UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE CATTLE AND BEEF ANTITRUST LITIGATION	Case No. 0:20-cv-01319 JRT-JFD
This Document Relates To: IN RE DPP BEEF LITIGATION	

DIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT BETWEEN DIRECT PURCHASER PLAINTIFFS AND JBS DEFENDANTS

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I. INTRODUCTION

Direct Purchaser Plaintiffs ("DPPs")[1] respectfully request that this Court grant final approval of a settlement (the "Settlement") with Defendants JBS S.A., JBS USA Food Company, Swift Beef Company, and JBS Packerland, Inc. (collectively, "JBS"). All of the factors to be considered in making the final approval determination – including the benefits of the proposed Settlement, the risks of continued litigation, the reaction of the class, the stage of the litigation, and the views of counsel – weigh in favor of granting approval. Indeed, there have been no objections to the proposed Settlement.

As DPPs explained in their Memorandum in Support of Preliminary Approval (Doc. No. 331) (the "Preliminary Approval Motion"), the Settlement is the first settlement for the DPP class and the first public settlement in the coordinated, complex beef antitrust cases. This icebreaker settlement represents a significant recovery for the class, providing both $52.5 million in monetary relief and extensive cooperation to the DPP class. The Settlement was negotiated at arm's length with the assistance of a nationally recognized, highly experienced mediator and follow-up negotiations extended over several months. This Court preliminarily determined that the Settlement was "fair, reasonable, adequate, and in the best interests of the Class" and that it "raises no obvious reasons to doubt its fairness..." Amended Order, Doc. No. 494 (the "Preliminary

[1] As used herein, "DPPs" means Howard B. Samuels solely in his capacity as Chapter 7 trustee for the bankruptcy estate of Central Grocers, Inc., R&D Marketing, LLC, and Redner's Markets, Inc.

Approval Order") at p. 1. Nothing has occurred that should change that preliminary determination.

The reaction of the Class also supports final approval. As explained more fully herein, an experienced and well-regarded notice and claims administrator, A.B. Data, issued both direct notice and supplemental publication notice. No Class Member has objected to the proposed Settlement nor to DPPs' request for the establishment of a litigation fund,[2] and only 106 opt-out notices were received, a result that is eminently reasonable and which is comparable to or smaller than the number of opt-outs in similar cases where final approval was granted.

For all of these reasons, as discussed in greater detail below, this Court should grant final approval of the Settlement.

II. BACKGROUND

DPPs filed their underlying complaints in June and July of 2020, after an initial investigation, which included review of public data and statements and working with an economic expert, along with researching the legal claims involved.[3] *See* Declaration of Daniel E. Gustafson in Support of Direct Purchaser Plaintiffs' Motion for Final Approval of Settlement Between Direct Purchaser Plaintiffs and JBS Defendants ("Gustafson Decl.") at ¶¶ 3-4. After that, DPPs continued their investigation, conducting significant

[2] *See* Direct Purchaser Plaintiffs' Motion for Establishment of a Litigation Fund to Cover Current and Future Litigation Expenses and supporting papers, Doc. Nos. 557-562.
[3] On September 4, 2020, the Court appointed Gustafson Gluek PLLC, Cotchett, Pitre & McCarthy, LLP, Hartley LLP, and Hausfeld LLP as Interim Co-Lead Counsel for the putative class of direct purchasers. Doc. No. 71.

research into the claims asserted in the actions against Defendants,[4] vetting the then-confidential witness information, and continuing extensive work with consulting economic experts. Gustafson Decl. at ¶ 5. That continued investigation resulted in DPPs filing their Corrected Consolidated Class Action Complaint on January 27, 2021. *Id.;* Doc. No. 158 (the "CAC").

DPPs allege that "Defendants conspired to . . . drive up the price of beef in order to realize sky-high margins" in violation of Section 1 of the Sherman Act. Doc. No. 238 ("MTD Order") at 3. DPPs allege Defendants did so, in part, by constraining the supply of beef in the United States through various means and by engaging in other collusive conduct, including fixing prices. *See, e.g.*, Complaint, ¶ 3. Plaintiffs allege that each Defendant, from 2015 on, unlawfully acted in concert to moderate and suppress slaughter volumes and to fix and stabilize the price of beef. MTD Order at 21.

