UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

IN RE PEANUT FARMERS ANTITRUST LITIGATION	Case No. 2:19-cv-00463 **Honorable Raymond A. Jackson** **Honorable Lawrence R. Leonard**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH THE OLAM AND BIRDSONG DEFENDANTS

I. INTRODUCTION

Plaintiffs, on behalf of Settlement Classes comprised of farmers that sold raw, harvested runner peanuts ("Runner Peanuts") to the Defendants between January 1, 2014 and December 31, 2019, have reached settlements ("Settlements") with Defendants Olam Peanut Shelling Company, Inc. ("Olam") and Birdsong Corporation ("Birdsong") (collectively, "Settlements" and "Settling Defendants"). Under the terms of the Settlements, Olam will pay $7.75 million and Birdsong will pay $50 million, for a total of $57.75 million ("Settlement Fund"). Additionally, each Settling Defendant has agreed to provide cooperation to assist Plaintiffs in the prosecution of claims against the remaining Defendant, Golden Peanut Company LLC ("Golden Peanut").

For the reasons set forth herein, Plaintiffs respectfully submit that the Settlements are fair, reasonable, and adequate, and should be approved by the Court.[1]

II. BACKGROUND

Plaintiffs are Peanut farmers in the United States who sold Runner Peanuts to peanut shelling companies, including Golden Peanut, Birdsong, and Olam. In September 2019, Plaintiffs filed a class action lawsuit against Golden Peanut and Birdsong (ECF No. 1), alleging that Defendants entered into a conspiracy, the purpose and effect of which was to suppress competition and to pay depressed prices for Runner Peanuts to farmers, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Golden Peanut and Birdsong filed motions to dismiss (ECF Nos. 47-50), which the Court denied on May 14, 2020 (ECF No. 135). Plaintiffs filed a Second Amended Class Action

[1] At this time, Plaintiffs are not seeking to distribute the proceeds of the Settlement Fund to Settlement Class Members, but plan to do so after their claims against Golden Peanut have been resolved. At the appropriate time, Plaintiffs will present the Court with a motion to distribute the proceeds of the Settlement Fund.

Complaint on May 27, 2020 (ECF No. 148), naming Olam as a Defendant for the first time, and all Defendants filed answers to this complaint on June 26, 2020.

All Defendants have denied and continue to deny Plaintiffs' allegations and have asserted numerous defenses to Plaintiffs' claims. However, after conducting substantial fact and expert discovery, Plaintiffs reached Settlements with Olam and Birdsong totaling $57,750,000. Settling Defendants do not admit liability, but chose to settle to avoid further expenses, burdens, and risks that are inherent in this litigation. This lawsuit will continue against Golden Peanut (the "Non-Settling Defendant").

On December 2, 2020, the Court entered an Amended Memorandum Opinion and Order ("Certification Order") finding that this case should proceed as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure and certified the following Class:

> All persons or entities in the United States who sold raw, harvested runner peanuts to any of the Defendants, their subsidiaries or joint-ventures, from January 1, 2014 through December 31, 2019 (the "Class Period"). Specifically excluded from this 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.

Certification Order at 18 (ECF No. 496). On December 16, 2020, Golden Peanut filed a Rule 23(f) petition for appeal with the United States Court of Appeals for the Fourth Circuit, and Plaintiffs filed their opposition on December 28, 2020.[2]

On December 23, 2020, the Court issued orders preliminarily approving the Settlements with the Settling Defendants and certifying Olam and Birdsong settlement classes pursuant to Fed.

[2] The Fourth Circuit has not yet ruled on the petition for appeal.

R. Civ. P. 23(b)(3) (ECF Nos. 514-515) ("Preliminary Approval Orders").[3] The Court will hold a Fairness Hearing on March 25, 2021 to determine whether to finally approve the Settlements and Class Counsel's request for reimbursement of litigation costs and expenses.[4] *Id*.

Recent amendments to Rule 23 (effective December 1, 2018) require that "[t]he parties must provide the court with information sufficient to enable it to determine whether to give notice of [a proposed settlement] to the class." Fed. R. Civ. P. 23(e)(1)(A). Notice "is justified by the parties' showing that the court 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)(B). By Order dated December 23, 2020, the Court approved Plaintiffs' Notice Program and authorized Plaintiffs to disseminate notice of the Certification Order, the Settlements, the Fairness Hearing, and related matters to the Settlement Classes (the "Notice Order"). (ECF 516).

Pursuant to the Notice Order, on January 12, 2021, the Notice was mailed, postage prepaid, to all potential members of the Settlement Classes identified from Defendants' transactional data. Further, on January 13, 2021, the process of publishing the Summary Notice and emailing the Summary Notice to Settlement Class members was begun; at or about that same time, Plaintiffs will use banner ads and social media advertising to enhance the outreach of the Notice. Finally, a copy of the Notice was (and remains) posted on-line at www.PeanutFarmersAntitrustLitigation.com.[5]

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[3] The definitions of the settlement classes certified in the Preliminary Approval Orders are the same as for the litigation class certified by the Court in its order of December 2, 2020.

[4] Class Counsel are not seeking attorneys' fees or service awards for the class representatives at this time, but plan to do so after Plaintiffs' claims against Golden Peanut have been resolved. Contemporaneously with the filing of the instant Motion for Final Approval, Plaintiffs have filed a motion seeking reimbursement of current litigation costs and expenses.

[5] At least ten (10) days before the Fairness Hearing, Class Counsel will file with the Court a declaration of the person(s) responsible for directing the Notice Program approved by the Court,

III. TERMS OF THE SETTLEMENT AGREEMENTS

On behalf of the Olam and Birdsong Settlement Classes, Plaintiffs entered into Settlements with Olam ($7,750,000) and Birdsong ($50,000,000) totaling $57,750,000. Additionally, the Settling Defendants have agreed to cooperate with respect to the prosecution of claims against remaining Defendant Golden Peanut.

