

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

IN RE BROILER CHICKEN ANTITRUST
LITIGATION

No. 1:16-cv-08637

Honorable Thomas M. Durkin
Magistrate Judge Jeffrey T. Gilbert

This Document Relates To:

All End-User Consumer Plaintiff Actions

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT AGREEMENT BETWEEN END-USER CONSUMER
PLAINTIFFS AND DEFENDANT HARRISON POULTRY, INC.**

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I. INTRODUCTION

The End-User Consumer Plaintiffs (EUCPs) move this Court for approval of settlement with Harrison Poultry, Inc. (hereinafter, “Harrison Poultry” or “Settling Defendant”) for \$2.9 million. This is the seventh settlement reached between EUCPs and defendant families, bringing the total recovery to date for the EUCP class to \$183.9 million. This Court granted final approval to settlements with defendants Fieldale (\$1.7 million), George’s (\$1.9 million), Mar-Jac Poultry (\$1 million), Peco (\$1.9 million), Pilgrim’s Pride Corporation (\$75.5 million), and Tyson (\$99 million) (collectively, “earlier Settling Defendants”) on December 20, 2021. ECF No. 5304. One class member appealed the award of attorneys’ fees to the Seventh Circuit. The Seventh Circuit heard argument on June 23, 2023. No order has yet been issued. Given this appeal, no distribution to the EUCP class has yet begun.

Given the pending motions for summary judgment and the likelihood of future settlements for the EUCP class, they respectfully request that notice be deferred at this time.

II. SUMMARY OF LITIGATION

EUCPs have been litigating this case diligently for seven years. The court has appointed Hagens Berman Sobol Shapiro LLP and Cohen Milstein Sellers & Toll, PLLC as counsel for the EUCP class. Since 2016, EUCPs have filed five amended complaints, adding Harrison Poultry as a defendant in 2018, a rule of reason claim, and at times conforming the pleadings to the evidence. Declaration of Shana E. Scarlett in Support of Motion for Preliminary Approval of Settlement Agreement Between End-User Consumer Plaintiffs and Defendant Harrison Poultry Inc., ¶ 3 (“Scarlett Decl.”).

EUCPs have engaged in rigorous discovery. Working with counsel representing the other classes, EUCPs have collected over eight million documents, taken over 180 depositions of

defendants' employees and third parties, and collected and analyzed voluminous structured data. Scarlett Decl., ¶ 3. In addition, all current class representatives sat for depositions. *Id.*

On June 21, 2019, after the United States Department of Justice moved to intervene in this case, the Court issued a partial stay of discovery. ECF No. 2302. On October 16, 2019, the Court extended the partial stay until June 27, 2020. ECF No. 3153.

On October 30, 2020, EUCPs filed a motion for class certification, supported by two expert declarations and a declaration provided by Fieldale. ECF No. 3971. The motion marshalled substantial econometric evidence, documentary evidence, and deposition testimony to show that EUCPs' claims are susceptible to class-wide treatment. Defendants opposed the motion; plaintiffs have filed a reply brief and further supporting testimony from Dr. Sunding. On May 27, 2022, the Court granted EUCPs' motion for class certification. ECF No. 5644.

Since class certification was granted, EUCPs have been engaged in efforts to oppose motions for summary judgment filed by remaining defendants in the case. Scarlett Decl., ¶ 4. Most recently, these efforts culminated in oral arguments, held over the course of two days on May 5, 2023, and June 2, 2023, and an opinion issued by the Court on June 30, 2023.

III. SUMMARY OF SETTLEMENT NEGOTIATIONS AND TERMS

The settlement was the product of confidential, arms-length negotiations and includes both monetary relief for the class and cooperation in EUCPs' litigation against the non-settling defendants. Scarlett Decl., ¶ 5.

Negotiations between EUCPs and Harrison Poultry took years to reach completion. Plaintiffs originally served a demand on Harrison Poultry in 2018. In 2021, Harrison responded to that demand, but no agreement was reached. Negotiations continued throughout the spring and summer of 2022, with no agreement reached. In January 2023, negotiations began anew and

continued through February 2023. An agreement on terms was reached shortly thereafter, with a final settlement agreement signed on May 22, 2023. Scarlett Decl., ¶ 6 & Ex. A.

