

**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

All End-User Consumer Plaintiff Actions

**MEMORANDUM OF LAW IN SUPPORT OF END-USER CONSUMER PLAINTIFFS'
MOTION FOR FINAL APPROVAL OF THE CLASS ACTION SETTLEMENTS**

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Fed. R. Civ. P. 23 *passim*

OTHER AUTHORITIES

4 Newberg on Class Actions § 13:53 (5th ed.)12

GLOSSARY OF DEFINED TERMS

Term	Definition
Andren Obj.	Obj. to Mot. for Attorneys' Fees, Costs, and Service Award, ECF No. 5182 (Nov. 10, 2021).
Berman Decl.	Decl. of Steve W. Berman in Supp. End User Consumer Plaintiffs' Mot. for Final Approval of the Class Action Settlements, filed concurrently herewith.
Class Cert. Mot.	End-User Consumer Plaintiffs' Motion for Class Certification, ECF No. 3971 (Oct. 30, 2020).
Class Cert. Reply	Reply in Support of End-User Consumer Plaintiffs' Motion for Class Certification, ECF No. 4487 (Mar. 29, 2021).
CAFA	Class Action Fairness Act, <i>See</i> 28 U.S.C. § 1715.
Class Counsel	Hagens Berman Sobol Shapiro LLP and Cohen Milstein Sellers & Toll PLLC
Class Representative Declarations	Exs. D & E, ECF Nos. 4377-6 and 4377-7, to the Decl. of Shana E. Scarlett in Support of Mot. for Prelim. Approval of Settlement Agreements Between End-User Consumer Plaintiffs and Tyson, Fieldale, Peco Foods, and George's Defendants, ECF No. 4377-1 (Mar.1, 2021); Ex. C. to the Decl. of Shana E. Scarlett in Supp. of Mot. for Prelim. Approval of Settlement Agreements between End-User Consumer Plaintiffs and Defendants Pilgrim's and Mar-Jac and to Direct Notice to the Settlement Class. 4921-1 (Aug. 5, 2021).
Class Representatives	Plaintiffs Linda Cheslow, Abraham Drucker, Ian Adams, Marilyn Stangeland, Daniel M. Percy, Kristin Davis, Leslie and David Weidner, Matthew Hayward, Dorothy Monahan, Joshua Madsen, Natalie Wilbur, Alison Pauk, Michael Perry, William David Marino, Eric Thomas, Kenneth Cote, Catherine Senkle, Margo Stack, James Flasch, Dina Morris, Dianne Spell, Angela Ashby, Christina Hall, Richard Heftel, and Stephen Holt.
DPP Interim Fee Order	Mem. and Order, ECF No. 5229 (Dec. 1, 2021).
ECF No.	Unless otherwise noted, all "ECF No." references are to the docket in <i>In re: Broilers Antitrust Litigation</i> , No. 1:16-cv-08637.
EUCPs	End-User Consumer Plaintiffs
EUCPs Response to Objectors	End-User Consumer Plaintiffs' Consolidated Response to Objections to Motions for Final Approval and for Attorneys' Fees, Costs, and Service Awards, filed concurrently herewith.
Fee Motion	Mem. in Supp. End-User Consumer Plaintiffs' Motion for Attorneys' Fees, Expenses, and Class Representative Awards, ECF No. 5161 (Oct. 27, 2021).