While the specific details of the cooperation agreed to by the Settling Defendants is set forth in confidential letter agreements between Plaintiffs and the Settling Defendants, it is fair to state that the Settling Defendants' cooperation will provide Plaintiffs with valuable assistance as they continue to pursue their claims against Golden Peanut. As stated in *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003), cooperation by a settling defendant provides a "substantial benefit" to the class and "strongly militate[] toward approval of the Settlement Agreement."

In exchange for the settlement payments and cooperation, the Settlements provide, *inter alia*, for the release by Plaintiffs, and the other Settlement Class members, of "Released Claims" against Olam and Birdsong. The Released Claims are antitrust and similar claims arising from the conduct alleged in the Complaint. The releases specifically exclude "any ordinary course of business commercial claims unrelated to the Action that are based solely on breach of contract."

The Settlement Agreements were reached after a) good faith and vigorous, arm's-length negotiations between experienced counsel, and b) extensive factual and expert discovery and legal

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showing that Notice was provided to the Class (and Settlement Classes) in accordance with the Notice Order. Class Counsel will also provide the Court with a report on opt-outs and any objections to the Settlements and Class Counsel's request for reimbursement of litigation costs and expenses.

analysis, such that the experienced counsel have a full understanding of the strengths and weaknesses of their respective positions. Thus, Plaintiffs believe that the Settlements are fair, reasonable, and adequate to the Settlement Classes, and respectfully submit that they merit final approval.

IV. THE SETTLEMENTS ARE FAIR, REASONABLE, AND ADEQUATE AND SHOULD BE APPROVED BY THE COURT.

A. The Governing Standards.

A court has broad discretion in deciding whether to approve a class action settlement. *In re: Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Practices and Prods. Liab. Litig.*, 952 F.3d 471, 484 (4th Cir. 2020) ("*Lumber Liquidators*") ("considerable deference" given to trial court in determining whether "to approve a class-action settlement as fair, reasonable, and adequate"), *citing*, *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000). In exercising this discretion, courts give considerable weight and deference to the views of experienced counsel as to the merits of an arm's-length settlement. *In re Montgomery Cnty. Real Estate Antitrust Litig.*, 83 F.R.D. 305, 315 (D. Md. 1979); *see also In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 254 (E.D. Va. 2009).

"Litigants should be encouraged to determine their respective rights between themselves and there is an overriding public interest in favor of settlement, particularly in class action suits." *Lomascolo v. Parsons Brinckerhoff, Inc.*, No. 1:08cv1310 (AJT/JFA), 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). "[A] court should be hesitant to substitute its own judgment for that of counsel." *Lomascolo*, 2009 WL 3094955, at *10 (citing *Cotton*, 559 F.2d at 1330). Due to the uncertainties and risks inherent in any litigation, courts take a common-sense approach and approve class action settlements if they

fall within a "range of reasonableness." *In re Celebrex (Celecoxib) Antitrust Litig.*, No. 2:14-cv-00361, 2018 WL 2382091, at *3 (E.D. Va. Apr. 18, 2018) ("The Settlement amount is well within the range of reasonableness in light of the best possible recovery and the risks the parties faced if the case continued to verdicts as to both liability and damages"); *In re Titanium Dioxide Antitrust Litig.*, No. RDB-10-0318, 2013 WL 5182093, at *3 (D. Md. Sept. 12, 2013) (court's inquiry is simply whether "there has been a basic showing that the" proposed settlements "are sufficiently within the range of reasonableness so that notice . . . should be given"). "[T]here is a strong initial presumption that the compromise is fair and reasonable…" *Mills*, 265 F.R.D. at 258 (quoting *In re MicroStrategy, Inc. Secs. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001)) (quotations omitted).

Moreover, a district court should guard against demanding too large a settlement, because a settlement "represents a compromise in which the highest hopes for recovery are yielded in exchange for certainty and resolution." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Ford Motor Co.*, No. 05-74730, 2006 WL 1984363, at *23 (E.D. Mich. July 13, 2006) (citation omitted); *accord Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 324 (3d Cir. 2011). *See, also, In re GMC Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 806 (3d Cir. 1995) ("T]he Court recognizes that "after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution").

B. The Proposed Settlements are Fair, Reasonable, and Adequate.

Fed. R. Civ. P. 23(e)(2) provides that a court may approve a settlement that would bind class members only after a hearing and on finding that the settlement is "fair, reasonable, and adequate." *Lumber Liquidators*, 952 F.3d at 484. The 2018 amendments to Rule 23(e) set forth a list of factors for a court to consider before approving a proposed settlement. The factors are whether:

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

Fed. R. Civ. P. 23(e)(2).

Prior to the 2018 amendments to Rule 23(e), the Fourth Circuit had developed its own factors to assess the "fairness" of a settlement: "(1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel in the area of [the] class action litigation." *Lumber Liquidators*, 952 F.3d at 484, *citing*, *Jiffy Lube*, 927 F.2d at 159. Similarly, the Fourth Circuit had specified several factors to assess the "adequacy" of a settlement: (1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendant[] and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement." *Id*. These Fourth Circuit factors "almost completely overlap with the new Rule 23(e)(2) factors…" *Id*. Further, the Advisory Committee Notes to Rule 23 acknowledge these judicially created standards, explaining that the newly enumerated Rule 23(e) factors are "core concerns" in every settlement

and were not intended to displace a court's consideration of other relevant factors in a particular case. Fed. R. Civ. P. 23 Advisory Committee Note (2018 Amendment).

As discussed more fully below, the Settlements with Olam and Birdsong are fair, reasonable, and adequate under the relevant criteria, and should be approved under Rule 23(e)(2).

1. The Class Representatives and Class Counsel Have Adequately Represented the Settlement Classes, and the Settlements Were Reached at Arm's Length.