Defendants moved to dismiss the CAC on February 18, 2021, which DPPs opposed on April 5, 2021. Gustafson Decl. at ¶ 6. This Court denied the motions to dismiss as to the DPPs' Complaint on September 14, 2021.[5] Doc. No. 238; Gustafson Decl. at ¶ 6. Plaintiffs filed a Second Consolidated Amended Class Action Complaint on October 15, 2021, Doc. No. 256, and a Third Consolidated Amended Class Action Complaint on January 18, 2022, Doc. No. 303 (the "Complaint"). Gustafson Decl. at ¶ 7.

[4] DPPs' Complaint names JBS S.A., JBS USA Food Company, Swift Beef Company, JBS Packerland, Inc., Cargill, Inc., Cargill Meat Solutions Corporation (a/k/a Cargill Protein), National Beef Packing Company, Tyson Foods, Inc., and Tyson Fresh Meats, Inc. as Defendants.

[5] This Court granted Defendants' Motions as to nine state law claims brought by the indirect purchasers. *See* Doc. No. 238.

DPPs have propounded various discovery requests, and, as discussed more fully in the Preliminary Approval Motion, have now spent many hours negotiating, substantively meeting and conferring, and arguing several motions regarding discovery requests, deposition limits, custodians, structured data, date ranges, search methodology, the scope of third-party subpoenas, and for the entry of a protective order. Gustafson Decl. at ¶ 8. DPPs have added additional class representatives to bolster the DPP class's representation throughout the case and have worked to respond to discovery requests from Defendants for these new representatives. Gustafson Decl. at ¶ 9.

III. SUMMARY OF SETTLEMENT NEGOTIATIONS AND AGREEMENT

DPPs and JBS reached the Settlement through protracted, confidential arms-length negotiations. Gustafson Decl. at ¶ 13. After the denial of Defendants' motion to dismiss, the parties discussed the possibility of settlement and agreed to mediate with Professor Eric Green. Gustafson Decl. at ¶ 11. Prior to the mediation, the parties submitted extensive briefing regarding their respective settlement positions and after an extended, hard-fought mediation on October 28, 2021, the parties made substantial progress but did not reach a final agreement on all material terms. Gustafson Decl. at ¶ 12. Following months of further difficult negotiations, the Parties agreed on the full Settlement, which is attached to the Gustafson Decl. as Exhibit A (Doc. 332-1).

The Settlement provides that JBS will pay $52.5 million into a non-reversionary settlement fund that will be used to compensate the direct purchaser class, pay for notice and administration of the Settlement and pay litigation fees and expenses. Exhibit A at ¶¶ 1(u), 9. The Settlement also provides for cooperation by JBS's U.S. Operations and sales

divisions, including: (a) an eight (8) hour attorney proffer where JBS's counsel is required to summarize the principal facts known to it that are relevant to the alleged conduct, market, and industry participants at issue in the Actions, including any facts previously provided to the DOJ or any other U.S. government investigative authority in response to subpoenas or otherwise related to the allegations in the Complaint; (b) production of JBS's structured data; (c) data, documents, and contact information necessary for facilitating class notice and settlement administration; (d) witness interviews with up to six (6) current JBS employees; (e) depositions of up to six (6) current JBS employees; (f) the production of up to three (3) current employee witnesses at trial; and (g) assistance with authentication and laying a foundation for admissibility at trial of JBS documents, among other cooperation provisions. Exhibit A at ¶ 10. In short, the Settlement provides for both significant monetary relief for the Class, as well as significant cooperation to aid the DPPs in their continued litigation against the remaining Defendants.

Upon final judgment, and in exchange for the monetary relief and extensive cooperation, DPPs will release the Released Claims, as defined in the Settlement, against JBS. *See* Exhibit A at ¶¶ 14-15.

IV. THIS COURT SHOULD CERTIFY A SETTLEMENT CLASS AND GRANT FINAL APPROVAL OF THE SETTLEMENT

"Minnesota courts recognize a 'strong public policy favoring the settlement of disputed claims without litigation.'" *Katun Corp. v. Clarke*, 484 F.3d 972, 975 (8th Cir. 2007) (internal citations omitted); *see also Liddell by Liddell v. Bd. of Educ. of the City of*

St. Louis, 126 F.3d 1049, 1056 (8th Cir. 1997). "The policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context." *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 11-MD-2247- ADM/JJK, 2012 WL 2512750, at *7 (D. Minn. June 29, 2012) (quoting *White v. Nat'l Football League*, 822 F. Supp. 1389, 1416 (D. Minn. 1993)). As the Eighth Circuit has directed, in considering settlements, "strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor." *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999); *see also Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1391 (8th Cir. 1990) (recognizing that settlement agreements are "presumptively valid.").