Term	Definition
Fieldale	Fieldale Farms Corporation
George's	George's Inc. and George's Farms, Inc.
Getz Obj.	<i>See</i> Berman Decl., Ex. I (filed concurrently herewith) (Objection of Carlton A. Getz).
Huang Obj.	Obj. to EUCP's Mot. for Attorney's Fee, ECF No. 5167 (Nov. 2, 2021).
Mar-Jac	Mar-Jac Poultry, Inc., Mar-Jac AL/MS, Inc., Mar-Hac Holdings, Inc.; Mar-Jac Poultry AL, LLC, Mar-Jac Poultry MS, LLC, and Mar-Jac Poultry, LLC
Lead Counsel App.	Application for Appointment of Steve W. Berman of Hagens Berman Sobol Shapiro LLP & Kit. A. Pierson of Cohen Milstein Sellers & Toll PLLC as Co-Lead Counsel for the Indirect Purchaser Consumer Class, ECF No. 117 (Oct. 7, 2016) (Lead Counsel Application).
Motion for Preliminary Approval	Mem. in Supp. Mot. for Prelim. Approval of Settlement Agreements between End-User Consumer Plaintiffs and Tyson, Fieldale, Peco Foods, and George's Defendants, ECF No. 4377 (Mar. 1, 2021).
Order Directing Notice	Order, ECF No. 4938 (Aug. 12, 2021).
Order Granting Preliminary Approval	Order Granting Prelim. Approval of Settlement Agreements between End-User Consumer Plaintiffs and Tyson, Fieldale, Peco Foods, and George's Defendants, ECF No. 4451 (Mar. 22, 2021).
Peco	Peco Foods, Inc.
Pilgrim's	Pilgrim's Pride Corporation
Scarlett Fee Decl.	Decl. of Shana Scarlett in Supp. Mem. in Supp. EUCP's Mot. for Attorneys' Fees, Expenses, & Class Representative Awards, ECF No. 5161-1 (Oct. 27, 2021).
Scarlett Prelim. Approval Decl. (Aug.),	Decl. of Shana E. Scarlett in Supp. Mot. for Prelim. Approval of Settlement Agreements between End-User Consumer Plaintiffs and Defendants Pilgrim's and Mar-Jac and to Direct Notice to the Settlement Class. ECF No. 4921-1 (Aug. 5, 2021).
Scarlett Prelim. Approval Decl. (Mar.),	Decl. of Shana E. Scarlett in Support of Mot. for Prelim. Approval of Settlement Agreements Between End-User Consumer Plaintiffs and Tyson, Fieldale, Peco Foods, and George's Defendants, ECF No. 4377-1 (Mar. 1, 2021).
Schachter Decl.	Decl. of Eric Schachter in Support of Mot. for Final Approval of the Settlement, filed concurrently herewith.
Settlement Agreements	Berman Decl., Ex. A (Tyson Settlement Agreement), Ex. B (Fieldale Settlement Agreement), Ex. C (George's Settlement Agreement), Ex. D (Peco Settlement Agreement), Ex. E (Mar-Jac Settlement

Term	Definition
	Agreement). Ex. F (Pilgrim’s Settlement Agreement) filed concurrently herewith.
Settling Defendants	Tyson, Pilgrim’s Fieldale, George’s, Peco, and Mar-Jac
the Settlement Class	<i>See pages 2-3 supra.</i>
Tyson	Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Breeders, Inc., and Tyson Poultry, Inc.

I. INTRODUCTION

EUCPs respectfully move this Court for final approval of settlements totaling \$181 million with six defendant families: Fieldale, Peco, George's, Tyson, Pilgrim's, and Mar-Jac. These settlements represent a substantial recovery for the EUCP class and were only achieved after years of zealous advocacy and intense discovery. On March 22, 2021, this Court granted preliminary approval of the settlements with Fieldale, Peco, George's and Tyson.¹ On August 12, 2021, the Court granted preliminary approval of the settlements with Pilgrim's and Mar-Jac and ordered dissemination of notice to class members.²

The notice administrator provided notice in accordance with this Court's order and the notice administrator estimates that notice reached more than 80% of potential class members. Schachter Decl., ¶ 21. Grocery stores and club stores provided EUCPs with consumers' email addresses, which EUCPs used to send direct notice to more than 40 million potential class members. This robust direct notice plan was supplemented with a state-of-the-art media indirect notice campaign, which generated more than 367 million impressions across Google, Facebook, Instagram, and YouTube. A simple settlement website (www.overchargedforchicken.com) made it easy for class members to file their claims and provided detailed information regarding the settlements and litigation.

Although the class encompasses millions of consumers, only three objections were filed, and only seven class members have requested exclusion from the class. The three objections focus almost exclusively on the attorney fee request.³ The small number of opt-outs and

¹ See Order Granting Preliminary Approval, ECF No. 4451.

² See Order Directing Notice, ECF No. 4938.

³ These objections are addressed separately in End-User Consumer Plaintiffs' Consolidated Response to Objections to Motions for Final Approval and for Attorneys' Fees, Costs, and Service Awards, (Response to Objectors) filed concurrently herewith.

objectors further supports approval of the settlements and demonstrates that the notice program met constitutional and statutory requirements. Respectfully, Plaintiffs request that this Court grant final approval of these settlements.

II. BACKGROUND

In their fee motion, EUCPs included a detailed discussion of this case's procedural history and described the efforts expended litigating this case.⁴ Because the Court is familiar with this litigation, EUCPs will not regale the Court with this narrative twice.

A. Summary of settlement terms.

EUCPs have proposed settlements with six defendant families, totaling \$181 million. The proposed Settlement Agreements will resolve all claims arising from the conspiracy to restrain competition for broiler chicken against the Tyson, Pilgrim's Fieldale, George's, Peco, and Mar-Jac Defendants. EUCPs continue to proceed on their claims against the 12 remaining defendants: Koch, Perdue, Sanderson, Wayne Farms, Mountaire, Foster Farms, House of Raeford, Simmons, O.K. Foods, Claxton, Harrison, and Agri Stats. The Tyson, Fieldale, George's, Peco and Mar-Jac Settlement Agreements define the Settlement Class as:

All persons and entities who indirectly purchased fresh or frozen raw chicken (defined as whole birds (with or without giblets), whole cut-up birds purchased within a package, or "white meat" parts including breasts and wings (or cuts containing a combination of these), but excluding chicken that is marketed as halal, kosher, free range, or organic) from Defendants or alleged co-conspirators for personal consumption, where the person or entity purchased in 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 (after July 15, 2013), South Carolina, South Dakota, Tennessee, Utah, and Wisconsin from

⁴ See, Fee Motion, ECF No. 5161, at 2-8.