The first two factors of Rule 23(e)(2) (adequate representation by class representatives and class counsel and whether the settlement was reached pursuant to arm's length negotiations) are procedural and focus on the history and conduct of the litigation and settlement negotiations. Fed. R. Civ. P. 23 Advisory Committee Note. Relevant considerations may include the experience and expertise of plaintiffs' counsel, the quantum of information available to counsel negotiating the settlement, the stage of the litigation and amount of discovery taken, the pendency of other litigation concerning the subject matter, the length of the negotiations, whether a mediator or other neutral facilitator was used, the manner of negotiation, whether attorneys' fees were negotiated with the defendant and if so how they were negotiated and their amount, and other factors that may demonstrate the fairness of the negotiations. *Id.*

The Plaintiffs and Class Counsel have more than adequately represented the Settlement Classes throughout this litigation and particularly in connection with the Settlements. The Plaintiffs' interests are the same as those of the Settlement Class members, and Class Counsel have extensive experience in handling class action antitrust and other complex litigation. They negotiated these settlements at arm's length with well-respected and experienced counsel for the Settling Defendants. Thus, there is a presumption that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion. *Lumber Liquidators*,

952 F.3d at 484-85, *citing*, *Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015) (fairness analysis primarily intended to ensure settlement is not collusive and results from arm's-length negotiations). Settlements reached by experienced counsel that result from arm's-length negotiations are entitled to deference from the court. *Lumber Liquidators*, 952 F.3d at 485 (experience of lawyers involved in negotiations a supporting factor in determining settlement was fair). *See, also, Dick v. Sprint Commc'ns*, 297 F.R.D. 283, 296 (W.D. Ky. 2014) ("Giving substantial weight to the recommendations of experienced attorneys, who have engaged in arms-length settlement negotiations, is appropriate....") (quoting *In re Countrywide Fin. Corp. Customer Data Sec. Breach Litig.*, No. 3:08-MD-01998, 2010 WL 3341200, at *4 (W.D. Ky. Aug. 23, 2010)); *In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 341 (E.D. Pa. 2007). Based on the foregoing, the Settlement is entitled to a presumption of fairness.

The negotiations that led to the settlements were at all times conducted by experienced counsel at arm's length. At the time of the negotiations, the parties had nearly completed fact and expert discovery and, thus, were acutely aware of strengths and weaknesses of their respective cases. *Lumber Liquidators*, 952 F.3d at 484, *citing*, *Berry*, 807 F.3d at 614 (settlement was fair where substantial discovery had been conducted). *See, also, Mills*, 265 F.R.D. at 254 ("[I]n cases in which discovery has been substantial and several briefs have been filed and argued, courts should be inclined to favor the legitimacy of a settlement.").

Because the proposed settlements were negotiated at arm's length by experienced counsel knowledgeable about the facts and the law, consideration of these factors fully supports final approval of the Settlements.[6]

2. The Relief Provided to the Classes is Adequate.

Courts "have recognized that the law favors the settlement of class action lawsuits." *See, e.g., Lomascolo*, 2009 WL 3094955, at *10; *International Union, United Auto., Aerospace, and Agr. Implement Workers of America v. General Motors Corp.*, 497 F.3d 615, 632 (6th Cir. 2007), *citing, In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) (noting general federal policy favoring the settlement of class actions). Generally, in evaluating a proposed class settlement, the court does "not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981). There are two reasons for this. First, the object of settlement is to avoid the determination of contested issues, so the approval process should not be converted into an abbreviated trial on the merits. *Montgomery Cnty.*, 83 F.R.D. at 315-16 (internal citations omitted) (court must weigh likelihood of plaintiffs' recovery on merits against amount offered in settlement; it is not necessary or desirable to try case to determine whether settlement is adequate because "very purpose of settlement is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation."). Second, "[b]eing a preferred means of dispute resolution, there is a strong presumption by courts in favor of settlement." *In re Telectronics Pacing Sys. Inc.*, 137 F. Supp. 2d 985, 1008-09 (S.D. Ohio 2001) (citing *Manual for Complex Litigation (3d ed.)* § 30.42).

[6] There was no negotiation of attorneys' fees. As noted above, a motion seeking an award of attorneys' fees and service awards will be filed when Plaintiffs' claims against Golden Peanut have been resolved.

The relief provided to the Settlement classes consists of cash payments by Olam and Birdsong totaling $57,750,000, together with cooperation by the Settling Defendants. Class Counsel believe that these substantial cash payments, along with cooperation, constitute more than adequate relief for the Settlement Classes.

a. The Costs, Risks, and Delay of Trial and Appeal.

When considering the adequacy of the relief to the class in determining the fairness of a class action settlement, the court should consider whether it falls within the range of reasonableness, factoring in the uncertainties and risks of litigating the case to completion. *See Mills*, 265 F.R.D. at 256 (Analyzing the adequacy of a settlement requires the Court "to examine how much the class sacrifices in settling a potentially strong case in light of how much the class gains in avoiding the uncertainty of a potentially difficult case"). These risks must be weighed against the significant settlement consideration: 1) the certainty of cash payments by the Settling Defendants totaling $57,750,000, and 2) valuable cooperation by each Settling Defendant in Plaintiffs' continued litigation against Golden Peanut. *Id.* ("When viewed against the substantial and certain benefits that a settlement would provide, these considerations support approval of the proposed partial settlement") (citing *In re Glob. Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004)) (quotation removed).

In short, Class Counsel believe that the Settlements are an excellent result. Weighing the Settlements' substantial benefits against the risks and costs of continued litigation strongly supports approval. "The high risk faced by taking the case to a jury verdict demonstrates the adequacy of this . . . settlement." *In re Genworth Fin. Secs. Litig.*, 210 F. Supp. 3d 837, 842 (E.D. Va. 2016). Plaintiffs are confident in the merits of their case, but success is not certain. Olam and Birdsong are each represented by highly experienced and competent counsel. They deny Plaintiffs'

allegations and assert numerous defenses. Plaintiff believes Settling Defendants are prepared to defend this case through trial and appeal. Risk, inherent in any litigation, is particularly true with respect to complex class actions such as this. So, in reaching the Settlements, Plaintiff accounted for the risk that the Settling Defendants could prevail with respect to certain legal or factual issues, which could reduce or eliminate any potential recovery.

