

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE BROILER CHICKEN ANTITRUST
LITIGATION

No. 1:16-cv-08637

This Document Relates To:

Honorable Thomas M. Durkin
Magistrate Judge Jeffrey T. Gilbert

All Commercial and Institutional Indirect
Purchaser Plaintiff Actions

**MEMORANDUM OF LAW IN SUPPORT OF COMMERCIAL AND INSTITUTIONAL
INDIRECT PURCHASER PLAINTIFFS' UNCONTESTED MOTION FOR
PRELIMINARY APPROVAL OF SETTLEMENT WITH DEFENDANT HARRISON
POULTRY, INC.**

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I. INTRODUCTION

The Commercial and Institutional Indirect Purchaser Plaintiffs (“CIIPPs”) respectfully move the Court for preliminary approval of a proposed settlement between CIIPPs and Defendant Harrison Poultry, Inc. (“Harrison Poultry” or “Settling Defendant”).¹ The proposed settlement—CIIPPs’ eighth in this action—was reached through extensive arm’s-length, hard-fought negotiations, after significant litigation, class certification, and discovery, and Interim Class Counsel believes that the settlement is in the best interests of the class. *See* Declaration of Adam J. Zapala (“Zapala Decl.”) ¶¶ 3-4, 6-8, 10. Harrison Poultry has agreed to pay two million eight hundred thousand dollars (\$2,800,000.00) in monetary consideration to the Settlement Class and provide specified types of cooperation to aid in the continued prosecution of this action. When combined with prior settlements between CIIPPs and other settling defendants, this settlement brings the total recovery for the CIIPP class to \$107,690,000. (ECF No. 5517-1 at ¶26).

CIIPPs estimate that Harrison Poultry’s market share for the sale of Broilers to the CIIPP class constitutes 0.83%. Thus, this settlement has a value of \$3,373,493.98 per market share point. This is at the upper range of the settlements CIIPPs have achieved, on a per market share point basis, when compared with CIIPPs’ initial seven settlements—CIIPPs’ recovery from the first four settlements (with defendants Amick, Fieldale, Peco, and Georges), ranged from approximately \$850,000 to \$1.2 million per market share point (ECF No. 5079-1 at ¶5), and CIIPPs recovered almost \$1.8 million per market share point from Mar-Jac, over \$3.2 million per market share point from Pilgrim’s and over \$3.3 million per market share point from Tyson. (ECF No. 5079-1 at ¶5).

¹ The Harrison Poultry Settlement Agreement is attached as Exhibit A to the Declaration of Adam J. Zapala.

As discussed in the memorandum, given the pendency of additional settlement discussions with Defendants, Co-Lead Counsel will at a later date move the Court to approve a program to notify members of the Settlement Class of this and any other then-pending settlements, as CIIPPs believe it would be more efficient to defer the notice and claims process until a later date.

II. BACKGROUND

This is an antitrust class action filed against certain producers of Broilers. CIIPPs allege that Defendants conspired and combined to fix, raise, maintain, and stabilize the price of Broilers sold in the United States. (*See* ECF No. 3929) (CIIPPs' Seventh Amended Consolidated Amended Complaint, and hereinafter the "Complaint") at ¶ 1.

This litigation was commenced in September 2016. On October 14, 2016, the Court appointed the undersigned as Interim Co-Lead Counsel for the CIIPPs. (ECF No. 144). Thereafter, CIIPPs filed a Consolidated Amended Complaint on October 28, 2016. (ECF No. 179). The current, operative complaint was filed on October 23, 2020. (ECF No. 3929) (public redacted), 3931 (sealed unredacted). On January 27, 2017, all Defendants named at the time filed a motion to dismiss CIIPPs' complaint. (ECF No. 292). The Court largely denied this motion on November 11, 2017. (ECF No. 541). On February 20, 2018, CIIPPs filed a fourth amended consolidated complaint, naming Harrison Poultry as a defendant. (ECF No. 746.) Discovery commenced in earnest and proceeded apace, though it subsequently slowed owing to a stay requested by the Department of Justice, (*see* ECF Nos. 2302, 3153) and the COVID-19 pandemic. On May 27, 2022, after heavily contested briefing, dueling expert reports, and a two-day evidentiary hearing, this Court certified the CIIPP classes. *See* ECF No. 5644.