January 1, 2009 (except for Rhode Island, which is from July 15, 2013) to July 31, 2019.⁵

The Pilgrim's Settlement Agreement covers the same class but has a period ending on December 31, 2020.⁶

The proposed Settlement Agreements require significant cash consideration from the Settling Defendants. And as the litigation has progressed, EUCPs required each settling defendant to "step up" their offer, either providing more money relative to their market share or more cooperation. As the table below demonstrates, each of the settlements provides a significant recovery – whether measured by total dollars or in proportion to each defendants' estimated share of sales to the EUCP class:

Settling Defendant	Date of Agreement	Proposed Settlement	Estimated Market Share	Settlement Value Per Point of Market Share
Peco	10/28/2020	\$1.9 million	1.7%	\$1.11 million per point of market share
George's	10/28/2020	\$1.9 million	1.2%	\$1.58 million per point of market share
Fieldale	12/3/2020	\$1.7 million	1.7%	\$1 million per point of market share ⁷
Tyson	2/21/2021	\$99 million	33.3%	\$2.9 million per point of market share
Pilgrim's	6/23/2021	\$75.5 million	21.5%	\$3.51 million per point of market share
Mar-Jac	7/28/2021	\$1 million	0.2%	\$5 million per point of market share
TOTAL		<i>\$181 million</i>	<i>59.6%</i>	<i>\$3 million per point of market share</i>

⁵ Berman Decl., Ex. A § II(G)(2) (Tyson Settlement Agreement), Ex. B § II(G)(2) (Fieldale Settlement Agreement), Ex. C § II(G)(2) (George's Settlement Agreement), Ex. D § II(G)(2) (Peco Settlement Agreement), Ex. E § II(G)(2) (Mar-Jac Settlement Agreement).

⁶ *Id.*, Ex. F ¶ (5) (Pilgrim's Settlement Agreement).

⁷ EUCPs agreed that Fieldale could pay less money per point of market share than other settling Defendants because Fieldale provided a declaration in support of EUCP's motion for class certification, which was materially more cooperation than the previous settling Defendants had provided. *See* Decl. Jeff Paschall, ECF No. 3972-1 (Oct. 30, 2020).

If the settlements are approved, the EUCPs will have recovered more from the Settling Defendants than any other class, whether measured by total cash paid or settlement value per point of market share. Berman Decl., ¶ 4. This represents a significant achievement and reflects Class Counsel's fierce representation of the consumers.

In addition to the monetary relief, each of the settlement agreements includes provisions to cooperate by authenticating documents and providing explanations when needed for structured data. *Id.*, ¶ 8. Finally, Tyson and Pilgrim's both agreed to provide live witnesses at trial. *Id.*

B. Release of claims.

Upon final approval and entry of judgement, class members will release all existing or potential claims related to this litigation, or factually predicated on this litigation. For Fieldale, George's, Peco, and Tyson, the releases apply to all claims arising from any act or omission related to the litigation that occurred during the Class Period (January 1, 2009 to July 31, 2019). *Id.*, ¶ 9. For Mar-Jac, the release applies to all claims arising from any act or omission related to the litigation that occurred through the date of preliminary approval (August 12, 2021). *Id.* For Pilgrim's, the release applies to all claims that arise from "the indirect purchase of Broilers produced, processed, or sold" by Pilgrim's that are related to the litigation which exist or could have existed through the date of preliminary approval (August 12, 2021).⁸ *Id.* The releases each exclude claims asserted against other defendants or co-conspirators. *Id.*

⁸ The Pilgrim's Settlement Agreement defines "Broilers" as "fresh or frozen raw chicken (defined as whole birds (with or without giblets), whole cut-up birds purchased within a package, or 'white meat' parts including breasts and wings (or cuts containing a combination of these) but excluding chicken that is marketed as halal, kosher, free range, or organic." Berman Decl., Ex. F ¶ (1)(b) (Pilgrim's Settlement Agreement). This is the same definition that applies to the settlement class for their purchases.

