UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE CATTLE AND BEEF ANTITRUST LITIGATION	Case No. 0:20-cv-01319 JRT-HB
This Document Relates To: IN RE DPP BEEF LITIGATION	

DIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT BETWEEN DIRECT PURCHASER PLAINTIFFS AND JBS DEFENDANTS

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I. INTRODUCTION

Direct Purchaser Plaintiffs ("DPPs")[1] respectfully move for preliminary approval of a settlement (the "Settlement") with Defendants JBS S.A., JBS USA Food Company, Swift Beef Company, and JBS Packerland, Inc. (collectively, "JBS"). This is the first settlement for the DPP class and the first public settlement overall in any of the coordinated, complex beef antitrust cases. This icebreaker settlement represents an excellent recovery for the class, both in terms of financial relief to class members and benefit to those class members in pursuing their claims against other Defendants.

The Settlement provides $52.5 million in monetary relief and extensive cooperation to the DPP class. This settlement was negotiated at arm's length with the assistance of a nationally recognized, highly experienced mediator and extended over several months. Because the Settlement provides significant relief to the class, it falls well within the range of reasonableness necessary to establish preliminary approval under Rule 23(e).

Based on the motion and supporting papers, the DPPs request that this Court grant preliminary approval of this Settlement; appoint Interim Co-Lead Counsel as Settlement Class Counsel; certify the proposed settlement class; approve the form of notice (including directing non-settling Defendants to timely provide notice data); direct that

[1] As used herein, "DPPs" means Howard B. Samuels solely in his capacity as Chapter 7 trustee for the bankruptcy estate of Central Grocers, Inc., R&D Marketing, LLC, and Redner's Markets, Inc.

individual notice of this settlement be distributed to potential members of the settlement class to the extent reasonably practicable; and set the date for the final approval hearing.

II. BACKGROUND

DPPs filed their underlying complaints in June and July of 2020, after extensive investigation. *See* Case No. 20-cv-1319, Doc. No. 1; Case No. 20-cv-1602, Doc. No. 1.[2] DPPs filed their consolidated amended class action complaint on December 28, 2020. Doc. No. 142 ("Complaint"). The investigation included significant research into the allegations of an alleged agreement and Defendants[3] participation in trade associations, vetting of the then-confidential witness information, and extensive work with economic experts.

The DPPs allege that "Defendants conspired to . . . drive up the price of beef in order to realize sky-high margins" in violation of Section 1 of the Sherman Act. Doc. No. 331 ("MTD Order") at 3. DPPs allege Defendants engaged in price-fixing, in part, by constraining the supply of beef in the United States through various means and by engaging in other collusive conduct. *See, e.g.*, Complaint, ¶ 3. Plaintiffs allege that each Defendant, from 2015 on, unlawfully acted in concert to moderate and suppress slaughter volumes in order to drive up the price of beef. MTD Order at 21.

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[2] On September 4, 2020, the Court appointed Gustafson Gluek PLLC, Cotchett, Pitre & McCarthy, LLP, Hartley LLP, and Hausfeld LLP as Interim Co-Lead Counsel for the putative class of direct purchasers. Doc. No. 71.

[3] DPPs' Complaint names JBS S.A., JBS USA Food Company, Swift Beef Company, JBS Packerland, Inc., Cargill, Inc., Cargill Meat Solutions Corporation (a/k/a Cargill Protein), National Beef Packing Company, Tyson Foods, Inc., and Tyson Fresh Meats, Inc. as Defendants.

After complaints making similar allegations were dismissed on September 29, 2020, DPPs further researched, investigated, and analyzed their claims to file an amended complaint, including with substantial expert analysis. *See* Doc. No. 127. Defendants moved to dismiss the DPPs' Amended Complaint on February 11, 2021, which DPPs opposed on March 29, 2021. After a lengthy hearing on the motions on July 12, 2021, this Court denied the motions as to the DPPs' Complaint on September 14, 2021.[4] Doc. No. 331.

Since filing the initial complaints, the parties exchanged discovery requests and objections and responses on September 9, 2020, and October 9, 2020, respectively. *See* Declaration of Daniel E. Gustafson ¶ 5. After the motions to dismiss were denied, discovery disclosures and requests, and related discussions, resumed in earnest. On October 15, 2021, DPPs served further requests for production on Defendants, including JBS; on December 3, 2021, Defendants served their objections and responses on DPPs. *Id*. ¶ 10.

The parties have now spent many hours negotiating and substantively meeting and conferring regarding discovery requests, deposition limits, custodians, structured data, date ranges, search methodology, the scope of third-party subpoenas, and for the entry of a protective order. *Id*. These tasks have been large but made even more complicated by the extensive coordination between DPPs and the other classes and the Direct Action Plaintiff ("DAP"). The parties have also extensively negotiated and submitted competing

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[4] This Court granted Defendants' Motions as to nine state law claims brought by the indirect purchasers. *See* Doc. No. 331.

scheduling proposals and worked to submit a Case Management Issues Order. *Id*. The DPPs have added additional class representatives to bolster the DPP class's representation throughout the case and have worked to respond to discovery requests from Defendants for these new representatives. *Id*. ¶ 11.