The settlement provides that Harrison Poultry will pay \$2.9 million (\$2,900,000) into a settlement fund that will be used to compensate the EUCP class and cover litigation fees and expenses, including the cost of notifying class members and administering the settlement. *Id.*, Ex. A, ¶¶ 12-13. Lead Counsel believe this sum is fair and reasonable in light of Harrison Poultry's market share of class products, and the cooperation Harrison Poultry agreed to provide, including, when reasonably requested by the EUCPs, 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. *Id.*, Ex. A, ¶ 10.

In exchange, EUCPs agree to release:

any and all claims, demands, actions, suits, causes of action, whether class, individual, or otherwise in nature (whether or not any member of the Settlement Class has objected to the Settlement Agreement or makes a claim upon or participates in the Settlement Fund, whether directly, representatively, derivatively or in any other capacity) that the Releasing Parties ever had, now have, or hereafter can, shall, or may ever have, that exist as of the date of the order granting Preliminary Approval, on account of, or in any way arising out of, any and all known and unknown, foreseen and unforeseen, suspected or unsuspected, actual or contingent, liquidated or unliquidated claims, injuries, losses, damages, and the consequences thereof, including any claims of third parties that have been assigned to a releasing Party and (to the extent the Releasing Party has the legal and contractual right to do so) any claims previously assigned by the Releasing Party to a third party, that have been asserted, or could have been asserted, under federal or state law, in any way arising out of acts or omissions through the date of Preliminary Approval relating to the subject matter of the Action (the "Released Claims").

Id., Ex. A, ¶ 14.

EUCPs' settlement agreement with Harrison Poultry refers to a judgment sharing agreement among certain defendants. This judgment sharing agreement provides that the remaining defendants will not be jointly and severally liable for damages that reflect a settling defendant's share of damages. The members of this judgment sharing agreement previously agreed how they would allocate each defendant's share of liability based on their respective sales. Because of this judgment sharing agreement, if EUCPs are awarded damages and final judgment, Harrison Poultry's portion of the damages would be removed from the calculation of the award. *Id.*, Ex. A, ¶ 37.

IV. ARGUMENT

A. The Court should preliminarily approve the settlement.

"It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement."¹ However, Courts must review class action settlements to ensure that they are "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

"The first step in district court review of a class action settlement is a preliminary, pre-notification hearing to determine whether the proposed settlement is within the range of possible approval."² In other words, the Court must consider whether it "will likely be able to" approve the settlement as fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(1)(B)(i); *see* Fed. R. Civ. P. 23(e)(2).

EUCPs' agreement with Harrison Poultry is fair, reasonable, and adequate. A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length

¹ *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312 (7th Cir. 1980)), *overruled on other grounds, Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). Internal citations and quotation marks omitted throughout the brief unless otherwise indicated.

² *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982).

negotiations between experienced, capable counsel after meaningful discovery.”³ As explained above, the settlement here was the result of arm’s length negotiations over several years, much of which took place post-class certification, after EUCPs (working with other plaintiffs) collected over eight million documents and deposed more than 180 witnesses. The settlement should therefore be accorded a presumption of fairness.

Moreover, “class representatives and class counsel have adequately represented the class.” Fed. R. Civ. P. 23(e)(2)(A). Class representatives have all prepared and sat for depositions and worked diligently to serve the interests of the class. The settlements provide “adequate” relief for the class, in accordance with Fed. R. Civ. P. 23(e)(2)(C). Harrison Poultry represents between 0.8 and 1.1% of market share for EUCP class products. Scarlett Decl., ¶ 10. A \$2.9 million settlement equates to between \$2.64 and \$3.54 million per point of market share. *Id.* This reflects roughly the same amount as the Tyson and Pilgrim’s settlements, and an increase from the first round of settlements. *Id.* Given that this settlement was reached at a similar stage of the case to the second round of settlements (after a ruling on the motions to dismiss, but before a ruling on the motions for summary judgment), EUCPs applied a similar risk analysis as to those prior two rounds of settlement. *Id.* And, in addition to the financial compensation, the cooperation that EUCPs have secured from the settlement will bolster EUCPs’ claims in a trial against the remaining non-settling defendants.