C. Notice to the class.

The consumer class is estimated at approximately 60-90 million class members.⁹ The class received direct and indirect notice through various methods, including direct email notice and publication notice. Schachter Decl., ¶¶ 5-15. Pursuant to this Court's order,¹⁰ the notice administrator provided direct notice via email (obtained from grocers and club stores who sell chicken to consumers) to more than 40 million potential class members. *Id.*, ¶ 6. The notice administrator estimates email notice was delivered to 81% of those email addresses. *Id.*

The direct notice campaign was supported by other outreach methods to ensure class members heard about the settlement and received sufficient information to evaluate their options. Since September 10, 2021, the settlement website (www.overchargedforchicken.com) has been available to the class. The website provides the short-form and long-form notices, and a Spanish translation of the notice, as well as answers to commonly asked questions, a claims form that is easy to fill out, and the relevant motions and orders (including the motion for attorneys' fees). *Id.*, ¶ 15. In addition, a toll-free automated telephone support line was put in place to provide answers to frequently asked questions by class members. *Id.*, ¶ 14.

In addition, the notice administrator engaged in an extensive public notice campaign. It incorporated the Court's suggestions as to the contents of the various forms of notice from the preliminary approval hearing. The campaign included:

- **Publication Notice:** Targeted advertisements were delivered to potential class members using their known contact information and to digital users who expressed an interest related to the subject of this case, such as cooking. *Id.*, ¶¶ 8-11. These notices were placed in "premium positioning" on websites and social media sites, and the notices were specifically designed to be readable, noticeable, and widely disseminated. *Id.* These targeted banner ads were placed on *Google Display Networks*, and on

⁹ Supplemental Information Regarding End-User Class Notice, ECF No. 4955, at 1.

¹⁰ See Order Directing Notice, ECF No. 4938.

websites such as *Facebook*, *Instagram* and *Youtube*. These ads appeared in both English and Spanish, and on both desktop and on mobile formats. The claims administrator also created a case-specific Facebook page. *Id.*

- **Sponsored Internet Search Listings:** Sponsored search listings directed potential class members to the settlement website when users searched for target phrases and keywords relevant to the action to assist potential class members with finding and accessing the case website. *Id.*, ¶ 10.
- **Informational Release:** News releases were disseminated via *PR Newswire* to the news desks of approximately 10,000 newsrooms, including those of print, broadcast, and digital websites across the United States. The news release was also translated and published to *PR Newswire*'s U.S. Hispanic media contacts and Hispanic news websites. *Id.*, ¶ 12.

In total, for example, the digital banner advertisements and social media advertisements generated 367 million impressions. *Id.*, ¶ 11. To date, the website has been viewed over 3 million times. *Id.*, ¶ 15. The notice administrator estimates that the notice plan reached approximately 81.1% of the target audience of potential class members. *Id.*, ¶ 21.

As a result of these notice efforts, in total, 1,239,892 class members have submitted claims to date. *Id.*, ¶ 4. EUCPs expect additional class members will continue to file claims until the claims period closes, on December 31, 2022. *Id.*, ¶ 4.

D. Plan of distribution.

After the claims period closes (on December 31, 2022), EUCPS will move the Court for a distribution order, and will provide additional detail on the plan of distribution, the number of claimants, and the method by which class members will be paid. Berman Decl., ¶ 13. EUCPs propose to distribute the settlement funds to class members on a *pro rata* basis, based on the amount of purchases that claimants made from January 1, 2009, through December 31, 2020. *Id.* ¶ 14. The notice administrator will distribute the settlement funds electronically to the accounts identified by class members, unless a class member indicates that they would prefer a physical check. Schachter Decl., ¶ 20. The claims administrator estimates that the total cost of

administrating notice and distributing the funds to the class will cost between \$1,250,000 and \$1,450,000.¹¹

Should a balance remain after the distribution to the class (whether by reason of tax refunds, uncashed checks, or otherwise), or multiple rounds of distribution (which are likely), Class Counsel propose to allow the money to escheat to state governments. Berman Decl., ¶ 14. Accordingly, no settlement funds will revert to the Settling Defendants. *Id.*

III. ARGUMENT

Because there is an overriding public interest in settling cases, “[f]ederal courts naturally favor the settlement of class action litigation.”¹² The standard for final approval of a class action settlement is whether the settlement is “fair, reasonable, and adequate.”¹³ The Seventh Circuit reviews a district court’s final approval determination for abuse of discretion.¹⁴

To determine whether a proposed class action settlement meets the final approval requirements, Rule 23(e)(2) instructs courts to consider whether: (1) the class representatives and class counsel have adequately represented the class, (2) the proposal was negotiated at arm’s length, (3) the proposal treats class members equitably relative to each other, and (4) the relief provided by the settlement is adequate, taking into account (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class; (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and

¹¹ To date, the claims administrator has spent \$572,838.90 administering notice. Schachter Decl., ¶ 19. The remainder of the estimated costs include additional notice, claims processing, contact center costs, fund distribution, project reporting, and postage. *Id.* EUCPs seek reimbursement for these costs on behalf of the claims administrator. *See* Section III(A)(3)(c), *infra*.