CIIPPs have previously settled and received preliminary and final approval of seven other settlements: (1) the Fieldale settlement for \$1.4 million, (ECF No. 5517-1 at ¶9, ECF No. 5536);

(2) the Amick settlement for \$2.95 million, (ECF No. 5517-1 at ¶12, ECF No. 5536); (3) the Peco settlement for \$3.525 million, (ECF No. 5517-1 at ¶14, ECF No. 5536); (4) the George’s settlement for \$3.525 million, (ECF No. 5517-1 at ¶16, ECF No. 5536); (5) the Mar-Jac settlement for \$5.99 million, (ECF No. 5517-1 at ¶20, ECF No. 5536); (6) the Pilgrim’s settlement for \$44 million (plus up to \$1 million additional to be used for notice and settlement administration), (ECF No. 5517-1 at ¶19, ECF No. 5536); and (7) the Tyson’s settlement for \$42.5 million, (ECF No. 5517-1 at ¶18, ECF No. 5536).

III. SUMMARY OF SETTLEMENT AGREEMENT

The proposed settlement reached here was the product of intensive settlement negotiations that took place over years, beginning in advance of class certification, and included extensive arm’s length negotiations and many rounds of give-and-take between CIIPPs’ Co-Lead Counsel and counsel for Harrison Poultry. *See Zapala Decl.* ¶¶ 3-10. Based on the arm’s-length negotiations between the parties and the extensive discovery record at the time of settlement, CIIPPs agreed to settle with Harrison Poultry in return for its agreement to pay two million eight hundred thousand dollars (\$2,800,000.00), and to provide specified types of cooperation. *See Harrison Poultry Settlement Agreement, Zapala Decl. Ex. A §§ II.C.3.* Harrison Poultry’s cooperation includes using “reasonable efforts to authenticate and provide foundation for admissibility of documents and/or things produced in the Action when Harrison Poultry can do so in good faith, where the facts indicate that the documents and/or things at issue are authentic and that such foundation is proper.” *Id.* CIIPPs agreed to release claims against Harrison Poultry arising from the conduct alleged in the Complaint. *Id.* at §§ I.B.27-29, II.D.1-3.²

² “Released Claims” are defined in the Settlement Agreement with Harrison Poultry in section I.B.27.

Pursuant to the Settlement Agreement, “[i]f the Court declines to grant a Preliminary Approval Order or Order and Final Judgment . . . or if the Court approves this Settlement Agreement in a materially modified form; or if after the Court’s approval, such approval is materially modified or set aside on appeal; or Final Approval is not obtained; or if the Court enters the Final Order and Judgment and appellate review is sought and on such review such Final Order and Judgment is not affirmed (collectively “Triggering Events”), then Harrison Poultry and Plaintiffs shall each, in their respective sole and absolute discretion, have the option to rescind, cancel, or terminate this Settlement Agreement in its entirety by providing written Notice of their election to do so (“Termination Notice”) to the other Party within fifteen (15) calendar days of any of the Triggering Events.” Settlement Agreement with Harrison Poultry, Zapala Decl. Ex. A §§ II.G.10. In addition, the Harrison Poultry Settlement Agreement allows Harrison Poultry, at its discretion, to rescind the Settlement Agreement if a certain specified percentage of Settlement Class Members, as set forth in a separate, confidential supplemental agreement, exclude themselves from the Settlement Classes. *See* Harrison Poultry Settlement Agreement § II.G.10.b.

Harrison Poultry is a party to a judgment sharing agreement among certain defendants. Because of this judgment sharing agreement, CIIPPs will exclude Harrison Poultry’s sale of Broilers from any calculation of the CIIPPs’ claimed damages at trial, and the other Defendants named in this litigation shall not be liable for any damages arising from Harrison Poultry’s sales of Broilers during the Class Period. *See* Harrison Poultry Settlement Agreement, Zapala Decl. Ex. A Recital G. & II.D.5.