B. The Court should certify the proposed Settlement Class.

The settlement proposes a Settlement Class of End-Users that is identical to that certified by this Court in its Memorandum Opinion and Order granting class certification, defined as:

³ *Am. Int’l Grp., Inc. v. ACE INA Holdings, Inc.*, Nos. 07 Civ. 2898, 09 Civ. 2026, 2012 WL 651727, at *10 (N.D. Ill. Feb. 28, 2012).

All persons and entities who indirectly purchased the following types of raw chicken, whether fresh or frozen: whole birds (with or without giblets), whole cut-up birds purchased within a package, breast cuts or tenderloin cuts, but excluding chicken that is marketed as halal, kosher, free range, organic, diced, minced, ground, seasoned, flavored or breaded—from defendants or co-conspirators for personal consumption in the Repealer Jurisdictions from January 1, 2012 to July 31, 2019.⁴

ECF No. 5644. As the Court found in its Memorandum Opinion and Order granting class certification, the class in the case (which is identical to the Settlement Class) satisfies all the requirements of Rule 23.

1. The proposed Settlement Class satisfies Rule 23(a).

a. Numerosity

The numerosity requirement of Rule 23(a)(1) is satisfied where joinder of all putative class members is “impracticable.”⁵ Generally, a class of forty or more plaintiffs is sufficient to satisfy the numerosity requirement.⁶ The EUCP class is comprised of millions of chicken consumers, which clearly meets this bar. *See* ECF No. 5644.

b. Commonality

There are also “questions of law or fact common to the [EUCP] class.” Fed. R. Civ. P. 23(a)(2). Commonality exists where plaintiffs’ claims depend on a “common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or

⁴ Any terms in the class definition have the meaning ascribed in the Court’s order granting class certification in ECF No. 5644. For the avoidance of doubt, the “Repealer Jurisdictions” are: California, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, and Wisconsin.

⁵ *Prac. Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc.*, 301 F. Supp. 3d 840, 849 (N.D. Ill. 2018).

⁶ *Id.*

falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”⁷ EUCPs are relying on several common contentions, including that: (1) defendants conspired to stabilize the price and supply of chicken sold in the United States; and (2) this collusion caused the plaintiff class to pay overcharges for chicken. *See* ECF No. 5644.

c. Typicality

Under Rule 23(a), typicality is satisfied if “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a). The typicality requirement “directs the district court to focus on whether the named representatives’ claims have the same essential characteristics as the claims of the class at large.”⁸ A “plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members.”⁹ Here, typicality is satisfied because EUCPs’ claims are based on the same antitrust conspiracy. *See* ECF No. 5644.

d. Adequacy

The proposed named plaintiffs are adequate representatives of the proposed class. Fed. R. Civ. P. 23(a)(4). The adequacy requirement is satisfied where the named representatives have a sufficient interest in the outcome of the case to ensure vigorous advocacy, and do not have interests antagonistic to those of the class.¹⁰ The named plaintiffs have no material conflict with other class members. Each purchased chicken from grocery stores, unaware of the existence of defendants’ alleged agreement to suppress the price and supply of chicken. No one individual class member

⁷ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

⁸ *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 597 (7th Cir. 1993).

⁹ *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983); *see also In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 351 (N.D. Cal. 2005) (“plaintiffs and all class members alleg[e] the same antitrust violations by defendants”).

¹⁰ *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 480 (N.D. Ill. 2009).

could avoid the claimed overcharges. Each named plaintiff is aligned with the class in establishing defendants' liability and maximizing class-wide damages. *See* ECF No. 5644.

2. The proposed Settlement Class satisfies Rule 23(b)(3).

Under Rule 23(b)(3), 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 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Both requirements are satisfied here.

First, common questions of law or fact predominate over individual questions. “[C]ommon questions can predominate if a common nucleus of operative facts and issues underlies the claims brought by the proposed class.”¹¹ Here, a series of common questions lies at the heart of all EUCPs' claims, including: whether defendants conspired to stabilize the price and supply of chicken; whether defendants' information exchange was anticompetitive; whether defendants occupy a relevant antitrust market and collectively wielded power in that market; whether defendants' conspiracy caused market-wide supra-competitive chicken prices; and whether higher chicken prices were passed on to chicken consumers. *See* ECF No. 5644.