III. SUMMARY OF SETTLEMENT NEGOTIATIONS AND AGREEMENT

DPPs and JBS reached this settlement through protracted, confidential arm's-length negotiations. *Id*. ¶¶ 12-15. This settlement includes both monetary relief for the class and JBS's extensive cooperation in DPPs' prosecution of the ongoing litigation against the non-settling Defendants.

After the denial of Defendants' motion to dismiss, the parties discussed the possibility of settlement and agreed to mediate with Professor Eric Green. *Id*. ¶ 13. Prior to the mediation, the parties submitted extensive papers regarding their respective settlement positions and after an extended, hard-fought mediation on October 28, 2021, made substantial progress but did not reach a final agreement on all material terms. Following months of further difficult negotiations, the Parties have agreed on the full Settlement. *See* Gustafson Declaration Ex. A.

The Settlement provides that DPPs shall seek appointment of Interim Co-Lead Counsel as Settlement Class Counsel for purposes of the Settlement and certification of the following "Settlement Class" for settlement purposes only:

> All persons and entities who, from January 1, 2015, through February 10, 2022, purchased for use or delivery in the United States, directly from any of the Defendants or their respective subsidiaries and affiliates, boxed or case-ready beef processed from Fed Cattle, excluding ground beef made from culled cows. Excluded from the

> Settlement Class are Defendants; their officers, directors or employees; any entity in which a Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of a Defendant. Also excluded from this Settlement Class are any federal, state, or local governmental entities, any judicial officer presiding over this action; the members of the judicial officer's immediate family and staff, and any juror assigned to this action.

Id. ¶ 5. The Settlement provides that JBS will pay $52.5 million into a settlement fund that will be used to compensate the direct purchaser class, pay for notice and administration of the settlement and pay litigation fees and expenses. *Id*. ¶¶ 1(u), 9.

Interim Co-Lead Counsel believe this remarkable recovery is fair and reasonable in any event, but particularly given the early stage of the litigation, JBS's market share regarding the products at issue, and the significant cooperation JBS has agreed to provide. The fairness and reasonableness of the settlement is further amplified by the fact that the Settlement is an "icebreaker" settlement in a multi-defendant case, assisting Plaintiffs in the litigation against the non-settling Defendants. The promised cooperation by JBS's U.S. Operations and sales divisions includes: (a) an eight (8) hour attorney proffer where JBS's counsel is required to summarize the principal facts known to it that are relevant to the alleged conduct, market, and industry participants at issue in the Actions, including any facts previously provided to the DOJ or any other U.S. government investigative authority in response to subpoenas or otherwise related to the allegations in the Complaint; (b) production of JBS's structured data; (c) data, documents, and contact information necessary for facilitating class notice and settlement administration; (d) witness interviews with up to six (6) JBS employees; (e) depositions of up to six (6) JBS employees; (f) the production of up to three (3) current employee

witnesses at trial; and (g) assistance with authentication and laying a foundation for admissibility at trial of JBS documents, among other cooperation provisions. *Id*. ¶ 10. The settlement includes a typical "opt out provision," set forth in a confidential side letter available to the Court for *in camera* review, that permits JBS to withdraw from the settlement if class members representing a specified percentage of total sales of Beef sold by JBS in the United States opt out of the settlement. *See, e.g.,* Manual for Complex Litigation, 4th Edition, § 22.922 (discussing such provisions and noting that it is common in Rule 23(b)(3) class settlements).

Upon final judgment, and in exchange for the monetary relief and extensive cooperation, DPPs will release claims, as defined in the Settlement, against JBS. *See Id.* at 21-22.

IV. THE SETTLEMENT IS WITHIN THE RANGE OF POSSIBLE APPROVAL

"The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation. The parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial. These economic gains multiply when settlement also avoids the costs of litigating class status—often a complex litigation within itself." *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (internal citations omitted). "Minnesota courts recognize a 'strong public policy favoring the settlement of disputed claims without litigation.'" *Katun Corp. v. Clarke*, 484 F.3d 972, 975 (8th Cir. 2007) (internal citations omitted); *Liddell v. Board of Educ. of the City of St.*

Louis, 126 F.3d 1049, 1056 (8th Cir. 1997). "The policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context." *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 11-MD-2247- ADM-JJK, 2012 WL 2512750, at *7 (D. Minn. June 29, 2012) (quoting *White v. Nat'l Football League*, 822 F. Supp. 1389, 1416 (D. Minn. 1993)). As the Eighth Circuit has directed, in considering settlements, "strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999).

