Class Counsel request that the Court allow them to defer providing notice of this settlement until a later time. CIIPPs will submit a motion for leave to disseminate notice and that motion will include a proposed form, method, and date for

dissemination of notice. CIIPPs expect to file that motion shortly after the present motion is filed.

VIII. CONCLUSION

For the reasons stated herein, the CIIPPs respectfully request that the Court preliminarily approve the Tyson Settlement and preliminarily certify the Settlement Class. If approved, the CIIPPs will submit a separate motion seeking approval of a proposed notice plan and setting a schedule for the dissemination of notice to the Settlement Class and Final Fairness Hearing for the Settlement Agreement.

Dated: July 6, 2021

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