¹² *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996).

¹³ Fed. R. Civ. P. Rule 23(e)(2).

¹⁴ *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (quoting *Isby*, 75 F.3d at 1199).

(iv) any agreement required to be identified under Rule 23(e)(3).¹⁵ The Seventh Circuit also instructs courts to consider (5) the strength of the plaintiffs' case compared to the amount of the defendants' settlement offer, (6) the opinion of experienced counsel, (7) the reaction of the class, and (8) the stage of the proceedings and the amount of discovery completed.¹⁶

Finally, before granting final approval, courts must assess whether defendants have met the notice requirements under the Class Action Fairness Act,¹⁷ and determine whether constitutional notice has been provided pursuant to Federal Rule of Civil Procedure 23(c)(2)(B). Here, the proposed settlement agreements meet these standards, and final approval should be granted.

A. The settlements are fair, reasonable and adequate.

The proposed settlements satisfy all four prongs listed under Rule 23(e)(2). The additional four factors identified by the Seventh Circuit also support granting final approval.¹⁸

1. Rule 23(e)(2)(A): Class Representatives and Class Counsel adequately represented the class.

First, the Class Representatives for EUCPs and Class Counsel have adequately represented the class. As described in EUCPs' Fee Motion, Class Counsel undertook significant work to develop EUCPs claims.¹⁹ Class Counsel has spent more than 67,500 hours in pursuit of these claims over the past five years. As this Court recently recognized with regard to DPPs'

¹⁵ Fed. R. Civ. P. Rule 23(e)(2).

¹⁶ *Synfuel*, 463 F.3d at 653 (quoting *Isby*, 75 F.3d at 1199).

¹⁷ *See* 28 U.S.C. § 1715(d).

¹⁸ *See, e.g., Synfuel*, 463 F.3d at 653 (quoting *Isby*, 75 F.3d at 1199).

¹⁹ *See* Fee Motion at 2-8 (describing counsels' efforts).

motion, Class Counsel overcame multiple motions to dismiss and navigated numerous other motions, leading up to the pending class certification motions.²⁰

Likewise, each named plaintiff has adequately represented the class – spending more than 40 hours on tasks such as responding to discovery, preparing for and sitting for depositions, and reviewing and providing input for each settlement.²¹ Each named plaintiff has provided a declaration describing their efforts and certifying that they considered the interests of all class members before approving of the settlements and noting that they understood that they could disagree with Class Counsel about the merits of the settlement.²² Most of the named plaintiffs approving these settlements have no connection with Class Counsel or any other attorney working on this case; those who have previously met an attorney connected to this litigation have disclosed as much and certified under oath that the association has “not in any way prevented me from providing my view on whether the settlements are in the best interests of the class.”²³ And *all* class representatives stated, under penalty of perjury: “If I believed that a settlement was not

²⁰ See DPP Interim Fee Order.

²¹ See Fee Motion at 8, 20 (describing the class representatives’ efforts).

²² See Class Representative Declarations, ECF Nos. 4377-6 and 4377-7.

²³ See Class Representative Declarations, ECF No. 4377-6. In *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 714 (7th Cir. 2015), the Seventh Circuit admonished class counsel for not disclosing that the one of the two class representatives was *working with class counsel as co-counsel* in another case. Here, *none* of the named plaintiffs have any business relationship with Class Counsel, nor do any have familial relationships. See Berman Decl., ¶ 23. And all Class Representatives disclosed whether, prior to this case, they knew any attorney who worked at Class Counsel’s law firms (whether or not that attorney has appeared in this case, and even if the attorney no longer works for Class Counsel) or knew any attorneys who appeared in this matter as non-lead counsel on behalf of EUCPs. Of the 25 class representatives, eight know attorneys who currently or previously worked at Class Counsel’s firms (*Mxes.* Flasch, Hayward, Madesen, Ashby, Davis, Holt, Morris, and Weidner). Four know attorneys who have worked as non-lead counsel (*Mxes.* Drucker, Stack, Marino, and Strangeland).

in the interest of the Class, I would provide that view to Class Counsel and the Court.”²⁴ This is more than sufficient to satisfy the requirements of Rule 23(e)(2)(A).²⁵

2. Rule 23(e)(2)(B): the proposals were negotiated at arm’s length.

The second consideration for final approval is whether the agreements were negotiated at an arm’s length. In this case, EUCPs engaged in lengthy, protracted negotiations with each defendant before agreeing to a settlement. *See* Berman Decl., ¶ 5. For the Tyson and Pilgrim’s settlements, EUCPs participated in multiple mediation sessions before Judge Daniel Weinstein (ret.). *Id.* For the George’s, Peco, Fieldale, and Mar-Jac settlements, the parties directly negotiated over many months and settlements were only reached after significant discovery. *Id.* There are no terms in the settlement that would suggest collusion.²⁶ As such, this consideration weighs in favor of granting final approval.