In reviewing class action settlements, courts must ensure that they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In assessing whether a settlement should receive preliminary approval, the fairness, reasonableness, and adequacy "standard is lowered, with emphasis only on whether the settlement is within the range of possible approval due to an absence of any glaring substantive or procedural deficiencies." *In re Centurylink Sales Pracs. & Sec. Litig.*, No. CV 18-296 (MJD/KMM), 2021 WL 3080960, at *5 (D. Minn. July 21, 2021). A court properly grants preliminary approval and approves class notice if the parties "will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1).

A. The Settlement is Fair, Reasonable, and Adequate

Rule 23(e)(2) directs courts to approve a settlement "only on finding that it is fair, reasonable, and adequate" after considering several factors, namely: that the class was adequately represented by counsel and the class representatives; that the proposed

settlement was negotiated at arm's length; that the settlement provides adequate relief to the class; and that the settlement treats class members equitably relative to each other.

Courts attach "[a]n initial presumption of fairness . . . to a class settlement reached in arm's-length negotiations between experienced and capable counsel after meaningful discovery." *Grier v. Chase Manhattan Auto Fin. Co.*, No. 99-cv-180, 2000 WL 175126, at *5 (E.D. Pa. Feb. 16, 2000); *see also Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975); *White v. Nat'l Football League*, 836 F. Supp. 1458, 1476-77 (D. Minn. 1993). "The court is entitled to rely on the judgment of experienced counsel in its evaluation of the merits of a class action settlement." *In re Employee Benefit Plans Sec. Litig.*, Civ. No. 3-92-708, 1993 WL 330595, *5 (D. Minn. June 2, 1993) (citation omitted); *see also Welsch v. Gardenbring*, 667 F. Supp. 1284, 1295 (D. Minn. 1987) (affording "great weight" to opinions of experienced counsel).

This proposed settlement satisfies all of the foregoing factors. First, the Settlement was reached in arm's length negotiations by counsel experienced in settling class actions. Sufficient investigation and initial data analysis were conducted in drafting the exhaustive complaints and counsel for both parties have had the opportunity to properly evaluate the strengths and weaknesses of their respective claims and defenses, and the propriety of settlement at this juncture. Both parties' counsel are experienced in antitrust matters. Indeed, lead counsel for the DPPs have substantial experience in litigating protein antitrust cases throughout the country. For example, Gustafson Gluek PLLC ("Gustafson") and Cotchett, Pitre & McCarthy, LLP ("CPM") are the court-appointed lead class counsel for a class of commercial food preparers in the *In re Broiler Chicken*

Antitrust Litigation currently pending in the Northern District of Illinois. *See* 16-cv-08637 (N.D. Ill.), Doc. No. 144 (order appointing lead counsel). That case similarly alleges collusive supply restraints and price-fixing. Gustafson is also serving as co-lead counsel for the indirect consumer class in the *In re Pork Antitrust Litigation* pending in this District and also involving some of the same defendant groups as this case. *See* 18-cv-1776 (D. Minn.), Doc. No. 151 (order appointing lead counsel). Moreover, Hausfeld LLP ("Hausfeld") is the court-appointed lead counsel for a class of direct purchasers in the *In re Packaged Seafood Antitrust Litigation*, No. 3:15-MD-2670 (S.D. Cal.) that is currently pending before both the Ninth Circuit and in the Southern District of California; Jason Hartley, now of Hartley LLP ("Hartley"), serves on Plaintiffs' steering committee in that matter. Doc. No. 119, at 3 (appointing Hausfeld LLP as co-lead counsel, appointing Jason Hartley to Plaintiffs' steering committee) (S.D. Cal. March 24, 2016). Finally, Gustafson, CPM, and Hausfeld are all serving in leadership or high-level roles in either the *In re Atlantic Farm-Raised Salmon Antitrust Litigation* or the related indirect purchaser matter, *Wood Mountain Fish LLC v. Mowi ASA*, 19-CV-22128, both pending in the Southern District of Florida. *In re Atlantic Farm-Raised Salmon Antitrust Litig.*, 19-cv-21551, Doc. No. 97, at 3 (S.D. Fla. June 3, 2019) (appointing Hausfeld LLP co-lead counsel). All of the foregoing experiences have provided class counsel with valuable insight into these protein markets, the associated volume of commerce, and the risks inherent in the litigation, which further support approval of the settlement.

Moreover, the negotiations over this settlement were conducted before a highly respected, nationally-renowned mediator, who has extensive experience in resolving

complex litigation and who ensured the negotiations were conducted at arm's length and were non-collusive. This further demonstrates the procedural fairness associated with the settlement. *In re Michael Milken and Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993); *Capsolas v. Pasta Res. Inc.*, No. 10-CV-5595 RLE, 2012 WL 1656920, at *1 (S.D.N.Y. May 9, 2012) ("The assistance of an experienced mediator . . . reinforces that the Settlement Agreement is noncollusive."); *cf. Ponce v. Lenovo (United States) Inc.*, No. 16-CV-1000 (JNE/JSM), 2017 WL 1093186, at *2 (D. Minn. Mar. 23, 2017) ("The assistance of a retired United States Magistrate Judge as a mediator in the settlement process supports a conclusion that the Settlement is non-collusive and was fairly negotiated at arm's length."). These factors weigh heavily in favor of preliminary approval.