Second, a class action is the superior mechanism for trying plaintiffs' claims. “Rule 23(b)(3)'s superiority requirement . . . is comparative: the court must assess efficiency [of a class action] with an eye toward other available methods.”¹² Rule 23 instructs that the matters pertinent to this inquiry include: (a) class members' interests in individually controlling the prosecution of separate actions; (b) whether other litigation exists concerning this controversy; (c) the desirability of concentrating the litigation in this forum; and (d) any difficulties in managing a class action.

¹¹ *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012); *see also Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 925 (7th Cir. 2016).

¹² *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 664 (7th Cir. 2015).

Fed. R. Civ. P. 23(b)(3). In this case, the first three factors weigh heavily in favor of class certification: class members have “little economic incentive to sue individually based on the amount of potential recovery involved, there are no known existing individual lawsuits [filed by end-user consumers], and judicial efficiency is served by managing claims in one proceeding.”¹³ See ECF No. 5644.

At the same time, there are no difficulties in managing this Settlement Class as a class action. Litigating the claims of the class members from different states in this Court does not present manageability concerns because all class members purchased chicken in states that have an antitrust or consumer statute that tracks the federal Sherman Act, ensuring that the core questions of liability will be proved with common evidence. See Class Cert. Mot. at 43-44. Indeed, “[c]onfronted with a request for settlement-only class certification,” the Supreme Court directs that a “district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial.”¹⁴

Finally, the proposed Settlement Class is ascertainable. Here, a class member may self-identify simply by reviewing the class definition. Moreover, given that EUCPs have subpoenaed and obtained contact information for tens of millions of class members through loyalty programs at grocery stores, the class is clearly ascertainable.

C. EUCPs request that the Court defer notice until further settlements are reached.

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

¹³ *Cirque du Soleil*, 301 F. Supp. 3d at 856.

¹⁴ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

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 because each provision of notice to a class of this size costs hundreds of thousands of dollars. Accordingly, providing separate notice to the Settlement Class each time that Plaintiffs enter into a settlement with any of the non-settling defendants might lead to inefficiencies and reduce the amount of funds available for distribution to the Settlement Class.

It will likely be in the best interests of the Settlement Class to combine the notice of the Harrison Poultry settlement with notice(s) of future settlement(s) with other defendants, should additional settlements be reached in the near future. Proceeding in this way creates attendant efficiencies and cost savings for the Settlement Class, resulting in more money from the settlements making it into the pockets of Settlement Class members. Indeed, courts often defer notice of partial settlements in complex antitrust cases until enough settlements have been reached to make the transmittal of notice cost-effective. *See, e.g., In re Aftermarket Filters Antitrust Litig.*, No. 1:08-cv-04883, Order (ECF No. 885), at 5, 11 (N.D. Ill. Feb. 16, 2012) (deferring class notice); *see also In re Auto. Wire Harnesses*, No. 12-md-02311, 2020 U.S. Dist. LEXIS 183483, at *267 (E.D. Mich. Sept. 30, 2020) (approving plaintiffs’ plan “to defer notice and the corresponding claims process until Class Counsel determined that an appropriate number of settlements occurred,” which “kept expenses lower”). This Court has itself previously allowed Plaintiffs to defer class notice of preliminarily approved settlement until a later date. ECF No. 462, ¶¶ 3-4.

If the Court approves Plaintiffs’ request to defer notice, Plaintiffs will propose a detailed notice plan in a subsequent motion that will be filed at a point reasonably calculated to maximize the funds available for distribution to the Settlement Class. The proposed notice plan will, pursuant

to Rule 23(c)(2)(B), provide the “best notice practicable” to all potential Settlement Class members who will be bound by the proposed Settlement Agreement.

In its most recent order regarding the claims period, the Court set a deadline of December 31, 2022. ECF 5304. Because the case is ongoing, class members have been allowed to continue making claims. Plaintiffs now request that the Court formally extend the claims period through the end of the year, until December 31, 2023, after which the settlement proceeds would be distributed to the Settlement Class.

V. CONCLUSION

For these reasons, EUCPs respectfully request that the Court preliminarily approve the settlement agreement with Harrison Poultry, to certify the Settlement Class proposed here, and to extend the claims period until December 31, 2023.

DATED: July 11, 2023

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on July 11, 2023, a true and correct copy of the foregoing was electronically filed by CM/ECF, which caused notice to be sent to all counsel of record.

/s/ Shana E. Scarlett

SHANA E. SCARLETT