3. Rule 23(e)(2)(C): the relief for the class is adequate, taking into account the four factors.

Rule 23(e)(2)(C) provides district courts with four factors to assess when considering whether relief is adequate. Here, each of these factors supports granting final approval of the \$181 million settlements.

²⁴ *See* Class Representative Declarations, ECF Nos. 4377-6.

²⁵ *See Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 492 (N.D. Ill. 2015) (finding adequacy to be met where there was “no evidence on the record to suggest, that [the named plaintiffs] interests are adverse to those of the settlement class. . . [and] class counsel demonstrated their competence in representing the class’s interests.”); *see also Foley v. Student Assistance Corp.*, 336 F.R.D. 445, 449 (E.D. Wis. 2020) (finding a class representative adequate, even though his wife was best friends with class counsel).

²⁶ *See Charvat v. Valente*, No. 12-CV-05746, 2019 WL 5576932, at *5 (N.D. Ill. Oct. 28, 2019) (finding “[t]he settlement agreement contains no red flags that would lead the Court to think the settlement agreement resulted from anything other than good faith arm’s length negotiations.”).

a. The costs, risks, and delay of trial and appeal favor settlement.

The first factor is the costs, risks, and delay of trial and appeal. As this Court recognized, “settlement in a complex antitrust case like this is far from a foregone conclusion.”²⁷ EUCPs have sought to move this case forward under difficult circumstances – for example, EUCPs opposed the DOJ’s motion for a stay (which resulted in the Court entering a much narrower stay than DOJ initially requested).²⁸ Even so, this case has required sixteen scheduling orders and Defendants are currently seeking the entry of a seventeenth. Despite EUCPs’ decision to move forward as on a “Track 1” schedule,²⁹ trial remains months – if not years – away. And appeals are likely. Thus, the costs, risks and delay of trial and appeal strongly support settlement here, where parties have engaged in five years of vigorous litigation and have yet to see trial.

b. The distribution plan and online claims forms offered by EUCPs are commonly accepted as an effective method for processing claims.

The claims administrator has designed a simple claim form that asks basic questions about class membership (*e.g.*, the form seeks the claimant’s name, location, and facts about their estimated monthly chicken purchases). Class members are not required to provide proof of a receipt, which is often seen by courts as a barrier to effective administration.³⁰ Instead, class members simply need to self-identify and attest to their chicken purchases. These methods are

²⁷ DPP Interim Fee Order at 7 (quoting *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016)).

²⁸ *See* End-User Consumer Plaintiffs’ Opp. to the United States’ Mot. to Stay Discovery, ECF No. 2287 (June 26, 2019).

²⁹ *See* End-User Consumer Plaintiffs’ Notice and Stipulation Concerning Intent to Proceed on Track One Trial, ECF No. 5150 (Oct. 26, 2021).

³⁰ *See* § 13:53. Final approval criteria—Rule 23(e)(2)(C)(ii): Distribution method, 4 Newberg on Class Actions § 13:53 (5th ed.) (“the goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible.”).

“claimant-friendly, efficient, cost-effective, proportional and reasonable” and generally accepted as effective.³¹

c. Class Counsel’s request for a fee award of 33% does not alter this analysis, because fee awards for antitrust cases in this circuit are almost always one-third of the settlement.

Next, courts are to assess the settlement when taking into account the terms, timing and amount of fees.³² The settlement agreements contain no provisions regarding the terms of fees, other than to state that these costs will be covered from the settlement fund. Berman Decl., ¶ 10. Courts consider this to be best practice, in contrast to cases where defendants agree to directly pay class counsel an award for fees or include “clear sailing” provisions.³³

EUCPs previously filed extensive briefing concerning their proposed fees and expenses; EUCPs requested a 33% fee award, \$8.75 million to partially reimburse out-of-pocket expenses, and \$2,000 for each class representative.³⁴ After filing their briefing on fees, the claims administrator provided EUCPs with a detailed estimate of the of the notice administration costs, which are estimated by the claims administrator to total between \$1,250,000 and \$1,450,000.³⁵

³¹ *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2018 WL 6606079, at *5 (S.D. Ill. Dec. 16, 2018).

³² Fed. R. Civ. P. Rule 23(e)(2)(C)(iii).

³³ *See, e.g., Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014).