In light of the strong public policy in favor of settlement, and because, as set forth more fully below, the Settlement meets the standards for final approval under both the Federal Rules and Eighth Circuit precedent, this Court should grant DPP's Motion.

A. The Court Should Certify a Settlement Class

For settlement purposes, DPPs respectfully request that the Court certify the Class as defined in this Court's Preliminary Approval Order and in the Settlement. As the Court held in its Preliminary Approval Order, the Class satisfies the applicable requirements of Rule 23(a) and of Rule 23(b)(3). The numerosity requirement is satisfied here because the Class consists of tens of thousands of entities from throughout the United States; joinder of all of them is impracticable. *See* Fed. R. Civ. P. 23(a)(1). "In general, a putative class exceeding 40 members is sufficiently large to make joinder impracticable." *Rasberry v. Columbia Cty., Arkansas*, No. 1:16-cv-1074, 2017 WL 3259447, at *2 (W.D. Ark. July

31, 2017) (citing *Alberts v. Nash Finch Co.*, 245 F.R.D. 399, 409 (D. Minn. 2007) ("[A] putative class exceeding 40 members is sufficiently large to make joinder impracticable.")). The Settlement Class here is sufficiently large, as shown from the number of notices sent out by AB Data, to merit certification.

The commonality requirement is also satisfied, because there are numerous questions of law and fact stemming from Defendants' alleged course of conduct "of such a nature that they are capable of classwide resolution – which means that determination of their truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). What matters is "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id*. (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)). The existence of a single, common question will satisfy Rule 23(a)(2). *Dukes*, 564 U.S. at 359; *see also Khoday v. Symantec Corp.*, No. 11-180 JRT/TNL, 2014 WL 1281600, at *15 (D. Minn. Mar. 13, 2014) (noting that a "single common contention" could satisfy commonality). The Complaint sets forth nine common questions relating to the scope of JBS's conduct to suppress the supply of beef and artificially inflate its price. *See* Complaint ¶ 333. These common questions will yield common answers and readily satisfy the commonality requirement.

For similar reasons, DPPs' claims are reasonably coextensive with those of absent Class Members, satisfying Rule 23(a)(3)'s typicality requirement. The typicality prerequisite is satisfied "when the claims of the named plaintiffs arise from the same

event or are based on the same legal theory as the claims of the class members." *Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 575 (D. Minn. 1995); *Dirks v. Clayton Brokerage Co. of St. Louis, Inc.*, 105 F.R.D. 125, 133 (D. Minn. 1985); *Paxton v. Union Nat. Bank*, 688 F.2d 552, 561-62 (8th Cir. 1982). "When the claims or defenses of the representative and the class are based on the same course of conduct or legal theory, it is thought that the representatives will advance the interest of the class members by advancing his or her own interests." *In re Control Data Corp. Sec. Litig.*, 116 F.R.D. 216, 220 (D. Minn. 1986) (internal citations omitted); *see also Smith v. United HealthCare Servs., Inc.*, No. 00-cv-1163 ADM/AJB, 2002 WL 192565, at *3-4 (D. Minn. Feb. 5, 2002) (plaintiffs typical of class despite varying degree of damages due to "strong similarity of legal theories").

Lastly, Plaintiffs have more than adequately represented the Class. In order to meet this requirement, the Court must find that (1) the representatives and their counsel are able and willing to prosecute the action competently and vigorously; and (2) each representative's interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge. *See In re Monosodium Glutamate Antitrust Litig.*, 205 F.R.D. 229, 233 (D. Minn. 2001); *Lockwood*, 162 F.R.D. at 576. Each Plaintiff has the same incentive to seek an equitable share of the Settlement Fund as absent Class Members; there is no divergence between their interests. And Plaintiffs have furthered their shared interests with other Class Members by selecting well-qualified counsel, who are highly experienced and capable in the field of class-action and antitrust litigation. Class Counsel have litigated scores of such cases to resolution – through both settlement

and trial – and are recognized as top authorities in their field. Plaintiffs have prosecuted the action by participating in the discovery process, subjecting themselves to substantial discovery obligations necessary to propel the case forward. Because Plaintiffs have demonstrated that their interests align with those of the Class and they have prosecuted the action to a beneficial resolution, the adequacy factor of Rule 23 has been satisfied.