Further, the relief provided to the class in this Settlement is substantial. As a threshold measure, in a multi-defendant case like this one, the existence of an "icebreaker" settlement is itself valuable to the class, because such settlements often bring remaining defendants to settlement negotiations. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) ("An early settlement with one of many defendants can 'break the ice' and bring other defendants to the point of serious negotiations."). But even were this not the first such settlement, by any measure, $52.5 million dollars is a substantial settlement sum. By comparison, JBS settled with the direct purchaser class in the *Pork* case for $24.5 million and that settlement was preliminarily approved by this Court. In addition to the financial component of this

Settlement, JBS's required cooperation will bolster DPPs' claims against the remaining Defendants.

Finally, the Settlement treats class members equitably relative to each other: funds will be awarded to class members on a *pro rata* basis, taking into account the amount of class products they purchased, and the number of claims submitted. There will be a simplified online claims process for class members once it is time for the funds to be distributed.

1. The Eighth Circuit Factors Support a Finding That the Settlement is Fair, Reasonable, and Adequate

The Eighth Circuit has established four factors for determining whether a proposed settlement is fair, reasonable and adequate: (1) the merits of plaintiffs' case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *Marshall v. Nat'l Football League*, 787 F.3d 502, 508 (8th Cir. 2015) (citing *In re Uponor, Inc. F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013)); *Dryer v. Nat'l Football League*, No. 09-cv-2182-PAM-AJB, 2013 WL 5888231, at *2 (D. Minn. 2013). At the preliminary approval stage, only the first three factors are considered, *In re Wireless Tel.*, 396 F.3d at 932, and the first is the most important, *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988).

All three factors favor preliminary approval of the Settlement. First, without the Settlement, the outcome of the litigation as to JBS would be far from certain. Although DPPs defeated Defendants' a motion to dismiss, the future stages of class certification,

summary judgment motions, and trial will be strenuously contested. Furthermore, any decisions on class certification or at trial are not only uncertain, but would likely face an appeal, which compounds the uncertainty, not to mention the delay associated with any recovery for the class. In lieu of the vicissitudes and delay that inhere in continued litigation, the Settlement provides for substantial, direct, and certain benefits to the class. This is a highly favorable result in the face of uncertain continued litigation. This factor favors approval of the Settlement.

Second, there is no indication that JBS's financial condition is not secure. After carefully reviewing the financial information JBS furnished, counsel concluded that JBS is capable of fulfilling its voluntary financial settlement obligations or of funding a vigorous defense to the litigation.

Third, this case will be complex and expensive, and will place an enormous burden upon the parties and the Court. Counsel for all parties have vigorously represented their clients and will continue to do so. This case will only get more expensive and complex as depositions and expert analyses begin to take place. This factor easily supports approval of the Settlement.

B. The Proposed Settlement Class Satisfies the Requirements for Class Certification at the Settlement Stage

To qualify for settlement-class certification, an action must satisfy all provisions of Federal Rule of Civil Procedure 23(a), plus one of the subdivisions of Rule 23(b). *See* Fed. R. Civ. P. 23(a) & 23(b). Rule 23(a) requires the proponents of certification to establish each of the following: (1) that the members of the proposed class are so

numerous that joinder of the individual claims would be impracticable; (2) that there are questions of law or fact common to the class; (3) that the claims of the proposed class representatives are typical of the claims of the Class members; and (4) that the proposed class representatives will adequately represent the interests of the class. Fed. R. Civ. P. 23(a). In this case, Rule 23(b)(3) requires that the common questions of law and fact must predominate over individual questions, and the class must be superior to other available methods for fairly and efficiently adjudicating the controversy. *See In re Select Comfort Corp. Sec. Litig.*, 202 F.R.D. 598, 611 (D. Minn. 2001). The proposed Settlement Class here satisfies each of the requirements of Rule 23(a) (numerosity, commonality, typicality and adequacy of representation) and of Rule 23(b)(3) (predominance and superiority).

1. Numerosity is Easily Satisfied

For a class action to be appropriate, the proposed class must be so numerous that joinder of all members is "impracticable." Fed. R. Civ. P. 23(a)(1). "In general, a putative class exceeding 40 members is sufficiently large to make joinder impracticable." *Rasberry v. Columbia Cty., Arkansas*, No. 16-cv-1074, 2017 WL 3259447, at *2 (W.D. Ark. July 31, 2017) (citing *Alberts v. Nash Finch Co.*, 245 F.R.D. 399, 409 (D. Minn. 2007) ("[A] putative class exceeding 40 members is sufficiently large to make joinder impracticable.")). Here, the proposed class includes thousands of direct purchasers of beef. Gustafson Decl., ¶ 5. The Defendants unquestionably sell their products directly to a number of direct purchasers that are geographically dispersed throughout the United States.