³⁴ *See Fee Motion at 2.*

³⁵ The administration costs were not deducted in EUCPs’ fee request brief because the estimates were uncertain at the time of the filing. Approximately one week after the filing, the claims administrator provided a detailed estimate of the notice and administration costs based on the current claims rate. *See Berman Decl.*, ¶ 11. EUCPs intended to update their request in this Motion to deduct these administration expenses, in accordance with precedent; but this was preempted by the DPP Interim Fee Order. Deducting just administrative costs first, as EUCPs respectfully argue is appropriate, would change EUCPs fee request from \$59,730,000 to \$59,251,500.

Since then, the Court has filed the DPP Interim Fee Order, which awarded one third of the settlement fund “after deducting the expenses and incentive awards.”³⁶

EUCPs respectfully maintain their prior arguments related to deducting litigation expenses – rather than administrative costs – before awarding fees.³⁷ Nevertheless, EUCPs acknowledge that the Court is likely to apply the same calculation that it applied in the DPP Interim Fee Order. For the Court’s ease, EUCPs have recalculated their request for 33% using the Court’s method. After deducting costs (and deducting the now-known estimated notice costs), EUCPs fee request for 33% of the settlement amounts to \$56,347,500. As the Court found in DPPs Interim Settlement Order, “[t]he fact that fee awards in antitrust cases in this circuit are almost always one-third is a strong indication that this should be considered the ‘market rate.’”³⁸ As such, this factor does not weigh against supporting the settlements.

d. All agreements have been identified in accordance with Rule 23(e)(3).

Next, EUCPs certify that they have identified all agreements in accordance with Rule 23(e)(3). EUCPs have publicly filed copies of the executed settlement agreements with their motions for preliminary approval. Berman Decl., ¶ 6. The claims administrator also posted copies of the settlement agreements on the website. There are no other agreements with the Settling Defendants. *Id.*

4. Rule 23(e)(2)(D): the proposal treats class members equitably to each other.

Under EUCP’s proposed distribution plan, all class members are entitled to a *pro rata* share of the settlement based on their purchases of chicken and will receive the same treatment.

³⁶ DPP Interim Fee Order at 13.

³⁷ See EUCP’s Response to Objectors § II(A)(1), filed concurrently herewith.

³⁸ DPP Interim Fee Order at 9.

Courts in this circuit have found such agreements meet the requirements of Rule 23(e)(2)(D) and weigh in favor of approving the settlement.³⁹

Having addressed all the of the considerations contained in Rule 23(e), EUCPs turn to the four additional factors identified by the Seventh Circuit in *Synfuel*.⁴⁰

5. The settlements offer significant compensation to class members, especially in light of risks the classes face.

The first and most important factor that courts should evaluate is “the strength of plaintiff’s case on the merits balanced against the amount offered in the settlement.”⁴¹ When assessing this factor, cash compensation for the class is considered the best outcome; courts tend to assess non-cash payments for settlements (such as coupons) with skepticism because “coupons serve as a form of advertising for the defendants, and their effect can be offset (in whole or in part) by raising prices during the period before the coupons expire.”⁴²

Here, EUCPs have negotiated \$181 million in settlements with six defendants. While damages in this case are estimated to be in the billions, the risks of non-recovery have been significant. As the Court pointed out in the DPP Interim Order, “The Court’s 92-page decision denying the motions to dismiss was a relatively close call. . . .Furthermore, issues raised in the motions to dismiss show that success on class certification and summary judgment, let alone trial, is no guarantee.”⁴³ Despite these risks, to date, EUCPs have negotiated the highest proposed

³⁹ See *Bills v. TLC Homes Inc.*, No. 19-CV-148-PP, 2020 WL 5982880, at *4 (E.D. Wis. Oct. 8, 2020).

⁴⁰ *Synfuel*, 463 F.3d at 653 (7th Cir. 2006) (quoting *Isby*, 75 F.3d at 1199).

⁴¹ *Id.* at 653 (quoting *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir. 1979)).

⁴² *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001).

⁴³ DPP Interim Fee Order at 8.

settlements from the Settling Defendants for any class – whether measured in total dollars or by dollars per market share. Berman Decl., ¶ 4. EUCPs have largely negotiated settlements that require each Settling Defendant to “step up” their settlement offer (relative to their market share) as the case progresses. *Id.* On average, these settlements represent more than \$3 million for each point of market share – which suggest a case valuation of over \$300 million before class certification and summary judgement have been decided. This is an exceptional outcome for this stage in the proceeding and this factor strongly favors granting final approval.

6. Experienced counsel recommends the settlements.

The Seventh Circuit also encourages courts to take experienced counsels’ recommendations into account when deciding whether a settlement is fair, adequate and reasonable.⁴⁴ This Court appointed Class Counsel because of their deep well of experience litigating antitrust claims and their commitment to consumers. Class Counsel recommends granting final approval of these settlements. Berman Decl., ¶ 2. This factor weighs in support of granting final approval of the settlements.⁴⁵

7. The positive reaction of the class supports the settlements.

The reaction of the class has been extraordinarily positive. Over 1.2 million class members have filed claims. Schachter Decl., ¶ 3. EUCPs expect additional class members will continue to file claims until the claims period closes, on December 31, 2022. *Id.* Despite the extraordinary number of claims, only seven people have opted out of the settlement and only 3 class members have objected to the settlement – representing .0008% percent of all claimants.

