UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

JUDY JIEN, *et al.*, Plaintiffs, v. PERDUE FARMS, INC., *et al.*, Defendants.	C.A. No. 1:19-CV-2521-SAG

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH PERDUE FARMS, INC. AND PERDUE FOODS, LLC, CERTIFICATION OF SETTLEMENT CLASS, AND APPOINTMENT OF SETTLEMENT CLASS COUNSEL

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Judy Jien, Kieo Jibidi, Elaisa Clement, Glenda Robinson, Emily Earnest, and Kevin West (collectively "Plaintiffs") submit this Memorandum in Support of their Motion for Preliminary Approval of the proposed settlement between Plaintiffs and Defendants Perdue Farms, Inc. and Perdue Foods, LLC (collectively, "Perdue" or "Settling Defendant"). The Settlement Agreement achieves excellent results for the Plaintiffs in this action and is attached as Exhibit A to the accompanying Declaration of Brent Johnson ("Johnson Decl."). All defined terms herein have the same meaning as set forth in the Settlement Agreement.

I. INTRODUCTION

Plaintiffs previously entered into settlements with Pilgrim's ($29 million), Simmons ($12 million), George's ($5.8 million), Peco ($3 million), WMS (for cooperation), Cargill ($15 million), Sanderson ($38.3 million) and Wayne ($31.5 million) that were preliminarily approved by the Court.[1] Plaintiffs have since entered into one additional settlement that would recover an additional $60,650,000 million for the class—for total recovery to date of $195.25 million for class members. The Settling Defendant has also agreed to provide material cooperation to Plaintiffs in the litigation against the remaining Defendants. This settlement was reached after hard-fought, arm's-lengths negotiation with sophisticated counsel representing all parties.

Accordingly, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving the Settlement Agreement; (2) certifying the Settlement Class defined below; (3) appointing Interim Co-Lead Counsel as Settlement Class Counsel; (4) appointing Plaintiffs as

[1] "Pilgrim's" refers to Pilgrim's Pride Corporation. "Simmons" refers to Simmons Foods, Inc. and Simmons Prepared Foods, Inc. "George's" refers to George's, Inc. and George's Foods, LLC. "Peco" refers to Peco Foods, Inc. "WMS" refers to Webber, Meng, Sahl and Company, Inc. d/b/a WMS & Company, Inc. "Cargill" refers to Cargill Meat Solutions Corporation. "Sanderson" refers to Sanderson Farms, Inc. "Wayne" refers to Wayne Farms LLC.

Settlement Class Representatives; (5) deferring notice of the Settlement Agreement to the Settlement Class until an appropriate future date; and (6) ordering a stay of all proceedings against Settling Defendant except those proceedings provided for or required by the Settlement Agreement.

II. BACKGROUND

A. The Litigation

Plaintiffs allege that the nation's leading poultry processors and two consulting companies conspired to depress the compensation paid to workers at poultry processing plants, hatcheries, feed mills, and complexes. Specifically, Plaintiffs allege that Defendants entered into two unlawful agreements in violation of the Sherman Act, 15 U.S.C. § 1: (1) a *per se* illegal agreement to fix compensation for poultry processing workers; and (2) an agreement to exchange competitively sensitive compensation information, in violation of the rule of reason. Defendants have denied Plaintiffs' allegations.

This action has been pending for nearly three and a half years, having been initially filed on August 30, 2019. Class Action Compl., ECF No. 1. Defendants moved to dismiss Plaintiffs' First Amended Complaint on March 2, 2020. *See, e.g.*, Defs.' Joint Mot. to Dismiss Am. Consolidated Compl., ECF No. 344. The Court granted those motions in part and denied them in part, without prejudice. Order, ECF No. 379. On November 2, 2020, Plaintiffs filed their Second Amended Complaint, which, as the Court later found, cured the pleading defects that the Court had identified in the First Amended Complaint. Second Am. Consolidated Compl., ECF No. 386; Mem. Op., ECF No. 414; Order, ECF No. 415.

Following the filing of the Second Amended Complaint, the parties commenced discovery, serving and responding to document requests and interrogatories. *See, e.g.*, Sanderson Farms, Inc.'s Answer to Pls.' Second Am. Consolidated Compl., ECF No. 431.

Plaintiffs moved for leave to file a Third Amended Complaint ("TAC") on January 20, 2022, and the motion was granted by the Court on February 16, 2022. Am. Mot. for Leave to File TAC, ECF No. 567; Order on Mots. to Seal & Mot. for Leave to File TAC, ECF No. 589. Among other modifications, the TAC extended the class period from a 2009 start date back to 2000, expanded the scope of the litigation class to include feed mill and hatchery workers, and named six additional defendants. This Court denied Defendants' motions to dismiss the TAC on July 19, 2022. Mem. Op., ECF No. 695.