2. There are Common Questions of Law and Fact

A common question, for purposes of Rule 23(a)(2), is a "common contention" that is "of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). What matters is "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id*. (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)). The existence of a single, common question will satisfy Rule 23(a)(2). *Dukes*, 564 U.S. at 359; *see also Khoday v. Symantec Corp.*, No. 11-180, 2014 WL 1281600, at *15 (D. Minn. Mar. 13, 2014) (noting that a "single common contention" could satisfy commonality).

The Complaint sets forth nine common questions relating to the scope of JBS's conduct to suppress the supply of beef and artificially inflate its price. *See* Compl. ¶ 333. These common questions will yield common answers and readily satisfy the commonality requirement.

3. Plaintiffs' Claims are Typical of the Class

The typicality prerequisite is satisfied "when the claims of the named plaintiffs arise from the same event or are based on the same legal theory as the claims of the class members." *Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 575 (D. Minn. 1995); *Dirks v. Clayton Brokerage Co. of St. Louis, Inc.*, 105 F.R.D. 125, 133 (D. Minn. 1985); *Paxton v. Union Nat. Bank*, 688 F.2d 552, 561-62 (8th Cir. 1982).

"When the claims or defenses of the representative and the class are based on the same course of conduct or legal theory, it is thought that the representatives will advance the interest of the class members by advancing his or her own interests." *In re Control Data Corp. Sec. Litig.*, 116 F.R.D. 216, 220 (D. Minn. 1986) (internal citations omitted); *see also Smith v. United Health Care Servs., Inc.*, No. 00-cv-1163, 2002 WL 192565, at *3-4 (D. Minn. 2002) (plaintiffs typical of class despite varying degree of damages due to "strong similarity of legal theories").

Here, the named Plaintiffs' and the putative Settlement Class's legal claims arise out of the same alleged conduct. Namely, that class members purchased beef directly from one or more Defendants during the Relevant Time Period and suffered economic injury as a result of paying Beef prices that were artificially inflated by Defendants' conspiracy. *See, generally,* Complaint. In short, Plaintiffs' claims arise out of the same course of conduct and the same injury, and they seek the same relief. *See In re Select Comfort Corp. Sec. Litig.*, 202 F.R.D. 598, 604 (D. Minn. 2001) ("Typicality is closely related to commonality as a finding of one generally compels a finding of the other.") (cleaned up). Because Plaintiffs' claims are typical of the Settlement Class's claims, this requirement is similarly met.

4. Plaintiffs Have Adequately Represented the Class

Under Rule 23(a)(4), a class representative must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). In order to meet this requirement, the Court must find that (1) the representatives and their counsel are able and willing to prosecute the action competently and vigorously; and (2) each representative's interests

are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge. *See In re Monosodium Glutamate Antitrust Litig.*, 205 F.R.D. 229, 233 (D. Minn. 2001); *Lockwood*, 162 F.R.D. at 576.

Since the Court's appointment of Interim Co-Lead Counsel, they have vigorously prosecuted this action on behalf of the class representatives and the entire proposed Settlement Class. Co-Lead Counsel—in addition to their extensive experience with protein related price-fixing cases cited above—have decades of experience leading and litigating some of the largest antitrust cases in the country. *See* Doc. No. 71 (firm resumes of Co-Lead Counsel previously submitted with DPPs' Motion to Appoint Lead Counsel). Further, the class representatives have come forward to litigate against their Beef suppliers on behalf of the Class and have actively participated in this action and fully cooperated with Interim Co-Lead Counsel. This requirement is satisfied.

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

A proposed class meets the predominance requirement of Rule 23(b)(3) when "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). District courts in Minnesota have recognized that "[a]s with commonality and typicality requirements, the predominance inquiry is directed toward the issue of liability." *In re Select Comfort*, 202 F.R.D. at 610. When determining whether common questions predominate, courts "focus on the liability issue . . . and if the liability issue is common to the class, common questions are held to predominate over individual questions." *Id*. (internal citations omitted).

Here, multiple common questions lie at the heart of all Settlement Class members' claims, including whether Defendants conspired to decrease the supply of beef and raise the price of beef and whether Defendants' conspiracy caused market-wide supracompetitive beef prices. Because the question of liability is common to the class, predominance is satisfied here.

6. A Class Action is the Superior Method for Resolving These Claims

Rule 23(b)(3) instructs that the matters pertinent to this inquiry include: (a) class members' interests in individually controlling the prosecution of separate actions; (b) whether other litigation exists concerning this controversy; (c) the desirability of concentrating the litigation in this forum; and (d) any difficulties in managing a class action. Each of these factors favor certification in this case. Requiring each direct purchaser of beef to come forward with individual—and identical—claims would deplete the judiciary's resources, likely create inconsistent results, establish incompatible standards of conduct for the Defendant, and lead to repetitious, complex trials. This litigation provides an efficient and economic method for individual direct purchasers to participate in this litigation and recover their damages, while aggregating costs. Finally, while there are similar cases being brought by other groups of purchaser plaintiffs, this is the only case seeking recovery for a class of direct purchasers. Despite the large number of putative Settlement Class members and the complex issues at stake, there are no insurmountable difficulties in managing this case as a class action. The Settlement itself

will obviate the need for management of further litigation and a possible trial and appeal involving one of the larger Defendants.