IV. ARGUMENT

A. The Proposed Settlement Falls Within the Range of Possible Approval and Should Be Preliminarily Approved.

There is an overriding public interest in quieting litigation through settlement; this is particularly true in complex class actions. *See Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) (“Federal courts naturally favor the settlement of class action litigation.”); *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888-89 (7th Cir. 1985) (noting that there is a “general policy favoring voluntary settlements of class action disputes”), *cert. denied sub nom. Agee v. E.E.O.C.*, 478 U.S. 1004 (1986); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312 (7th Cir. 1980) (“It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement.”), *overruled on other grounds, Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). Class action settlements minimize the litigation expenses of the parties and reduce the strain such litigation imposes upon already scarce judicial resources. *Armstrong*, 616 F.2d at 313 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). A class action, however, may be settled only with court approval. *See Armstrong*, 616 F.2d at 313-14; 4 NEWBERG ON CLASS ACTIONS, §13.1 (6th ed. 2023).

A proposed settlement falls within the “range of possible approval” under Rule 23(e) when it is likely that the proposed settlement will meet the standards applied at final approval. The standard for final approval of a class action settlement is whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e); *see Isby*, 75 F.3d at 1196.

When granting preliminary approval, a court does not conduct a “definitive proceeding on the fairness of the proposed settlement.” *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983) (quoting Manual for Complex Litigation § 1.46 at 62, 64-65). That determination must await the final approval hearing where the fairness, reasonableness, and

adequacy of the settlement are assessed under the factors set forth in *Armstrong*.³ Here, the settlement consideration (\$2.8 million) is at the upper range of the settlements CIIPPs have already achieved, on a per market share point basis, when compared with the previous seven settlements with Fieldale, Amick, Peco, George’s, Mar-Jac, Pilgrim’s, and Tysons, all of which this Court has preliminarily and finally approved. (ECF Nos. 1910, 3696, 4113, 5363; ECF No. 5536). In light of this, and the context of this case, the settlement amount strongly supports preliminary approval.

B. The Settlement Is Fair and Resulted from Arm’s-Length Negotiation.

All of the procedural elements for finding that the settlement should be preliminarily approved exist. At preliminary approval, there is an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm’s-length negotiations. *See Goldsmith v. Tech. Solutions Co.*, No. 92-C-4374, 1995 WL 17009594, at *3 n.2 (N.D. Ill. Oct. 10, 1995) (“[I]t may be *presumed* that the agreement is fair and adequate where, as here, a proposed settlement is the product of arm’s-length negotiations. . . .”) (italic in original); 4 NEWBERG ON CLASS ACTIONS, § 13.45 (6th ed. 2023). The initial presumption in favor of such settlements reflects courts’ understanding that vigorous negotiations between experienced counsel advance the fairness concerns embodied in Rule 23(e).

The settlement reached here was the product of intensive settlement negotiations that took place over years, beginning in advance of class certification, and included extensive arm’s length negotiations and many rounds of give-and-take between CIIPPs’ Co-Lead Counsel and counsel

³ The *Armstrong* factors for a motion for final approval of a class settlement as fair, reasonable, and adequate are: (1) the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement; (2) the defendants’ ability to pay; (3) the complexity, length, and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of class members to the settlement; (7) the opinion of competent counsel; and (8) the stage of the proceedings and the amount of discovery completed. *Armstrong*, 616 F. 2d at 314.

for Harrison Poultry. The parties held a number of telephonic meetings, exchanged information and settlement proposals, debated many issues, and negotiated many terms of the settlement, including the amount of payment, the timing of payment, potential conditions on payment, and potential cooperation. Each side had the opportunity to be fully informed of the relative strengths and weaknesses of their positions, litigation risks and issues involving the ability to pay. Zapala Decl. ¶¶ 3-10. Based on the arm's-length negotiations between the parties and the extensive discovery record at the time of settlement, CIIPP Co-Lead Counsel strongly believe this is a fair settlement for the Class. *Id.* ¶ 12.

While CIIPPs believe that their case is strong, any complex antitrust litigation is inherently costly and risky, and this settlement mitigates that risk and therefore serves to protect the Class. There remain many contingencies that could affect a determination on the merits in favor of the CIIPPs, including whether or not certain Defendants will prevail on summary judgment or liability at trial; and, if a favorable judgment is obtained, whether or not certain Defendants will become insolvent at the conclusion of the matter. These are just a few of the risks, although Lead Counsel's duties to the CIIPPs preclude a further or more detailed discussion in this brief as to how Lead Counsel weighs those risks.