B. The Settlement Agreement

Given that this case has been pending for nearly three and a half years, and that Plaintiffs' counsel have had the benefit of cooperation from other Defendants, the settlement discussions with Perdue were undertaken with an especially deep understanding of the strengths and weaknesses of the case. Johnson Decl. ¶ 9. The agreement was executed on October 31, 2022. The basic terms of the Settlement agreement include:

1. The Settlement Class

The Settlement Class is co-extensive with the class in the operative complaint: "[a]ll persons employed by Defendant Processors, their subsidiaries, and/or related entities at poultry processing plants, poultry hatcheries, poultry feed mills, and/or poultry complexes in the continental United States from January 1, 2000 until July 20, 2021." Johnson Decl., Ex. A § II(F)(3). The following persons and entities are excluded from the Settlement Class: "complex managers, plant managers, human resources managers, human resources staff, office clerical staff, guards, watchmen, and salesmen; Defendants, co-conspirators, and any of their subsidiaries, predecessors, officers, or directors; and federal, state or local governmental entities." *Id.* The Settlement Class is the same as the class alleged in the TAC.

2. The Settlement Amount

The proposed Settlement Agreement provides that Perdue will pay sixty million, six hundred fifty thousand U.S. dollars ($60,650,000) for the benefit of the Settlement Class. This amount will be deposited in an escrow account by Perdue within fourteen (14) business days after entry of the preliminary approval order. Johnson Decl., Ex. A § II(A)(1). This is a non-reversionary fund; once the Settlement Agreement with Perdue is finally approved by the Court and after administrative costs, litigation expenses, and attorneys' fees are deducted, the net funds will be distributed to Settlement Class members with *no amount* reverting back to Perdue. *Id.* § II(E)

3. Cooperation Requirements

In addition to providing a substantial monetary payment, the Settlement Agreement obligates Perdue to cooperate with Plaintiffs in the further prosecution of their claims against the remaining Defendants, which each remain jointly and severally liable for *all* damages caused by the members of the alleged conspiracy. Perdue will provide data, documents, information, and witnesses from its Poultry Processing Operations concerning the Allegations (as those terms are defined in the Settlement Agreement), including *inter alia*:

- the production of relevant structured compensation data;
- the production of responsive documents from eighteen (18) current or former employees identified by Plaintiffs that are responsive to search terms identified by Plaintiffs, including:
    - all documents that (1) reference WMS, any of WMS's employees, or any surveys or survey results prepared by WMS, (2) were sent by Perdue or Perdue's employees to WMS or WMS's employees, and/or (3) were received by Perdue or Perdue's employees from WMS or WMS's employees; and
    - all documents produced to, and received from, the Joint Poultry Industry Human Resources Council, the National Chicken Council, and the U.S. Poultry & Egg Association that reference any form or component of compensation;
- the deposition of eighteen (18) then-current employees identified by Plaintiffs and the participation of these witnesses at trial (if requested by Plaintiffs);

- in addition to the custodial searches outlined above, the production of the following documents identified after a reasonable search:
    - all written agreements or contracts with Agri-Stats, Inc. and/or Express Markets, Inc.;
    - all Perdue's contracts with labor unions executed during the Settlement Class Period;
    - any documents that have been or will be produced to the Department of Justice by Perdue prior to the resolution of this Action against all Defendants in connection with any investigation regarding any form or component of compensation that have not already been produced to Plaintiffs, so long as the agency consents or does not object to the production or the Court orders the production;
- the authentication of documents produced by Perdue; and
- assistance with Plaintiffs' efforts to obtain phone records from third-party carriers.

See Johnson Decl., Ex. A § II(A)(2).

4. Release of All Claims against Perdue

In exchange for the monetary and cooperation consideration from Perdue, upon entry of a final judgment approving the Settlement Agreement with Perdue, Plaintiffs and the Settlement Class will release and discharge Perdue from any and all claims arising out of or relating to "an alleged or actual conspiracy or agreement between Defendants relating to reducing competition for the hiring and retaining of, or to fixing, depressing, restraining, exchanging information about, or otherwise reducing the Compensation paid or provided to," the Settlement Class. Johnson Decl., Ex. A § II(B)(2). This Release covers both claims that were asserted and claims that could have been asserted.

The Settlement Agreement with Perdue, however, does nothing to abrogate the rights of any member of the Settlement Class to recover from any other Defendant. The Settlement Agreement also expressly excludes from the Release "any claims wholly unrelated to the

allegations or underlying conduct alleged in the Action that are based on breach of contract, negligence, personal injury, bailment, failure to deliver lost goods, damaged or delayed goods, product defect, discrimination, COVID-19 safety protocols, failure to comply with wage and hours laws unrelated to anticompetitive conduct, or securities claims." *Id*.

III. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT AGREEMENT

A. Standard for Granting Preliminary Approval

Federal Rule of Civil Procedure 23(e) provides that "[t]he claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Before a court may approve a proposed settlement, it must conclude that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). This boils down to "examining [a] proposed . . . settlement for fairness and adequacy." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).[2]

At the preliminary approval stage, however, the Court does not make a final determination of the merits of the proposed settlement. *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983). Full evaluation is made at the final approval stage, after notice of the settlement has been provided to the members of the class and those class members have had an opportunity to voice their views of the settlement. *Id.*

Rather, "at the preliminary approval stage, the court's role is to determine whether there exists probable cause to submit the proposal to members of the class and to hold a full-scale hearing

[2] The United States Court of Appeals for the Fourth Circuit has "not enumerated factors for assessing a settlement's reasonableness." *In re Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 952 F.3d 471, 484 (4th Cir. 2020).

on its fairness." *Fire & Police Retiree Health Care Fund v. Smith*, No. CCB-18-3670, 2020 WL 6826549, at *2 (D. Md. Nov. 20, 2020). A court should grant preliminary approval "when the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or of segments of the class or excessive compensation for attorneys and appears to fall within the range of possible approval." *Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, No. 3:08-cv-00271-JFA, 2012 WL 2370523, at *6 (D.S.C. June 22, 2012) (citation omitted), *superseded*, No. 3:08-cv-00271-JFA, 2012 WL 13008138 (D.S.C. July 31, 2012). "In assessing the fairness and adequacy of a proposed settlement, there is a strong initial presumption that the compromise is fair and reasonable." *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991) (internal quotation marks and citation omitted).