The Settlements represent a compromise between the parties after full consideration of the risks, expense, and delay of further litigation, including the possibility that Plaintiffs might recover nothing. *Mills*, 265 F.R.D. at 256 (Determining adequacy "asks the Court to weigh the settlement in consideration of the substantial time and expense litigation of this sort would entail if a settlement was not reached"); *Brunson v. Louisiana-Pacific Corp.*, 818 F. Supp. 2d 922, 927 (D.S.C. 2011) ("The Settlement affords a substantial and immediate remedy for the Class Members while obviating the need for further expensive and time-consuming discovery and motion practice; a lengthy, uncertain and expensive trial; and appeals on numerous complex legal and factual issues"). *See also Telectronics*, 137 F. Supp. 2d at 1013 (settlement avoids the costs, delays, and multitude of other problems associated with complex class actions).

As the Settlements have not yet been finally approved and Plaintiffs are still litigating the case against Golden Peanut, it is not appropriate to discuss with any specificity Class Counsel's analysis of the risks of litigation. Class Counsel believe that at this point it is sufficient to state that the Settlements avoid the inherent risks associated with this complex antitrust litigation.

In deciding whether a proposed settlement warrants approval, courts should consider the judgment of counsel and whether the settlement was the result of good-faith negotiations. *In re Montgomery Cnty. Real Est. Antitrust Litig.*, 83 F.R.D. at 315; *U.S. Fid. & Guar. Co. v. Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1577 (D.S.C. 1991) ("The court will, in approving the

settlement, ascertain whether the settlement was entered in good faith"). Class Counsel's judgment that the Settlements are in the best interests of the Settlement Classes is entitled to significant weight. *Brunson*, 818 F. Supp. 2d at 927; *DeWitt v. Darlington Cnty. S.C.*, No. 4:11-cv-00740, 2013 WL 6408371, at *4 (D.S.C. Dec. 6, 2013) (citing *Lomascolo*, 2009 WL 3094955, at *10 ("A settlement fairness hearing is not a trial, and the court should defer to the evaluation and judgment of experienced trial counsel in weighing the relative strengths and weaknesses of the parties' respective positions and their underlying interests in reaching a compromise")).

Class Counsel have extensive experience in handling antitrust class actions and other complex litigation. They have negotiated the Settlements at arm's length with well-respected and experienced counsel for Settling Defendants. Class Counsel believe that the proposed Settlements eliminate the risks, expense, and delay with respect to continued litigation against Settling Defendants, ensure a substantial payment to the Settlement Classes, and provide the Settlement Classes with valuable cooperation. This factor also supports final approval of the proposed Settlements.

b. The Effectiveness of Any Proposed Method of Distributing Relief to the Classes, Including the Method of Processing Class Member Claims, if Required.

This case presents no difficulties in identifying claimants or distributing settlement proceeds. Although the current plan is to hold off on distributing the Settlement Fund to Settlement Class members until after Plaintiffs' claims against Golden Peanut have been resolved, Class Counsel intend to propose that the net settlement funds be distributed pro rata to approved claimants. Angeion, the settlement claims administrator appointed by the Court, will review claim forms, assist Class Counsel in making recommendations to the Court concerning the disposition

of those claims, and mail checks to approved claimants for their *pro-rata* shares of the net settlement funds.

A plan of allocation that awards class members a pro rata share of a settlement is "fair, reasonable, and adequate." *In re Genworth Fin. Secs. Litig.*, 210 F. Supp. 3d 837, 843 (E.D. Va. 2016) (finding that pro rata plan for distribution was "fair, adequate, and reasonable."); *In re Neustar, Inc. Secs. Litig.*, No. 1:14cv885 (JCC/TRJ), 2015 WL 8484438, at *6 (E.D. Va. Dec. 8, 2015) (ruling that pro rata plan of allocation met the standards of "fairness, adequacy, and reasonableness"); *In re MicroStrategy, Inc. Secs. Litig.*, 148 F. Supp. 2d at 669. *See*, *also*, *In re Ikon Office Solutions, Inc., Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000); *Smith v. MCI Telecoms Corp.*, No. Civ. A. 87-2110-EEO, 1993 WL 142006, at *2 (D. Kan. April 28, 1993); 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 12.35, at 350 (4th ed. 2002) ("*Newberg*") (noting that *pro-rata* allocation of a settlement fund "is the most common type of apportionment of lump sum settlement proceeds for a class of purchasers" and "has been accepted and used in allocating and distributing settlement proceeds in many antitrust class actions"). This factor supports final approval.

c. The Terms of Any Proposed Award of Attorneys' Fees, Including Timing of Payment.

The Settlement Agreements provide that attorneys' fees shall be paid solely out of the settlement funds subject to court approval, and that final approval of the settlement is not contingent on the outcome of any petition for attorneys' fees.[7] Accordingly, this factor supports final approval.

[7] As stated above, there was no negotiation of attorneys' fees. A motion seeking an award of attorneys' fees and service awards will be filed after Plaintiffs' claims against Golden Peanut have been resolved.

d. There Are No Separate Agreements Relating to the Proposed Settlements.

There are no separate agreements that would affect the settlement amounts, the eligibility of class members to participate in the settlements or exclude themselves from them, or the treatment of class member claims. This factor is therefore neutral.

3. The Settlements Treat Class Members Equitably Relative to Each Other.

Class members will be treated equitably relative to each other in terms of their eligibility for a *pro-rata* portion of the Settlement Fund and their right to opt-out of the Settlement Classes. Likewise, each class member gives the same releases. The Settlement Agreements contemplate that Class Counsel may seek service awards for Class Representatives, as has been done in other cases. Such awards are justified as a reward for the Class Representatives' efforts on behalf of the class. *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 578 (E.D. Va. 2016) ("Courts recognize the purpose and appropriateness of service awards to Class Representatives"). "Service awards are 'intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney general." *Galloway v. Williams*, No. 3:19-cv-470, 2020 WL 7482191, at *6 (E.D. Va. Dec. 18, 2020) (quoting *Berry*, 807 F.3d at 613).