⁴⁴ *Isby*, 75 F.3d at 1200.

⁴⁵ *In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 792 (N.D. Ill. 2015) (“Even though Class Counsel may be considered biased because they stand to benefit from approval, under *Synfuel*, this factor weighs in favor of approval.”).

“Such a low percentage of opposition favors a finding that the settlement is fair, reasonable, and adequate under Rule 23.”⁴⁶

8. The stage of the proceedings favors granting final approval of the settlements.

The final factor that the Seventh Circuit asks courts to assess is the stage of the proceedings and the amount of discovery completed.⁴⁷ “This factor is relevant because it determines how fully the district court and counsel are able to evaluate the merits of plaintiffs’ claims.”⁴⁸ The Court is well-aware that the classes have engaged in extensive, rigorous discovery, as reflected in the more than 5,000 docket entries that comprise this case.⁴⁹ Courts have held that this factor weighs in favor of settlement when discovery has been much less extensive.⁵⁰ Here, the years of robust discovery that occurred prior to settlement weigh in favor of granting final approval of the settlements.

B. All additional approval factors support final approval.

Finally, EUCPs note that two additional factors related to notice weigh in favor of the settlement. First, Defendants have complied with the Class Action Fairness Act (CAFA). Second, the class has been adequately notified of the settlements in accordance with the constitution and Rule 23(c)(2)(B).

⁴⁶ *In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d at 792 (565 class members opted out of the settlement and 14 objected); *also In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 965 (N.D. Ill. 2011) (finding scant opposition to the settlement where there were 10 objectors and 235 opt outs).

⁴⁷ *Synfuel*, 463 F.3d at 653.

⁴⁸ *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d at 966 (citations and quotations omitted).

⁴⁹ *See* Fee Motion at 2-8; *also* DPP Interim Fee Order at 2.

⁵⁰ *See, e.g., In re Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d at 793 (finding six months of discovery to be sufficient); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d at 966 (finding an exchange of informal discovery to be sufficient).

1. Defendants have provided notice in compliance with the Class Action Fairness Act.

CAFA requires that “[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve [notice of the proposed settlement] upon the appropriate State official of each State in which a class member resides and the appropriate Federal official[.]”⁵¹ The court may not grant final approval of a class action settlement until the CAFA notice requirement is met.⁵² Here, the Settling Defendants provided the required CAFA notice to all Attorneys General and the U.S. Department of Justice. Berman Decl., ¶ 12. No Attorneys General have submitted statements of interest or objections in response to these notices. *Id.*

2. The class has been provided constitutional notice in accordance with Rule 23(c).

Class actions brought under Rule 23(b)(3) must satisfy the notice provisions of Rule 23(c)(2), and upon settlement of a class action, “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal[.]”⁵³ Rule 23(c)(2) prescribes the “best notice that is practicable under the circumstances, including individual notice” of particular information.⁵⁴

⁵¹ 28 U.S.C. § 1715(b).

⁵² 28 U.S.C. § 1715(d) (“An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under [28 U.S.C. § 1715(b).]”).

⁵³ Fed. R. Civ. P. 23(e)(1)(B).

⁵⁴ Fed. R. Civ. P. 23(c)(2)(B) (enumerating notice requirements for classes certified under Rule 23(b)(3)).

This Court approved the form of the proposed class notice and notice program.⁵⁵ Eric Schachter of A.B. Data Ltd., the Court-appointed notice administrator, implemented a direct notice campaign via email, as well as an indirect notice campaign in both hard-copy publications and on the Internet. Schachter Decl., ¶¶ 5-15. Direct notice was emailed to more than 40 million potential class members. *Id.*, ¶ 6. The notice administrator estimates an 81% deliverable rate for the email notice. *Id.* Publication notice was disseminated widely, with digital banner advertisements and social media advertisements generating 367 million impressions. The claims website has been viewed more than three million times. The notice itself informed class members of the nature of the action, the terms of the proposed settlements, the effect of the action and the release of claims, as well as class members' right to exclude themselves from the action and their right to object to the proposed settlements. *Id.*, ¶ 17. This notice complies with all of the requirements of Rule 23.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs request that the court grants final approval of the Settlement Agreements.

DATED: December 6, 2021

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⁵⁵ See Order Directing Notice.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on December 6, 2021, a true and correct copy of the foregoing was electronically filed via CM/ECF, which caused notice to be sent to all counsel of record.

By /s/Steve W. Berman
Steve W. Berman