When evaluating the fairness and adequacy of a proposed settlement, courts keep in mind the following policy consideration: "It has long been clear that the law favors settlement." *United States v. Manning Coal Corp.*, 977 F.2d 117, 120 (4th Cir. 1992). This "strong presumption" is "especially strong in class actions and other complex cases . . . because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (*en banc*) (citation omitted) (affirming certification of two nationwide antitrust settlement classes).

B. The Settlement Agreement Is Fair

A court's fairness analysis is intended primarily to ensure that a "settlement [is] reached as a result of good-faith bargaining at arm's length, without collusion." *In re India Globalization Cap., Inc., Derivative Litig.*, No. DKC 18-3698, 2020 WL 2097641, at *3 (D. Md. May 1, 2020) (citation omitted). The fairness analysis involves examination of "(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 [antitrust] class action litigation." *Id.*[3]

The Settlement Agreement with Perdue is more than fair; it is an excellent result for the class. The first factor—*i.e.*, the posture of the case—weighs in favor of preliminary approval. The Settlement Agreement was reached after more than three years of adversarial and informative litigation. The prosecution and defense of the action included the briefing of multiple rounds of motions to dismiss, each of which yielded a lengthy and detailed ruling by the Court regarding the viability of the alleged claims. The Court's resolution of Defendants' motions to dismiss clarified the applicable law and legal hurdles and set the stage for the parties' positions in their settlement negotiations. *See* Johnson Decl. ¶ 10.

The second factor—*i.e.*, the extent of discovery—also weighs in favor of preliminary approval. The parties have conducted a range of measures of formal discovery. The parties have served extensive document requests, exchanged and responded to interrogatories, and briefed discovery disputes concerning depositions, document requests, and custodians. *Id.* ¶ 11. Plaintiffs have also reviewed tens of thousands of documents produced by settling Defendants George's, Peco, and WMS, as well as a 109-page declaration executed by the president of WMS. *Id.* ¶¶ 8-12. This *formal* discovery materially informed Plaintiffs' counsel's assessment of their claims

[3] "Federal Rule of Civil Procedure 23(e)(2) has been amended and now sets forth factors for the district court to assess in evaluating fairness, reasonableness, and adequacy." *Herrera v. Charlotte Sch. of Law, LLC*, 818 F. App'x 165, 176 n.4 (4th Cir. 2020). The United States Court of Appeals for the Fourth Circuit, however, has noted that "our factors for assessing class-action settlements almost completely overlap with the new Rule 23(e)(2) factors." *In re Lumber Liquidators*, 952 F.3d at 484 n.8. As the overlap "render[s] the analysis the same," the Fourth Circuit "continues to apply its own standards." *Herrera*, 818 F. App'x at 176 n.4; *see also* Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment ("The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.").

against the Settling Defendant. *See Edelen v. Am. Residential Servs., LLC*, No. DKC 11-2744, 2013 WL 3816986, at *8 (D. Md. July 22, 2013) (granting final approval "[a]lthough the scope of [formal] discovery was somewhat limited" because "all parties had sufficient information about their claims and defenses at the time they began exploring the possibility of settlement").

In addition to these different measures of formal discovery, there has also been "sufficient *informal* discovery and investigation to fairly evaluate the merits of Defendants' positions during settlement negotiations." *Strang v. JHM Mortg. Sec. Ltd. P'ship*, 890 F. Supp. 499, 501 (E.D. Va. 1995) (emphasis added). Indeed, "[d]istrict courts within the Fourth Circuit have found that even when cases settle early in the litigation after only informal discovery has been conducted, the settlement may nonetheless be deemed fair." *Temp. Servs.*, 2012 WL 2370523, at *11. There is "no minimum or definitive amount of discovery that must be undertaken," *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 244 (S.D. W. Va. 2005), and "[e]ngaging in formal discovery is not essential . . . or even the critical focal point of the analysis." *In re PNC Fin. Servs. Grp., Inc., Sec. Litig.*, 440 F. Supp. 2d 421, 433 (W.D. Pa. 2006). *See, e.g.*, *In re India*, 2020 WL 2097641, at *3-4 (preliminarily approving class action settlement before the filing of motions to dismiss and or commencement of formal discovery).