With respect to Rule 23(b)(3), the Class is appropriate. District courts in Minnesota have recognized that "[a]s with commonality and typicality requirements, the predominance inquiry is directed toward the issue of liability." *In re Select Comfort Corp. Securities Litig.*, 202 F.R.D. 598 (D. Minn. 2004) at 610. When determining whether common questions predominate, courts "focus on the liability issue . . . and if the liability issue is common to the class, common questions are held to predominate over individual questions." *Id*. (internal citations omitted). Here, multiple common questions lie at the heart of all Settlement Class members' claims, including whether Defendants conspired to decrease the supply of beef and raise the price of beef and whether Defendants' conspiracy caused market-wide supracompetitive beef prices. Because the question of liability is common to the class, predominance is satisfied here.

Because of the large number of potential claims, the desirability for consistency in adjudications of these claims, the limited interest Class Members would have in controlling the prosecution of claims, and the economic factors that would render individual actions cost-prohibitive, a class action is also the superior means of adjudication. Accordingly, because Rule 23's requirements are satisfied, the Court should certify the Settlement Class.

B. The Settlement is Fair, Reasonable, and Adequate Under Rule 23.

Fed. R. Civ. P. 23(e)(2) directs courts to approve a settlement "only on finding that it is fair, reasonable, and adequate" after considering several factors, namely: that the class was adequately represented by counsel and the class representatives; that the proposed settlement was negotiated at arm's length; that the settlement provides adequate relief to the class; and that the settlement treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2).

There is no doubt that the Class is adequately represented here. As set forth in more detail in DPP's Preliminary Approval Motion, Interim Co-Lead counsel for the DPPs have substantial experience in litigating antitrust cases, including leadership roles in cases with similar subject matter such as *In re Broiler Chicken Antitrust Litigation*, Case No. 16-CV-08637 (N.D. Ill.), *In re Pork Antitrust Litigation*, Case No. 18-cv-1776 (D. Minn.), *In re Packaged Seafood Antitrust Litigation*, Case No. 3:15-MD-2670 (S.D. Cal.), and *In re Atlantic Farm-Raised Salmon Antitrust Litigation*, Case No. 19-cv-21551 (S.D. Fla.). Gustafson Decl. at ¶ 13. One would be hard-pressed to find counsel with more experience that is directly relevant to the claims made in this litigation. Moreover, these counsel have engaged in extensive investigation and analysis of the claims in this litigation, and negotiated the Settlement after a thorough examination of its strengths and weaknesses. Gustafson Decl. at ¶¶ 4-5, 8, 14. That these counsel unreservedly recommend approval of this Settlement strongly weighs in favor of approval. "The court is entitled to rely on the judgment of experienced counsel in its evaluation of the merits of a class action settlement." *In re Emp. Ben. Plans Sec. Litig.*, Civ. No. 3-92-708, 1993 WL

330595, *5 (D. Minn. June 2, 1993) (citation omitted); *see also Welsch v. Gardenbring*, 667 F. Supp. 1284, 1295 (D. Minn. 1987) (affording "great weight" to opinions of experienced counsel). Similarly, it is evident that the named plaintiffs have acted in the best interest of the class and are adequate representatives.

Further, the Settlement is entitled to a presumption of fairness due to the arm's-length negotiations between the parties. As previously stated, this Settlement is the result of a hard-fought mediation before a well-known and respected mediator, followed by months of additional negotiations. Gustafson Decl. at ¶ 12. In preliminarily approving this Settlement, based on these facts, the Court found that "the proposed Settlement Agreement has been negotiated at arm's length." Preliminary Approval Order at p. 1. "Courts in the Eighth Circuit have held that 'there is a presumption of fairness when a settlement is negotiated at arm's length by well informed counsel.'" *Beaver Cnty. Employees' Ret. Fund v. Tile Shop Holdings, Inc*., No. 014CV00786ADMTNL, 2017 WL 2574005, at *2 (D. Minn. June 14, 2017) (*citing In re Charter Commc'ns, Inc. Sec. Litig.,* No. 4:02-CV-1186 CAS, 2005 WL 4045741, at *5 (E.D. Mo. June 30, 2005) and *In re Zurn Pex Plumbing Prods. Liab. Litig.,* No. 08-MDL-1958 ADM/AJB, 2012 WL 5055810, at *6 (D. Minn. Oct. 18, 2012)); *see also Grier v. Chase Manhattan Auto Fin. Co.*, No. 99-cv-180, 2000 WL 175126, at *5 (E.D. Pa. Feb. 16, 2000) (Courts attach "[a]n initial presumption of fairness . . . to a class settlement reached in arm's-length negotiations between experienced and capable counsel after meaningful discovery.").