It should also be noted that the proposed Settlement Class is easily ascertainable in two ways: first, a class member may self-identify simply by reviewing the class definition, and second, Defendants, including JBS, possess complete lists of clients and customers who purchased beef directly from them.

Because DPPs have satisfied Rule 23(a) and (b)(3) for purposes of the proposed Settlement, the Court should provisionally certify the proposed Settlement Class.

V. NOTICE PLAN

A. The Court Should Direct Settlement Class Notice to the Class

Under generally recognized standards, class notice must afford potential class members the ability to "make an informed decision about their participation [in the litigation]." MANUAL FOR COMPLEX LITIGATION, FOURTH, § 21.311, at 289. For class action cases where the class is certified under Rule 23(b)(3) or for settlement purposes, the Court must direct notice to class members that is the "best notice that is 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). Settlement class notice generally requires individual notice where possible, and "alternative means such as notice through third parties, paid advertising, and/or posting in places frequented by class members" where individual notice is not possible. *Mullins v. Direct Digital*, 795 F.3d 654, 665 (7th Cir. 2015); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1149 (8th Cir. 1999); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995). This standard

does not require that every conceivable class member receive actual notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). Notice need not provide "a complete source of information" or an exact amount of recovery for each class member. *Petrovic*, 200 F.3d at 1153 (citing *DeBoer*, 64 F.3d at 1176). 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). Other putative settlement class members may be notified by publication notice. *See City of Greenville v. Syngenta Crop Prot.*, No. 3:10-CV-188, 2012 WL 1948153, *4 (S.D. Ill. May 30, 2012).

1. The Robust, Multilayered Proposed Notice Plan Will Provide the Best Notice Practicable

DPPs' Notice Provider. DPPs have retained an experienced and well-regarded notice and claims administrator, A.B. Data, to serve as the notice provider for this Settlement. *See* Declaration of Eric Schachter ¶¶ 3-5, Ex. A (listing many prior engagements on complex settlement administration projects). A.B. Data has extensive experience providing notice and claims administration in antitrust cases, such as this one. *Id*. For example, this Court appointed A.B. Data as notice provider and claims administrator in connection with the direct purchasers' settlements in *In re Pork Antitrust Litigation*. *See* 18-cv-1776 (D. Minn.), Doc. Nos. 631, 832. This Court also appointed A.B. Data as notice and claims administrator with respect to the consumer indirect purchaser class in *Pork*. *See* 18-cv-1776, Doc. No. 811.

Similarly, A.B. Data has also been appointed by the court as notice and claims administrator in the *In re Broiler Chicken Antitrust Litigation*, currently pending in the

Northern District of Illinois. Notably, A.B. Data has been appointed as notice provider for *each of the three classes* litigating *Broilers* claims there: the Direct Purchaser Plaintiffs, the Commercial and Institutional Indirect Purchaser Plaintiffs, *and* the End-User Consumer Plaintiffs. *See, e.g.,* 16-cv-08637 (N.D. Ill.), Doc. No. 5234.

A.B. Data is also the court-appointed notice provider and claims administrator for direct purchasers in the antitrust litigation pending against the Turkey producers. *See Olean Wholesale Grocery Cooperative Inc. et al. v. Agri-Stats, Inc.*, *et al.*, 19-cv-08318 (N.D. Ill.), Doc. Nos. 265, 295. The extensive experience A.B. Data has gained from the other protein antitrust cases involving chicken, pork, and turkey will be invaluable in this case.

Direct Notice. Proposed forms of the notice materials to the putative Settlement Class are included herewith as exhibits attached to the Schacter Declaration, and include the Long-Form Notice at Exhibit B. The foregoing materials provide plain, easily understood information about, among other things, that this is a class action; the amount of the settlement; the Settlement Class definition in plain and engaging language; that the Action alleges antitrust violations and price-fixing claims; that a member of the Settlement Class may appear through an attorney if the member wants; that members of the Settlement Class can be excluded from the Settlement Class or object to the Settlement if they so choose; the amount of the litigation fund that Plaintiffs seek; the maximum amount of fees and expenses to be sought; the time and manner for requesting exclusion or submitting an objection; the binding effect of a judgment on the Settlement

Class; and that, if the Court grants final approval, the case will be dismissed as against the Settling Defendants. Schachter Decl. ¶ 9.