Here, as the Court is aware, Plaintiffs' capable counsel have engaged in substantial *informal* discovery to analyze the strengths and weaknesses of the Settlement Class's claims. Both prior to and after filing Plaintiffs' initial detailed complaint, Plaintiffs' counsel expended considerable time and resources to conduct an extraordinary investigation of Defendants' conduct in setting compensation for their employees. *See* Johnson Decl. ¶ 9. Plaintiffs' counsel interviewed multiple confidential witnesses formerly employed by Defendants and other poultry processors. *Id.* Plaintiffs' counsel also conducted extensive research of both the poultry labor market and the

workers that comprise the Settlement Class. *Id.* These unusually extensive investigative and analytical efforts support a finding of fairness. *See In re PNC*, 440 F. Supp. 2d at 430-31; *see also ADESSO Homeowners' Ass'n v. Holder Props., Inc.*, No. 3:16-cv-710-JFA, 2017 WL 11272589, at *9 (D.S.C. May 23, 2017) ("[T]he parties have committed substantial resources to the investigation and legal analysis of the claims and defenses of the parties, to obtain sufficient information to weigh the benefits of the proposed settlement against the risks of continued litigation.").

The third factor—*i.e.*, the circumstances surrounding the negotiations—heavily favors preliminary approval. Where, as here, "a settlement is the result of genuine arm's-length negotiations, there is a presumption that it is fair." *Gaston v. LexisNexis Risk Sols., Inc.*, No. 5:16-cv-00009-KDB-DCK, 2021 WL 244807, at *6 (W.D.N.C. Jan. 25, 2021), *subsequent determination*, No. 5:16-cv-00009-KDB-DCK, 2021 WL 2077812 (W.D.N.C. May 24, 2021) ; *see also ADESSO*, 2017 WL 11272589, at *8 ("[A] proposed class action settlement is considered presumptively fair where there is no evidence of collusion and the parties, through capable counsel, have engaged in arms' length negotiations."). Before executing the Settlement Agreement, the parties engaged in arm's-length negotiations between sophisticated counsel well acquainted with the strengths and weaknesses of this case. The negotiations were adversarial throughout and showed no trace of collusion. *See* Johnson Decl. ¶¶ 7-8.

Finally, the fourth factor—*i.e.* the experience of counsel—strongly favors preliminary approval. The lawyers who conducted these negotiations, and who have endorsed the Settlement Agreement as fair and adequate, are highly experienced and nationally recognized antitrust and class action practitioners. *See* Unopposed Mot. for Consolidation of Related Actions & for Appointment of Interim Co-Lead Class Counsel, ECF No. 60; *see also* Johnson Decl. ¶ 2. This

"further minimizes concerns that [Plaintiffs and Settling Defendants] colluded to the detriment of the class's interests." *In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 665 (E.D. Va. 2001). "[T]he opinion of experienced and informed counsel in favor of settlement should be afforded due consideration in determining whether a class settlement is fair and adequate." *Gaston*, 2021 WL 244807, at *6 (citing *Jiffy Lube*, 927 F.2d at 159).

In sum, the proposed Settlement Agreement was the product of genuine arm's-length negotiations by experienced counsel, and it was reached only after an extensive investigation of the strengths and weaknesses of the claims.

C. The Settlement Agreement Is Adequate.

In determining whether a proposed settlement is adequate, courts consider the following factors: "(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 defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement." *In re India*, 2020 WL 2097641, at *4.

Detailed analyses of the fourth and the fifth factors are unnecessary. This Court has held that it "places little weight upon [the fourth] factor." *In re Mid-Atlantic*, 564 F. Supp. at 1386. And with respect to the fifth factor, "[d]ue to the preliminary nature of this motion," opposition to the Settlement Agreements has not yet presented itself. *Temp. Servs.*, 2012 WL 2370523, at *13.

"The most important factors in this analysis are the relative strength of the plaintiffs' claims on the merits and the existence of any difficulties of proof or strong defenses." *Sharp Farms v. Speaks*, 917 F.3d 276, 299 (4th Cir. 2019). An evaluation of the strength of Plaintiffs' claims in light of the risks and costs of continued litigation supports a finding that the Settlement Agreement is adequate.

Plaintiffs believe that they have presented a strong case. The Court denied the motions to dismiss the TAC and has previously remarked that Plaintiffs have alleged "extremely rare" direct evidence of a *per se* antitrust conspiracy. Mem. Op. at 11-16, ECF No. 378.

But this is a complex antitrust action. "[A]n integral part of the strength of a case on the merits is a consideration of the various risks and costs that accompany continuation of the litigation." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985) (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975)). It is inherently difficult to prove a complex antitrust class action, and there are "significant risks associated with continued litigation." *Temp. Servs.*, 2012 WL 2370523, at *12. "Regardless of the strength of a claim on the merits, one can never ensure a finding of liability in complex litigation like this. Similarly, all parties to this litigation face significant difficulties and risks in establishing liability and defending against the claims." *US Airline Pilots Ass'n v. Velez*, No. 3:14-cv-00577-RJC-DCK, 2016 WL 1615408, at *4 (W.D.N.C. Apr. 22, 2016). "Experience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict, particularly in complex antitrust litigation." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 523 (E.D. Mich. 2003); *see* Johnson Decl. ¶ 13.