Notably, the Settlements were provided to the Class Representatives for their review and approval without any discussion of service awards, such that the prospect of such awards was not the reason the Class Representatives approved them. *Hillson v. Kelly Servs. Inc.*, No. 2:15-cv-10803, 2017 WL 279814, at *6 (E.D. Mich. Jan. 23, 2017). Plaintiffs submit that this factor supports final approval.

4. The Settlements are Consistent with the Public Interest.

There is a public interest favoring class action settlements, which minimize the litigation expenses of the parties and reduces the strains such litigation imposes upon already scarce judicial resources. *South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990); *Lomascolo*, 2009 WL 3094955, at *10; *U.S. Fid. & Guar. Co. v. Patriot's Point Dev. Auth.*, 788 F. Supp. 880, 882 (D.S.C. 1992) (discussing "strong federal interest of settlement of complex class action securities cases"). "The Fourth Circuit adheres to a strong policy of fostering settlement to 'advantage the parties and to conserve scarce judicial resources.'" *Free Bridge Auto Sales, Inc. v. Focus, Inc.*, No. 3:08-CV-00002, 2014 WL 521661, *2 (W.D. Va. Feb. 4, 2014) (quoting *United States ex rel. McDermitt, Inc. v. Centex-Simpson Constr. Co.*, 34 F. Supp. 2d 397, 399 (N.D. W. Va. 1999)).

Consideration of the above factors clearly supports final approval of the proposed Settlements. Class Counsel respectfully submit that the Settlements are in the best interests of the Settlement Classes and should be finally approved.

V. NOTICE WAS PROPER UNDER RULE 23 AND SATISFIED DUE PROCESS.

"[U]pon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3) [ ] the court must direct to class members 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). Rule 23(e)(1) provides that a court must direct notice in a "reasonable manner" to all class members who would be bound by a proposed settlement. Rule 23(e) notice must contain a summary of the litigation sufficient "to apprise interested parties of the pendency of the action and to afford them an opportunity to present

their objections." *UAW*, 497 F.3d at 629 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). *Accord In re Insurance Brokerage Antitrust Litig.*, 297 F.R.D. 136, 151 (E.D. Pa. 2013). In addition, the "notice must clearly and concisely state in plain, easily understood language:" (1) the nature of the action; (2) the class definition; (3) the class claims, issues, or defenses; (4) that a class member may enter an appearance through counsel; (5) that the court will exclude from the class any member who requests exclusion; (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment on class members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

For all the reasons set forth in the Court's Notice Order, the Notice Program and forms of notice utilized by Plaintiffs satisfy these requirements. The Notice sets forth all information required by Rule 23(c)(2)(B) and 23(e)(1) and informs potential members of the Olam and Birdsong Settlement Classes that Class Counsel do not intend to distribute any proceeds from the Settlements to qualifying Settlement Class members at this time, but instead intend to combine any distribution of the Settlements' proceeds with proceeds from any future settlement or other recovery in the litigation. The Notice also informs Settlement Class members that Class Counsel will seek attorneys' fees and service awards for the Class Representatives at a later date, and that such requests will be subject to Court approval and further notice. Finally, the Notice advises that Class Counsel are currently requesting reimbursement of litigation costs and expenses.

Pursuant to the Notice Order, the Notice was mailed to potential Settlement Class members on January 12, 2021; the process of publication and emailing of Summary Notice began on January 13, 2021; a press release will be issued and online banner advertisements and social media advertising will commence on shortly thereafter; and finally, the Notice was (and remains) posted online at www.PeanutFarmersAntitrustLitigation.com, the website dedicated to this litigation.

The content and method for dissemination of notice fulfill the requirements of Federal Rule of Civil Procedure 23 and due process.

VI. THE PROPOSED PLAN FOR DISTRIBUTION OF THE SETTLEMENT FUNDS IS FAIR, REASONABLE, AND ADEQUATE, AND MERITS APPROVAL.

Approval of a settlement fund distribution in a class action is governed by the same standards applicable to approval of the settlement as a whole: the plan of distribution must be fair, reasonable, and adequate. "The court also must consider whether the distribution plan of the settlement fund meets the standards of fairness, reasonableness, and adequacy." *Speaks v. U.S. Tobacco Coop., Inc.* 324 F.R.D. 112, 155 (E.D.N.C. 2018). *See, also, Ikon Office Solutions*, 194 F.R.D. at 184; *MCI Telecoms Corp*., 1993 WL 142006, at *2; 4 *Newberg*, § 12.35, at 350 (noting that *pro-rata* allocation of a settlement fund "is the most common type of apportionment of lump sum settlement proceeds for a class of purchasers" and "has been accepted and used in allocating and distributing settlement proceeds in many antitrust class actions"). An allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel. As with other aspects of a settlement, the opinion of experienced and informed counsel is entitled to considerable weight. *In re American Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001); *Strang v. JHM Mortg. Secs. Ltd. P'ship*, 890 F. Supp. 499, 501–02 (E.D. Va. 1995) ("[T]he Court is persuaded that Plaintiff's counsel, with their wealth of experience and knowledge . . . engaged in sufficiently extended and detailed negotiations to secure a favorable settlement for the Class"); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975) ("While the opinion and recommendation of experience counsel is not to be blindly followed by the trial court, such opinion should be given weigh in evaluating the proposed settlement").