Under DPPs' plan, the notice provider will send by mail (and email where available) the Long Form Notice to settlement class members whose contact information has been provided by the settling and non-settling Defendants.[5] The Long-Form Notice provides significant information and transparency regarding the proposed settlement and contains all information required by the Rules and case law. The Long-Form Notice also provides the URL for the website where class members may review the more fulsome information about the lawsuit and the proposed settlement. In addition to a physical mailing, the Notice will also be emailed directly to settlement class members where email information is available. *See* Schachter Decl. ¶¶ 7-10.

Supplemental Publication Notice. In addition to the robust direct-notice plan outlined above, DPPs will supplement the notice plan with other forms of notice reasonably tailored to reach a maximum number of additional potential class members as efficiently as possible. These measures include:

- **Paid Media**. A.B. Data has devised a well-tailored paid media program that will include publishing the Short-Form Notice one time in *Supermarket News and Nation's Restaurant News*, trade journals targeting supply chain executives and food industry professionals and implementing a thirty-day digital media banner ad campaign on www.supermarketnews.com and www.nrn.com. Schachter Decl. ¶ 11. The subscriber base for the trade journals and websites encompasses many businesses responsible for procurement of beef and other

[5] Class Counsel for DPPs estimates that there are approximately 30,000 class members. An exact number cannot be provided at this time because Defendants have not produced their granular data yet in this litigation. Gustafson Decl. ¶ 16. The 30,000-class member estimate is based on Class Counsel and A.B. Data's experience in similar antitrust protein cases, including *Broilers*, *Pork*, and *Turkey*. *Id*.

businesses that fall within the settlement class definition. A proposed sample banner ad is included with the Notice Plan and attached as Exhibit D to the Schachter Declaration.

- **News Release**. A.B. Data will disseminate a news release via the *PR Newswire* distribution service. Schachter Decl. ¶ 12. This news release will be distributed to more than 10,000 newsrooms, including print, broadcast, and digital media, across the United States. It will also be distributed to food-industry trade publications.

Settlement Website and Toll-Free Number. A.B. Data will further assist potential class members in understanding their rights under the settlement by establishing a case-specific toll-free number and website. Schachter Decl. ¶¶ 13-15. The toll-free telephone number will be equipped with an automated interactive voice response system in both English and Spanish. The automated interactive voice response system will present callers with a series of choices to hear prerecorded information concerning the Settlement Agreement. If callers need further help, they will have an option to speak with a live operator during business hours. *Id*. The website will present relevant information and documentation, including a case summary, copies of the settlement agreement and related Orders, other important documents, and a schedule showing important dates. *Id.*

Courts have regularly approved class notice plans that include multilayered approaches, such as the foregoing. *See Petrovic*, 200 F.3d at 1153; *DeBoer*, 64 F.3d at 1176.

2. The Form of Plaintiffs' Proposed Notice Satisfies Rule 23 and Due Process

Under Rule 23(c)(2)(B), the proposed class 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; (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). As demonstrated in Exhibits B-D to the Schachter Declaration, DPPs' Class Notice Plan addresses each of Rule 23's requirements in a clear and easily understood manner. DPPs' notice expert has opined that the notice plan meets the requirements of Rule 23. Accordingly, the Notice Plan and accompanying forms are reasonable and adequate under the circumstances and are fairly calculated to apprise class members of their rights under the settlement. *See id*. DPPs respectfully submit that this multifaceted, comprehensive Notice Plan provides the best notice practicable under the circumstances of this case and fully satisfies Rule 23 and due process requirements. *See Petrovic*, 200 F.3d at 1153; *DeBoer*, 64 F.3d at 1176; Schachter Decl. ¶ 17. Interim Co-Lead Class Counsel requests that the Court approve the proposed form and manner of notice to the Settlement Class as set forth in the Notice Plan.

B. To Provide for Adequate Notice, the Court Should Require the Non-Settling Defendants to Produce Their Available Customer Contact Information

The foregoing plan requires providing direct notice to the DPP class in accord with Rule 23. DPPs have thus far received no customer contact information from the non-settling Defendants in this litigation. Through this filing, DPPs seek an order from the Court requiring that all non-settling Defendants produce their customer names, addresses, and email addresses for the settlement class period. Courts regularly require non-settling defendants to produce this information for purposes of effectuating notice of class