Further, even though the case will continue against the non-settling Defendants, continuing to litigate this case against the Settling Defendant would have required significant additional resources and materially increased the complexity of the case. To obtain a jury verdict against the Settling Defendant, Plaintiffs would have needed to conduct additional adversarial discovery of the Settling Defendant, litigate additional discovery disputes with the Settling Defendant, brief summary judgment motions concerning the Settling Defendant, and prepare a liability case against the Settling Defendant for trial. Courts in the Fourth Circuit have found that such circumstances

(involving partial settlements in complex actions) support approval: "From the court's perspective, it is clear that pursuing the claims and potential claims against the settling defendants would add complexity, expense and delay which could postpone actual recovery for years." *In re PNC*, 440 F. Supp. 2d at 432. Another court found: "Although plaintiffs have expressed their intention to continue to pursue their claims against the non-settling defendants, many additional hours would have been required to prepare and respond to anticipated summary judgment motions, and to try the case against the settling defendants. Settlement under these circumstances clearly is appropriate." *Stone*, 139 F.R.D. at 340.

In light of the above risk assessment, the terms of the proposed Settlement Agreement provide the Settlement Class with more than adequate relief. Under the Settlement Agreement, the Settling Defendant will pay $60,650,000 into a settlement fund that will provide tangible financial benefits to the Settlement Class. The Settlement Agreement represents a significant increase in the valuation of the case and in the compensation recovered by class members. The following chart demonstrates how each settlement reached in the litigation has continued to increase in valuation:[4]

[4] Plaintiffs settled with WMS and Peco for no dollars and $3 million, respectively. These settlements involved comparatively lower dollar values due to the significant cooperation provided by WMS and due to Peco's complete absence from both the surveys conducted by WMS and the meetings held to discuss the WMS survey results. Pls.' Mem. in Supp. of Mot. for Prelim. Approval of Settlement with WMS & Peco Defs., ECF No. 548. In addition, the estimated market share numbers in the chart for Defendants who previously settled have been refined since Plaintiffs' initial motions for preliminary approval after additional analysis and in accordance with the inclusion of the longer class period and additional defendants in the TAC.

Defendant	Estimated Market Share	Settlement Funds	Date Reached	Case valuation per market share point
Perdue	7.9%	$ 60,650,000.00	10/31/2022	$7.7
Wayne	4.2%	$ 31,500,000.00	07/21/2022	$7.5
Sanderson	5.1%	$ 38,300,000.00	07/21/2022	$7.5
Cargill	2.5%	$ 15,000,000.00	05/02/2022	$6.0
Simmons	2.2%	$ 12,000,000.00	01/27/2022	$5.5
George's	2.0%	$ 5,800,000.00	08/17/2021	$2.9
Pilgrim's	17.1%	$ 29,000,000.00	06/14/2021	$1.7
Peco	2.1%	$ 3,000,000.00	12/16/2021	$1.4
WMS	--	--	11/19/2021	--

Meanwhile, the remaining Defendants continue to be jointly and severally liable for *all* the damages caused by the alleged conspiracy.

The financial recovery from the Settling Defendant alone would render the Settlement Agreement adequate, but Plaintiffs also secured extensive cooperation obligations (summarized above) that Plaintiffs expect will materially strengthen their claims against the remaining thirteen Defendants. The Settlement Agreement allows Plaintiffs to secure potentially key evidence—in the form of documents, deposition testimony, and trial testimony—from the Settling Defendant and its employees. *See In re Ampicillin Antitrust Litig.*, 82 F.R.D. 652, 654 (D.D.C. 1979) (approving settlement in light of settling defendant's "assistance in the case against [a non-settling defendant]"); *see generally In re IPO Sec. Litig.*, 226 F.R.D. 186, 198-99 (S.D.N.Y. 2005) (recognizing the value of cooperating defendants in complex class action litigation).

In sum, the proposed Settlement Agreement is adequate in light of the strength of the claims and the risks and expense of continued litigation. Accordingly, the proposed Settlement Agreement is fair and should be preliminarily approved.

IV. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS

Plaintiffs request that the Court certify the proposed Settlement Class to receive the benefits of the Settlement Agreement. Specifically, Plaintiffs seek certification of a Settlement Class consisting of "[a]ll persons employed by Defendant Processors, their subsidiaries, and/or related entities at poultry processing plants, poultry hatcheries, poultry feed mills, and/or poultry complexes in the continental United States from January 1, 2000 until July 20, 2021."[5] Johnson Decl., Ex. A § II(F)(3).

"A settlement class, like a litigation class, must satisfy the requirements" of Federal Rule of Civil Procedure 23(a) and one of the categories of Rule 23(b). *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 566 (E.D. Va. 2016). The Fourth Circuit practice is to "give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application [that] will in the particular case 'best serve the ends of justice for the affected parties and . . . promote judicial efficiency.'" *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (quoting *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989)).

This proposed Settlement Class meets the prerequisites of Rule 23(a) as well as the prerequisites of Rule 23(b)(3).

A. The Settlement Class Satisfies Rule 23(a).

1. Numerosity

Rule 23(a)(1) requires that the class be so numerous as to make joinder of its members "impracticable." Generally, classes consisting of forty or more members are considered

[5] As Plaintiffs noted earlier, the Settlement Class excludes "complex managers, plant managers, human resources managers, human resources staff, office clerical staff, guards, watchmen, and salesmen; Defendants, co-conspirators, and any of their subsidiaries, predecessors, officers, or directors; and federal, state or local governmental entities." Johnson Decl., Ex. A § II(F)(3).

sufficiently large to satisfy the numerosity requirement. *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 337 (D. Md. 2012), *order amended*, 962 F. Supp. 2d 840 (D. Md. 2013); *see also, e.g.*, *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (holding that a class of only 18 members satisfied the numerosity requirement). Here, the precise number of Settlement Class members is presently known only to Defendants. But based on extensive investigation, Plaintiffs' counsel believe that hundreds of thousands of people fall within the Settlement Class definition. Rule 23(a)(1) is satisfied.

2. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Plaintiffs must show that resolution of an issue of fact or law "is central to the validity of each" class member's claim; "[e]ven a single [common] question will" satisfy the commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 359 (2011) (citation and internal quotation marks omitted). "In the antitrust context, courts have generally held that an alleged conspiracy or monopoly is a common issue that will satisfy Rule 23(a)(2) as the singular question of whether defendants conspired to harm plaintiffs will likely prevail." *D&M Farms v. Birdsong Corp.*, No. 2:19-cv-463, 2020 WL 7074140, at *3 (E.D. Va. Dec. 2, 2020).

Here, a central allegation in the Complaint is that Defendants, including the Settling Defendant, illegally conspired to depress their workers' compensation. Proof of this alleged conspiracy will be common to all Settlement Class members. In addition to that overarching question, this case is replete with other questions of law and fact common to the Settlement Class, including, *inter alia*, the identity of the participants in the alleged conspiracy, the duration of the alleged conspiracy, and the measure of damages caused by the alleged conspiracy. *See* TAC ¶ 516, ECF No. 590. Rule 23(a)(2) is satisfied.

3. Typicality

Rule 23(a)(3) requires that the class representatives' claims be "typical" of class members' claims. "As a general matter, the 'typicality' prerequisite is satisfied in instances where plaintiffs' claims arise out of the common course of conduct of one or more defendant." *ADESSO*, 2017 WL 11272589, at *4. Typicality is "established by plaintiffs and all class members alleging the same antitrust violations by defendants." *D&M Farms*, 2020 WL 7074140, at *10 (quoting *Am. Sales Co. v. Pfizer, Inc.*, No. 2:14cv361, 2017 WL 3669604, at *11 (E.D. Va. July 28, 2017)). Here, both Plaintiffs' claims and Settlement Class members' claims arise out of a common course of misconduct by Defendants; each received compensation that was depressed by Defendants' conduct. As such, Rule 23(a)(3) is satisfied.

4. Adequacy

Rule 23(a)(4) requires that, for a case to proceed as a class action, the court must find that "the representative parties will fairly and adequately protect the interests of the class." This inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982)). For a conflict to defeat class certification, the conflict "must be more than merely speculative or hypothetical," but rather "go to the heart of the litigation." *Gunnells*, 348 F.3d at 430-31 (citations omitted).

There is no conflict here, as the interests of Plaintiffs are aligned with those of Settlement Class members. Plaintiffs, like all Settlement Class members, share an overriding interest in obtaining both the largest possible monetary recovery and most helpful cooperation from the Settling Defendant. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981) ("[S]o long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for

representation purposes.") (citation omitted). Moreover, Plaintiffs are not afforded any special or unique compensation by the proposed Settlement Agreement. As such, Rule 23(a)(4) is satisfied.

B. The Requirements of Rule 23(b)(3) Are Satisfied.

Once Rule 23(a)'s four prerequisites are met, Plaintiffs must demonstrate that the proposed Settlement Class satisfies Rule 23(b)(3). Specifically, Plaintiffs must show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Plaintiffs have done so.

1. Predominance of Common Issues

"Courts focus on the issue of liability to determine whether a proposed class meets the predominance prong: '[i]f the liability issue is common to the class, common questions are held to predominate over individual ones.'" *City of Cape Coral Mun. Firefighters' Ret. Plan v. Emergent Biosolutions, Inc.*, 322 F. Supp. 3d 676, 685 (D. Md. 2018) (citation omitted). "[A] claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 307 (E.D. Mich. 2001) (citation omitted). Therefore, when one or more of the central issues in the action are common to the class and can be said to predominate, the class will be considered proper. *See* 7AA Charles Alan Wright, Arthur R. Miller & Mary K. Kane, Federal Practice & Procedure: Civil § 1778 (3d ed. 2005).

The Supreme Court has stated that "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem*, 521 U.S. at 625. As this is an antitrust conspiracy case, common issues regarding the existence, scope, and effect of the alleged conspiracy, *inter alia*, predominate over individual issues. *See, e.g.*, *Hughes v. Baird & Warner,*

Inc., No. 76 C 3929, 1980 WL 1894, at *3 (N.D. Ill. Aug. 20, 1980) ("Clearly, the existence of a conspiracy is the common issue in this case. That issue predominates over issues affecting only individual sellers.").

Plaintiffs "are not required to prove that each element of their claims is susceptible to classwide proof, but only that 'common questions predominate over any questions affecting only individual [class] members.'" *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md-2836, 2020 WL 3446895, at *28 (E.D. Va. June 18, 2020) (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013)), *report and recommendation adopted*, 481 F. Supp. 3d 571 (E.D. Va. 2020). Nevertheless, Plaintiffs could use common evidence to prove each of the elements of their antitrust claims on behalf of the Settlement Class. To prevail in an antitrust case, Plaintiffs must prove three elements: (1) a violation of the antitrust laws; (2) the impact of the unlawful activity; and (3) measurable damages. *In re Zetia*, 2020 WL 3446895, at *28.

a. Violation of the Antitrust Laws

Courts have found that the existence and scope of an antitrust conspiracy are common issues. *See, e.g.*, *In re Zetia*, 2020 WL 3446895, at *29 ("As many courts—including this one—have recognized, such evidence is common to the class, for if each member pursued its claims individually, it would rely on the same evidence to prove the alleged antitrust violations."); *see also* Alba Conte & Herbert Newberg, Newberg on Class Actions § 18:26, at 18-83 to 18-86 (4th ed. 2002) ("[I]n antitrust [cases], the issues of conspiracy . . . have been viewed as central issues which satisfy the predominance requirement.").