The Notice sent to potential Settlement Class members on January 12, 2021 explains that the proceeds of the Settlement Fund will not be distributed at this time but will be done pursuant to a plan of distribution approved by the Court and upon further notice to the Settlement Class members. More specifically, Class Counsel will recommend a plan of distribution of settlement funds to Settlement Class members who file timely and proper claim forms; the distribution plan is that the Settlement Fund, plus accrued interest, will be allocated among approved claimants according to the amount of their recognized sales of Runner Peanuts to Defendants during the Class Period, after payment of attorneys' fees, litigation and administration costs and expenses, and service awards for Class Representatives.[8]

Courts in the Fourth Circuit have approved similar pro-rata distribution plans in other class action cases. *See, e.g., In re MicroStrategy, Inc. Secs. Litig.*, 148 F. Supp. 2d at 669 (noting that plan of allocation treated class members fairly by awarding pro rata share claimants); *In re Genworth Fin. Secs. Litig.*, 210 F. Supp. 3d at 843 (finding pro rata plan for distribution was "fair, adequate, and reasonable."); *In re Neustar, Inc. Secs. Litig.*, No. 1:14cv885 (JCC/TRJ), 2015 WL 8484438, at *6 (E.D. Va., Dec. 8, 2015) (ruling that pro rata plan of allocation met the standards of "fairness, adequacy, and reasonableness"); *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 461 (D. Md. 2014) (approving of pro rata allocation plan as "fair and reasonable"). *See also* 4 *Newberg*, § 12.35, at 353-54 (noting propriety of *pro-rata* distribution of settlement funds). "Settlement distributions, such as this one, that apportion funds according to the relative amount of damages suffered by class members have repeatedly been deemed fair and reasonable." *In re Vitamins Antitrust Litig.*, No. 99-197, 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000) (finding

[8] In conjunction with a subsequent notice, Settlement Class members will be sent a claim form, which will also be available on the litigation website.

proposed plan for pro-rata distribution of partial settlement funds was fair, adequate and reasonable). *Accord In re Prandin Direct Purchaser Antitrust Litig.*, C.A. No. 2:10-cv-12141-AC-DAS, 2015 WL 1396473, at *3 (E.D. Mich. Jan. 20, 2015) (approving a plan as fair, reasonable, and adequate that utilized a pro-rata method for calculating each class member's share of the settlement fund). The proposed plan for allocation and distribution satisfies the above criteria and should receive final approval.

VII. CERTIFICATION OF THE SETTLEMENT CLASSES FOR PURPOSES OF EFFECTUATING THE PROPOSED SETTLEMENTS IS APPROPRIATE.

In preliminarily approving the Olam and Birdsong Settlements, the Court found that Rule 23's requirements were met and provisionally certified Olam and Birdsong Settlement Classes. *See* Preliminary Approval Orders at ¶ 2 (ECF Nos. 514-515). The "Settlement Classes" certified by the Court are identical:

> All persons or entities in the United States who sold raw, harvested runner peanuts to any of the Defendants, their subsidiaries or joint-ventures, from January 1, 2014 through December 31, 2019 (the "Class Period"). Specifically excluded from this 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.

Id.

It is well established that a class may be certified for purposes of settlement. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Automotive Parts*, 2:12-cv-00103, ECF No. 497, at 24; *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 516-19 (E.D. Mich. 2003); *Thacker v. Chesapeake Appalachia, LLC*, 259 F.R.D. 262, 266-70 (E.D. Ky. 2009). As demonstrated below, the Olam and Birdsong Settlement Classes meet all the requirements of Rule 23(a) and Rule 23(b)(3) for settlement purposes.

A. The Olam and Birdsong Settlement Classes Satisfy Rule 23(a).

Certification of a class requires meeting the requirements of Fed. R. Civ. P. 23(a) and one of the subsections of Rule 23(b). *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004) ("Every class action must satisfy the four requirements of Rule 23(a) . . . . In addition, a proposed class must also satisfy the requirements of one of the three Rule 23(b) categories.") (citing *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 337 (4th Cir. 1998)); *Manuel v. Wells Fargo Bank, Nat'l Ass'n*, No. 3:14CV238, 2015 WL 4994549, *4 (E.D. Va. Aug. 19, 2015). Certification is appropriate under Rule 23(a) if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *See Lienhart v. Dryvit Sys.*, 255 F.3d 138, 146–47 (4th Cir. 2001); *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 545 (E.D. Va. 2000).

1. The Settlement Classes are Sufficiently Numerous.

Class certification under Rule 23(a)(1) is appropriate where a class contains so many members that joinder of all would be "impracticable." Fed. R. Civ. P. 23(a)(1). There is no strict numerical test to satisfy the numerosity requirement; the most important factor is whether joinder of all the parties would be impracticable for any reason. "In reviewing the Rule 23(a) requirements, we note that numerosity requires that a class be so large that 'joinder of all members is impracticable.'" *Lienhart*, 255 F.3d at 146 (quoting Fed.R.Civ.P. 23(a)(1)).

Moreover, numerosity is not determined solely by the size of the class, but also by the geographic location of class members. "Other factors such as the nature of the action, the size of

the individual claims, and the location of the class members, also inform the numerosity analysis." *Adams v. Devos*, No. 3:15-3592, 2017 WL 3633744, *5 (S.D. W. Va. Aug. 23, 2017) (citing *Colo. Cross Disability Coal v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1215 (10th Cir. 2014)). "Factors including the nature of the action, the size of the individual claims, and the location of the members of the class may contribute to a court's decision." *Brown v. Nucor Corp.*, No. 2:04-22005-CWH, 2007 WL 2284581, at *9 (D.S.C. Aug. 7, 2007). "When considering whether joinder is impractical, factors to consider are 'the size of the class, the nature of the action the location of the class members, the expediency of joinder and the practicality of multiple lawsuits." *Jeffreys v. Commc'ns Workers Am., AFL-CIO*, 212 F.R.D. 320, 322 (E.D. Va. 2003) (citing *McGlothlin v. Connors*, 142 F.R.D. 626, 632 (W.D. Va. 1992)).

Here, there are thousands of potential members of the Settlement Classes, geographically dispersed throughout the southeastern United States. Thus, joinder of all Settlement Class members would be impracticable, satisfying Rule 23(a)(1).