settlements and facilitating claims administration in antitrust and complex cases. *See, e.g., In re Pork Antitrust Litigation*, Case No. 18-cv-1776-JRT-HB (D. Minn. January 13, 2021), ECF No. 631, ¶ 7 ("So that the proposed notice plan may be carried out, each Defendant in this Action is directed to provide a customer list to the Settlement Administrator, including any reasonably available names, email addresses, and mailing addresses, pursuant to the schedule below."); *Precision Associates Inc. et al. v. Panalpina World Transport (Holding) Ltd.,* Case No. 08-cv-000042-BMC-PK (E.D.N.Y. Sept. 29, 2011, Oct. 17, 2011 & Dec. 02, 2011), (ECF Nos. 536 (ordering production from non-settling defendants); 546 (denying limitation that class lists be sent directly to claims administrator without access by class counsel); 561 (ordering further production from those defendants only providing subsets of customer contact information)); *In re Aftermarket Auto. Lighting Prod. Antitrust Litig.*, No. 09-ML-2007 (C.D. Cal. Aug. 29, 2011) (Doc. No. 315-3) (Finegan declaration) (defendants produced class member records); *Encinas v. J.J. Drywall Corp.,* 265 F.R.D. 3, 11 (D.D.C. 2010); *In re Processed Egg Prod. Antitrust Litig*., No. 08-MD-2002, ¶ 3 (E.D. Pa. July 15, 2010) (ordering "each Defendant who has not already done so" to produce customer lists); *In re Air Cargo Shipping Serv. Antitrust Litig*., No. 06-MD-01775 (E.D.N.Y. Oct. 31, 2007) (Doc. No. 646) (ordering production from non-settling defendants). There are myriad other decisions holding similarly.[6] DPPs respectfully request that such information be

[6] *See, e.g., In re Visa Check/MasterMoney Antitrust Litigation*, 2002 WL 31528478, at *3 (E.D.N.Y. June 21, 2002) (Gleeson, J.) (non-settling defendants required to produce customer information for purposes of notice); *In re Urethane Antitrust Litig.*, No. 04-MD-01616, ECF No. 291 at 3 (D. Kan. April 6, 2006) (requiring production of records

provided to DPPs within 30 days of this Court's order directing notice to the class and preliminarily approving this settlement.

B. Proposed Notice Schedule

Set forth below is the proposed schedule for purposes of the notice plan, objections and opt-out deadlines, deadlines for filing any attorneys' fees and reimbursement of litigation fund expenses, and a schedule for final approval. The relevant dates are not yet affixed in the proposed notices but will be once the Court sets dates certain for the following litigation events.

EVENT	**DEADLINE**
JBS to issue CAFA notice	Within 10 days after the Preliminary Approval Motion is filed
Order approving Plaintiffs' proposed Notice Program ("Order")	N/A
All Defendants to produce reasonably available customer names, mailing addresses and email addresses	30 days after the Court's Order
Direct mail; Mailed and Email notice to potential Settlement Class Members; establish the settlement website; and issue a press release over PR Newswire	60 days after the Court's Order

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from non-settling defendants' records); *Lazy Oil Co. v. Witco Corp.*, 95 F.Supp.2d 290, 297 (W.D. Pa. 1997) (mailed notice based on non-settling defendants' customer lists); *In re Packaged Ice Antitrust Litig.,* No. 08-MD-1952, 2010 WL 5638219, *2 (E.D. Mich. Sept. 2, 2010) (directing non-settling defendants to provide customer data); *In re Citric Acid Antitrust Litig.,* No. 1092, C-95-2963, 1997 WL 446239, *1 (N.D. Cal. July 24, 1997); *In re Art Materials Antitrust Litig.*, MDL No. 436, 1983 WL 1815, *2 (N.D. Ohio May 2, 1983) (ordering defendants to identify purchasers).

EVENT	DEADLINE
Publication notice begins	60 days after the Court's Order or as soon as practicable thereafter due to publication schedules
Plaintiffs to file motion for final approval of $5 million Litigation Fund	75 days after the Court's Order
Deadline for class members to object	105 days after the Court's Order (objections must be received by this deadline)
Deadline for class members to request to opt out of the settlement	105 days after the Court's Order (requests must be postmarked by this deadline)
Plaintiffs to file affidavits or declarations of the person(s) under whose general direction notice was issued	At least 10 days before the Final Approval Hearing
Plaintiffs to file final approval brief, response to objections, if any, and a proposed final approval order with a complete list of all Settlement Class Members that have opted out of the Settlement	At least 10 days before the Final Approval Hearing or by a date to be set by the Court
Final Approval Hearing	At least 135 days after the Court's Order, as the Court's schedule permits

VI. CONCLUSION

Based on the foregoing, Interim Co-Lead Counsel respectfully asks the Court to enter an Order:

- Preliminarily approving the settlement between DPPs and JBS;
- Certifying the Settlement Class for purposes of Settlement, and appointing Howard B. Samuels solely in his capacity as Chapter 7 trustee for the

bankruptcy estate of Central Grocers, Inc.; R&D Marketing, LLC; and Redner's Markets, Inc. as representatives of the Class; appointing DPP Interim Co-Lead Counsel as Settlement Class Counsel, and granting preliminary approval of the proposed Settlement;

- Ordering the non-settling Defendants to produce customer names, addresses, and email addresses for the settlement class period;

- Approving the proposed form and manner of notice to the Settlement Class, and directing that the notice to the Settlement Class be disseminated by Claims Administrator A.B. Data in the manner described, establishing a deadline for Settlement Class Members to request exclusion from the Class or file objections to the Settlement; and

- Setting the proposed schedule for completion of further Settlement proceedings, including scheduling the Final Approval Hearing.

Dated: January 31, 2022

Respectfully Submitted,

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