Proof of Defendants' antitrust violations would involve evidence common to all Settlement Class members. Critically, Plaintiffs' allegations of compensation-fixing focus on the actions of the Defendants, rather than the actions of individual class members, so that common issues regarding Defendants' liability predominate. Proof, common to the Settlement Class, establishes

the creation, scope, terms, participants, and enforcement of the alleged conspiracy, as well as acts in furtherance of it. Such evidence comes from Defendants' own files, statements, records, and employees. In short, proof of Defendants' antitrust violations is a common issue of sufficient importance that it alone causes common issues to predominate in this case. *See Am. Sales Co.*, 2017 WL 3669604, at *14 ("Based on this common evidence, the legal issues surrounding the antitrust violation will also be resolved uniformly across the class—whether [defendant] violated antitrust laws does not depend on any legal issue unique to a particular class member. Accordingly, Plaintiffs have proven by a preponderance of the evidence that common issues regarding the antitrust violation predominate over any individualized inquiry.").

b. Impact of the Unlawful Activity

"To show antitrust impact, there must be sufficient evidence to show that the class members suffered some damage as a result of [Defendants'] alleged antitrust violation." *In re Zetia*, 2020 WL 3446895, at *29 (quoting *Am. Sales Co.*, 2017 WL 3669604, at *14). "But at the class certification stage," Plaintiffs need not prove actual class-wide impact; rather, Plaintiffs "need only 'demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.'" *Id.* (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008)).

At trial, Plaintiffs will prove common impact on a class-wide basis using evidence common to the Settlement Class. First, Defendant Processors and co-conspirators collectively possess market power in the market for employment at poultry processing plants, poultry complexes, hatcheries, and poultry feed mills in the continental United States. TAC ¶ 534, ECF No. 590. Defendant Processors and co-conspirators together control more than 90 percent of that relevant labor market, which affords them "the power to jointly set compensation for workers at poultry processing complexes, plants, hatcheries, and feed mills." *Id.* Second, individual poultry

processing facilities did *not* set compensation for Settlement Class members. Rather, decisions regarding "the compensation of workers at poultry processing complexes, plants, hatcheries, and feed mills owned by Defendant Processors, their subsidiaries, and related entities were made exclusively by and at each Defendant Processors' corporate headquarters during the Class Period." *Id.* ¶ 186. Third, the alleged conspiracy "commonly impacted all workers at poultry processing complexes, plants, hatcheries, and feed mills owned by Defendant Processors, their subsidiaries, and related entities in the continental United States . . . because Defendant Processors valued internal equity, *i.e.* the idea that similarly situated employees should be compensated similarly." *Id.* ¶ 477. Defendant Processors "determined the hourly wages, annual salaries, bonuses, and employment benefits for Class Members across the country in a formulaic way, establishing schedules that compensated employees according to their specific positions in poultry processing complexes, plants, hatcheries, and feed mills." *Id.* ¶ 188. As a consequence, when Defendant Processors aligned their compensation schedules, the alignment systematically impacted the compensation of each Settlement Class member, as each occupied a position within those schedules. Fourth, in the absence of the alleged conspiracy, Defendant Processors would have vigorously "competed with each other for labor during the Class Period by offering higher wages, higher salaries, and superior benefits to Class Members." *Id.* ¶ 208. This is particularly true given that each Defendant Processor owns and operates a poultry processing plant that is within 47 miles of a poultry processing plant owned by another Defendant Processor, another Defendant Processor's subsidiary, or a co-conspirator, "meaning that many workers could easily switch to rival poultry processing plants offering better compensation in an unrestrained competitive market." *Id.* Instead, through their coordinated effort, Defendants restrained competition resulting in injury to the entire Settlement Class.

Another antitrust case within the Fourth Circuit that alleged a conspiracy to depress compensation—*Seaman v. Duke University*, No. 1:15-CV-462, 2018 WL 671239 (M.D.N.C. Feb. 1, 2018)—is instructive. In that case, plaintiffs alleged that the University of North Carolina ("UNC") and Duke University conspired not to hire each other's faculty, which had the effect of reducing compensation. In certifying a class, the court found two of the plaintiffs' arguments persuasive for purposes of demonstrating common impact: (1) "that because of the no-hire agreement the UNC and Duke defendants did not have to provide preemptive compensation increases for faculty that otherwise would have been needed to ensure employee retention" and (2) "that the defendants' internal equity structures—policies and practices that are alleged to have ensured relatively constant compensation relationships between employees—spread the individual harm of decreased lateral offers and corresponding lack of retention offers to all faculty, thus suppressing compensation faculty-wide." *Id.* at *4. The court concluded that those "theories of anti-trust impact to faculty present common questions for which common proof will be proffered." *Id.* Here, Plaintiffs have similarly and sufficiently demonstrated that class-wide impact is capable of common proof at trial.

c. Measurable Damages

No precise damages formula is required at the class certification stage. Rather, the Court's inquiry is merely limited to assessing whether methods are "available to prove damages on a class-wide basis." *In re Zetia*, 2020 WL 3446895, at *32 (citation omitted). "Assuming an appropriate model is put forth, 'the need for some individualized determinations' is not fatal to class certification." *Id.* (quoting *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015)).