Indeed, CIIPPs' work in this case has been extensive, and the information gleaned during the course of litigation and discovery guided the parties during the settlement negotiations. Among other tasks through the course of this litigation, CIIPPs' counsel (1) comprehensively researched the industry and consulted with experts prior to filing their initial 177-page consolidated complaint; (2) extensively briefed oppositions to the motions to dismiss, which they largely prevailed on; (3) committed significant resources to analysis and review of 8.5 million documents produced in discovery; (4) took over 100 depositions; (5) argued numerous motions; (6) worked extensively

with experts to submit a class certification expert report and merits reports; (7) moved for and obtained certification of the CIIPP class; and (8) opposed motions for summary judgment as well as Daubert motions to exclude CIIPPs' experts. Zapala Decl. ¶ 4.

In sum, the Settlement Agreement: (1) provides substantial benefits to the class; (2) is the result of extensive good faith negotiations between knowledgeable and skilled counsel; (3) was entered into after extensive factual investigation, discovery, and legal analysis; and (4) in the opinion of experienced Class Counsel, is fair, reasonable, and adequate to the Class.

C. The Settlement Is On Behalf of a Certified Class.

On May 27, 2022, the Court granted CIIPPs' motion for class certification and certified the following CIIPP Classes:

All entities that purchased Broilers indirectly from a Defendant or named co-conspirator in an Indirect Purchaser State⁴ for their own use in commercial food preparation from January 1, 2009, until July 31, 2019.

Excluded from the [Indirect] class are: Natural persons who purchased Broilers for their personal use and not for commercial food preparation; purchases of Broilers directly from Defendants; purchases of Broilers for resale in unaltered form; purchases or Broilers from an intermediary who has further processed the Broiler; 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; any federal, state governmental entities, any judicial officer presiding over this action and the members of her/her immediate family and judicial staff, any juror assigned to this action; and any co-conspirator identified in this action.

⁴ The "Indirect Purchaser States" are: Arizona, California, the District of Columbia, Florida, Hawaii, Iowa, Illinois, Kansas, Massachusetts, Maine, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska, New Hampshire, New Mexico, Nevada, New York, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, or West Virginia. CIIPPs seek damages for this class under the respective state laws. The Court also certified CIIPPs' nationwide class for injunctive relief under federal law. (ECF No. 5644 at 3-4, 55). Plaintiffs are settling the claims of both classes here.

(ECF No. 5644 at 3-4, 55). The Court also certified a nationwide injunctive relief class. *See id.* “If the court has certified a class prior to settlement, it does not need to re-certify it for settlement purposes.” 4 NEWBERG ON CLASS ACTIONS, § 13:18 (6th ed. 2023). Here, the parties do not request any changes to the Certified Class, so the Court need not re-certify it.

D. Notice to the Class

Rule 23(e) requires that prior to final approval, notice of a proposed settlement be given in a reasonable manner to all class members who would be bound by such a settlement. For a class proposed under Rule 23(b)(3), whether litigated or by virtue of a settlement, Rule 23(c)(2)(B) enumerates specific requirements.

At an appropriate time prior to moving for final approval of this proposed settlement CIIPPs intend to propose to the Court a plan of notice which, pursuant to Rule 23(c)(2)(B), will provide due process and reasonable notice to all customers of Defendants—Settling and Non-Settling Defendants alike—who can be identified through customer lists.

However, CIIPPs are in pending discussions with other Defendants in an effort to settle their claims against those Defendants. Accordingly, and consistent with prior settlements reached in this action, as well as recognizing the conservation of resources to be realized by deferring notice under such circumstances, CIIPPs request that the Court defer formal notice to the Class at the present time.⁵

⁵ In large antitrust cases, courts have deferred notice under similar circumstances. *See, e.g., In re Aftermarket Filters Antitrust Litig.*, No. 1:08-cv-04883, Preliminary Approval Order (ECF No. 885) at p. 5 (N.D. Ill. Feb. 16, 2012) (granting preliminary approval of settlement agreements, certifying settlement class, and ordering that class notice be deferred until a later time); *In re New Jersey Tax Sales Antitrust Litig.*, No. 3:12-cv-01893, Order (ECF No. 276) at ¶ 7 (D.N.J. Aug. 13, 2013) (granting preliminary approval of settlement and finding that cost of class notice warranted deferral)

V. CONCLUSION

For these reasons, Interim Co-Lead Counsel respectfully request that the Court preliminarily approve the Settlement Agreement and preliminarily certify the Settlement Class.

Dated: June 28, 2023

Respectfully Submitted:

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