2. There are Common Questions of Law and Fact.

Fed. R. Civ. P. 23(a)(2) requires that a proposed class action involve "questions of law or fact common to the class." "To satisfy this [commonality] requirement, there need be only one single issue common to the class." *Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 199 (E.D. Va. 2015). "To establish commonality, the party seeking certification must 'demonstrate that the class members have suffered the same injury' and that their claims 'depend upon a common contention.'" *Boyd v. Coventry Health Care Inc.*, 299 F.R.D. 451, 458 (D. Md. 2014) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). "In the antitrust context, commonalty is often readily satisfied because allegations of conspiracy . . . normally constitute a 'central or single overriding issue . . . sufficient to establish a common question.'" *In re Zetia (Ezetimibe)*

Antitrust Litig., No. 2:18-md-2836, 2020 WL 3446895, at *18 (E.D. Va. June 18, 2020); *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 338 (D. Md. 2012) ("Accordingly, this Court finds by a preponderance of the evidence that the existence of the alleged conspiracy, standing alone, is sufficient to establish commonality"). *See, also*, *In re Flat Glass Antitrust Litig.*, 191 F.R.D 472, 478 (W.D. Pa. 1999) (citing 4 *Newberg on Class Actions*, § 18.05-15 (3d ed. 1992)).

Here, whether Defendants participated in an illegal conspiracy to artificially depress the prices of Runner Peanuts is a factual question common to all members of the Settlement Classes because it is an essential element of proving an antitrust violation. Common legal questions include whether, if such an agreement was reached, Defendants violated the antitrust laws and the impact on members of the Settlement Classes. *In re Indep. Gasoline Antitrust Litig.*, 79 F.R.D. 552, 557 (D. Md. 1978) ("The question of whether a conspiracy existed to fix prices is a common question sufficient to satisfy the requirement of Rule 23(a)(2)"); *Zetia*, 2020 WL 3446895, at *18 ("[Plaintiffs] allege that they were injured as a result of Defendants' unlawful conspiracy . . . . Defendants sharply dispute those claims . . . . As this court and others have held, such issues easily qualify as common questions of law and fact under Rule 23(a)(2)").

3. Plaintiffs' Claims are Typical of Those of the Settlement Classes.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "[T]ypicality refers to the nature of the claims of the class representative and not necessarily to the specific facts from which the case arose . . . . Where the class representatives' claims are such that they will have to prove the same elements as the remainder of the class, then typicality should be found notwithstanding factual differences between various members of the class." *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 38 (E.D. Va. 1981) (citing *Minn. v. U.S. Steel Corp.*, 44. FR.D. 559 (D. Minn. 1968));

Butt v. Allegheny Pepsi-Cola Bottling Co., 116 F.R.D. 486, 488 (E.D. Va. 1987) (finding typicality despite "many products sold at varied prices and conditions" because class members still sought "to prove the same elements"); *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006) ("That is not to say that typicality requires that the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned.").

"Typicality therefore requires the named plaintiffs to demonstrate '(1) that their interests are squarely aligned with the interests of the class members and (2) that their claims arise from the same events and are premised on the same legal theories as the claims of the class members." *Zetia*, 2020 WL 3446895, at *18 (quoting *Jeffreys*, 212 F.R.D. at 322); *Morris v. Wachovia Secs., Inc.*, 223 F.R.D. 284, 295 (E.D. Va. 2004) (quoting *Fisher v. Va. Electric & Power Co.*, 217 F.R.D. 201, 212 (E.D. Va. 2003) ("In general, the typicality requirement is met when class representatives show that . . . 'their claims arise from the same events or course of conduct and are premised on the same legal theories as the claims of the class members")).

Here, Plaintiffs' claims arise from the same course of conduct as the claims of the other Settlement Class members: Defendants' alleged violations of the antitrust laws. Plaintiffs and the other Settlement Class members are proceeding on the same legal claim, alleged violations of Section 1 of the Sherman Antitrust Act. Accordingly, the Rule 23(a)(3) typicality requirement is satisfied.

4. Plaintiffs Will Fairly and Adequately Protect the Interests of the Settlement Classes.

Rule 23(a)(4) requires that the class representative fairly and adequately protect the interests of the class. "The two requirements of 23(a)(4) are the absence of potential conflicts between the representatives and other members of the class and assurances that the case will be

prosecuted vigorously." *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 40 (E.D. Va. 1981); *Nat'l Constructors Ass'n v. Nat'l Elec. Contractors Ass'n, Inc.*, 498 F. Supp. 510, 546 (D. Md. 1980) ("The courts have identified two principal criteria to be considered in connection with that part of the Rule 23(a)(4) analysis. First, the proposed class representatives must show that their interests are coextensive with those of the class members to such a degree that the representatives will vigorously prosecute or defend the class's interests. Second, the proposed class representatives must show that they have no interests which are antagonistic to those of the class members").

These requirements are met here. The interests of the Class Representatives are common to those of other Settlement Class members. The Class Representatives all sold Runner Peanuts to Defendants. Plaintiffs and the other Settlement Class members claim that they were injured because of the alleged conspiracy and seek to prove that Defendants violated the antitrust laws. Plaintiffs interests are thus aligned with those of the other Settlement Class members.

Moreover, Plaintiffs have retained qualified and experienced counsel to pursue this action.[9] Class Counsel vigorously represented Plaintiffs and the Settlement Classes throughout this litigation, particularly in settlement negotiations with each Settling Defendant. Adequate representation under Rule 23(a)(4) is therefore satisfied.

B. Plaintiffs' Claims Satisfy the Prerequisites of Rule 23(b)(3) for Settlement Purposes.

In addition to satisfying Rule 23(a), Plaintiffs must show that the proposed class action satisfies Rule 23(b)(3), which authorizes class certification if "questions of law or fact common to

[9] Rule 23(g) requires the court to examine the capabilities and resources of class counsel to determine whether they will provide adequate representation to the class. As the Court's Certification Order makes clear, Class Counsel are more than adequate representatives of the Settlement Classes.

the members of the class predominate over any questions affecting only individual members, and … a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Titanium Dioxide*, 284 F.R.D. at 340 (quoting Fed.R.Civ.P. 23(b)(3)) ("Rule 23(b)(3) [] requires a finding that common questions '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"). "The predominance test requires the court to determine whether the common questions of law or fact predominate over any questions affecting only individual class members. The question is whether the class is cohesive enough to warrant adjudication by representation." *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 213 (E.D. Va. 2003) (citing *Jeffreys*, 212 F.R.D. at 323).