Multiple methodologies are available to prove damages in this case on a class-wide basis. For example, class-wide damages can be calculated using an industry benchmark model, which is an approach commonly employed in antitrust cases of this type. The compensation paid to workers

in another industry (or industries) can be used as a yardstick to estimate the compensation that Settlement Class members would have received in the absence of the alleged conspiracy. This can be done using standard regression techniques that control for non-conspiratorial differences between the two industries that would be likely to influence compensation. *See Seaman*, 2018 WL 671239, at *6-7 (holding that a regression analysis is a viable method for calculating damages using common evidence in a case alleging the depression of compensation).

2. Superiority of a Class Action

In addition to the predominance of common questions, Rule 23(b)(3) requires a finding that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Factors relevant to the superiority of a class action under Rule 23(b)(3) include: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

In this case, a class action is certainly superior. The interests of Settlement Class members in individually controlling the prosecution of separate claims are outweighed by the efficiency of the class mechanism. There are no other pending actions raising the same allegations. Thus, the first three factors listed above are easily addressed: no class member has demonstrated any interest in litigating individually; the claims in this case are not being litigated anywhere else; and it would be enormously inefficient—for both the Court and the parties—to engage in multiple trials of the same claims asserted in multiple individual actions. "Requiring individual Class Members to file their own suits would cause unnecessary, duplicative litigation and expense, with parties, witnesses

and courts required to litigate time and again the same issues, possibly in different forums." *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. at 240.

Moreover, "the expense of individual actions, weighed against the potential individual recovery of the vast majority of class members here, would be prohibitive." *Temp. Servs.*, 2012 WL 2370523, at *5; *see also City of Ann Arbor Emps.' Ret. Sys. v. Sonoco Prods. Co.*, 270 F.R.D. 247, 257 (D.S.C. 2010) (holding that the superiority requirement has been satisfied because "the costs associated with bringing individual actions would be prohibitive when weighed against the potential individual recoveries"). Because it would be economically unreasonable for Settlement Class members to adjudicate their separate claims individually, the superiority of a class action is evident. Proceeding as a class action, rather than a host of separate individual trials, would provide significant economies in time, effort, and expense, and permit Settlement Class members to seek damages that would otherwise be too costly to pursue.

Finally, the Supreme Court has found that when certifying a settlement class "a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620. Such is the case here. If approved, the Settlement Agreements would obviate the need for a trial against the Settling Defendant, and thus questions concerning that trial's manageability are irrelevant. Accordingly, the Court should certify the Settlement Class.

V. DEFERRING CLASS NOTICE IS APPROPRIATE IN THIS CASE

Rule 23(e) requires that, prior to final approval of a settlement, notice of that settlement must be distributed to all class members who would be bound by it. Rule 23(c)(2)(B) requires that notice of a settlement be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

Plaintiffs request that the Court agree to defer formal notice of the Settlement Agreement to the Settlement Class until a later date.[6] Plaintiffs have negotiated with Defendants and corresponded with Settling Defendants, and will receive the production of names and contact information of Settlement Class members this spring. After the production of this information, Plaintiffs will file a motion to direct notice with the Court. *See, e.g.*, *McKinney v. U.S. Postal Serv.*, 292 F.R.D. 62, 68 (D.D.C. 2013) (court deferred the issuance of class notice "pending the completion of [an] additional six-month search period" that would "allow [party's] counsel to locate more accurate information" regarding class members).

If the Court approves Plaintiffs' request to defer notice, Plaintiffs will propose a detailed notice plan in a subsequent motion that will be filed after Defendants and Settling Defendants have produced data regarding each of the identifiable Settlement Class members. The proposed notice plan will, pursuant to Rule 23(c)(2)(B), provide the "best notice that is practicable" to all potential Settlement Class members who will be bound by the proposed Settlement Agreements.

VI. CONCLUSION

For the above reasons, Plaintiffs respectfully request that the Court enter an order: (1) preliminarily approving Plaintiffs' settlement with the Settling Defendant, (2) certifying the Settlement Class, (3) appointing Interim Co-Lead Counsel as Settlement Class Counsel, (4) appointing Plaintiffs as Settlement Class Representatives, (5) deferring notice to Settlement Class members until a later date, and (6) ordering a stay of all proceedings against the Settling Defendant except those proceedings provided for or required by the Settlement Agreement.

[6] Plaintiffs and the Settling Defendant have agreed that the timing of a motion to provide notice to the Settlement Class of the Settlement Agreement is at the discretion of Interim Co-Lead Counsel and may be combined with notice of other settlements in this action. *See* Johnson Decl., Ex. A § II(F)(5).

Dated: March 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice to counsel for all parties that have appeared in this case.

/s/ Brent W. Johnson