1. Common Legal and Factual Questions Predominate.

Rule 23(b)(3)'s requirement that common issues predominate ensures that a proposed class is "sufficiently cohesive" to warrant certification. *Amchem*, 521 U.S. at 623. The predominance requirement is met where "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007) (citation omitted). *DeLoach v. Philip Morris Co.*, 206 F.R.D. 551, 561 (M.D.N.C. 2002) (quoting *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 689 (N.D. Ga. 1991) ("Instead the evidence concerning conspiracy . . . reveals a 'common nucleus of operative facts' concerning the alleged antitrust violation."). Courts have repeatedly recognized that horizontal price-fixing cases are particularly well-suited for class certification because proof of the conspiracy is a common, predominating question. *Amchem*, 521 U.S. at 625.

In this case, the same set of core operative facts and theory of liability apply to each member of the Settlement Classes. As discussed above, whether Defendants entered into an illegal agreement to artificially depress the prices of Runner Peanuts is a question common to all members of the Settlement Classes because it is an essential element of proving an antitrust violation. Common questions also include whether, if such an agreement was reached, Defendants violated the antitrust laws, and whether Defendants' acts caused anticompetitive effects. *Titanium Dioxide*, 284 F.R.D. at 345 (finding that can show predominating common questions by demonstrating "a common method for proving that the class plaintiffs paid higher actual prices than in the but-for world"); *In re Indep. Gasoline Antitrust Litig.*, 79 F.R.D. 552, 557 (D. Md. 1978) ("The question of whether a conspiracy existed to fix prices is a common question sufficient to satisfy the requirement of Rule 23(a)(2))).

If Plaintiffs and the other members of the Settlement Classes were to bring their own individual actions, they would each be required to prove the same wrongdoing by Defendants to establish liability. Therefore, common proof of Defendants' violations of antitrust law will predominate.

2. A Class Action is Superior to Other Methods of Adjudication.

Rule 23(b)(3) lists factors to be considered in determining the superiority of proceeding as a class action compared to individual methods of adjudication: (1) the interests of the members of the class in individually controlling the prosecution of separate actions; (2) the extent and nature of other pending litigation about the controversy by members of the class; (3) the desirability of concentrating the litigation in a particular forum; and (4) the difficulties likely to be encountered in management of the class action. Fed. R. Civ. P. 23(b)(3). Consideration of these factors evinces that a Class Action is superior to other methods of adjudication. Due to the relative size of

Settlement Class members' claims and the unlikely prospect that they would want to pursue individual litigation against the large and well-funded Defendants, a class action may be the only realistic method of adjudicating Plaintiffs' claims. And if a Settlement Class member wants to control its own litigation, it can do so by opting out of the Class and either or both of the Settlement Classes. Thus, consideration of factors (1) – (3) demonstrates the superiority of a class action. With respect to factor (4), in *Amchem*, 521 U.S. at 620, the Court explained that when a court is asked to certify a settlement-only class it need not consider the difficulties in managing a trial of the case because the settlement will end the litigation without a trial. *See Cardizem*, 218 F.R.D. at 517.

In addition, due to the complexities and expense of antitrust litigation, it is unlikely that individual Settlement Class members could bring suits on their own. *Speaks*, 324 F.R.D. at 141 ("[T]he burden and expense of individual litigation, and the legal and practical difficulty of proving individual claims . . . make it highly unlikely that individual class members could obtain the relief achieved in this settlement if they were forced to proceed on their own"); *In re Outer Banks Power Outage Litig.*, No. 4:17-CV-141, 2018 WL 2050141, at *6 (E.D.N.C. May 2, 2018) ("[T]he burden and expense of individual litigation, and the legal and practical difficulty of proving individual claims concerning these events, make it highly unlikely that individual class members could obtain the relief achieved in this settlement if they were forced to proceed on their own"); *Nat'l Constructors Ass'n v. Nat'l Elec. Contractors Ass'n, Inc.*, 498 F. Supp. 510, 550–51 (D. Md. 1980) ("[T]he cost to each plaintiff of litigating its claim individually might preclude meritorious claims and C the deterrent effect of the Sherman Act's treble-damage provision"); *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 228 (E.D. Va. 2003) (*Windham v. American Brands, Inc.*, 545 F.2d 68–69 (4th Cir. 1977)) ("[I]t appears that the end result of the case-by-case approach urged by the Defendants would be that few [plaintiffs] would proceed on their claims because the economic

costs could significantly exceed the potential benefits. Such a result would be inconsistent with the purpose of Rule 23, which is 'to achieve economies of time, effort, and expense, and promote uniformity of decisions as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results'").

Moreover, by proceeding as a class action, both judicial and private resources will be more efficiently utilized to resolve the predominating common issues, which will bring about a single outcome that is binding on all members of the Settlement Classes. The alternatives to a class action are a multiplicity of separate lawsuits with possibly contradictory results for some plaintiffs, *In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 234 (E.D. Pa. 2012), or no recourse for many class members for whom the cost of pursuing individual litigation would be prohibitive. *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 527 (S.D.N.Y 1996). Thus, class litigation is superior to the alternatives in this case.

VIII. CONCLUSION

For the foregoing reasons, Class Counsel respectfully request that the Court:

(1) Grant final approval of the Settlements;

(2) Certify the Settlement Classes; and,

(3) Approve the proposed plan for distribution of the Settlement Fund.

Dated: January 13, 2021

Respectfully submitted,

By */s/ Kevin J. Funk*
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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically e-mail notification of such filing to all counsel of record.

To the best of my knowledge, there are no other attorneys or parties who require service by U.S. Mail.

/s/ Kevin J. Funk

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