The Settlement provides substantial value to DPPs. In a multi-defendant case like this one, the existence of an "icebreaker" settlement is itself valuable to the class, because

such settlements often bring remaining defendants to settlement negotiations. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) ("An early settlement with one of many defendants can 'break the ice' and bring other defendants to the point of serious negotiations."). But even were this not the first such settlement, by any measure, the relief provided by a significant financial recovery – $52.5 million – is material. By comparison, JBS settled with the direct purchaser class in the *Pork* case for $24.5 million and that settlement was approved by this Court. *See* Order Granting Direct Purchaser Plaintiff's Motion for Final Approval of the Class Action Settlement with the JBS Defendants and Entry of Final Judgment ("Pork Final Approval Order"), Case No. 0:18-cv-01776, at Doc. No. 838, a copy of which is attached to the Gustafson Decl. as Exhibit B.

The cooperation required of JBS as a condition of the Settlement is of considerable present and *future* value to the Class, further supporting the fairness, reasonableness, and adequacy of the Settlement. *See In re Linerboard,* 292 F. Supp. 2d at 643 ("The provision of such assistance [from settlement cooperation] is a substantial benefit to the classes and strongly militates toward approval of the Settlement Agreement.") (citations omitted). Here, JBS's required cooperation includes (a) an eight (8) hour attorney proffer where JBS's counsel is required to summarize the principal facts known to it that are relevant to the alleged conduct, market, and industry participants at issue in the Actions, including any facts previously provided to the DOJ or any other U.S. government investigative authority in response to subpoenas or otherwise related to the allegations in the Complaint; (b) production of JBS's structured data; (c) data,

documents, and contact information necessary for facilitating class notice and settlement administration; (d) witness interviews with up to six (6) JBS employees; (e) depositions of up to six (6) JBS employees; (f) the production of up to three (3) witnesses at trial; and (g) assistance with authentication and laying a foundation for admissibility at trial of JBS documents, among other cooperation provisions. Exhibit A at ¶ 10. This extensive cooperation required of JBS by the Settlement is expected to greatly assist DPPs in prosecuting the case against the remaining Defendants. Exhibit A at ¶ 10.

As previously stated, on preliminary approval this Court determined that the Settlement was "fair, reasonable, adequate, and in the best interests of the Class" and that it "raises no obvious reasons to doubt its fairness." Preliminary Approval Order at p. 1. Nothing has occurred in the interim to change that analysis.

Finally, the Settlement treats class members equitably relative to each other: funds will be awarded to class members on a *pro rata* basis, taking into account the amount of class products they purchased, and the number of claims submitted. No set of class members are singled out for either preferential or disadvantageous treatment, nor are there any differences between the scope of relief between class members. There will be a simplified online claims process for class members once it is time for the funds to be distributed.

C. The Eighth Circuit Factors Also Support a Finding That the Settlement is Fair, Reasonable, and Adequate.

The Eighth Circuit has established four factors for determining whether a proposed settlement is fair, reasonable and adequate: (1) the merits of plaintiffs' case,

weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *Marshall v. Nat'l Football League*, 787 F.3d 502, 508 (8th Cir. 2015) (citing *In re Uponor, Inc., F1807 Plumbing Fittings Prod. Liab. Litig*., 716 F.3d 1057, 1060 (8th Cir. 2013)); *Dryer v. Nat'l Football League*, No. 09-cv-2182-PAM/AJB, 2013 WL 5888231, at *2 (D. Minn. Nov. 1, 2013).

All these factors favor final approval of the Settlement, including the most important factor: the strength of the case versus the terms of the settlement. "The single most important factor in determining whether a settlement is fair, reasonable, and adequate is a balancing of the strength of the plaintiff's case against the terms of the settlement." *Marshall*, 787 F.3d at 508 (*quoting Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988)). While DPPs believe they have a strong case, and have already defeated Defendants' motion to dismiss, the future stages of class certification, summary judgment motions, and trial will be strenuously contested, and the outcome of a jury trial is never certain. The proposed Settlement realizes the risks of complex litigation and trial, including the risks particular to any antitrust litigation. *See, e.g, In re Uponor,* 2012 WL 4328370, at *3 (D. Minn. Sept. 20, 2012) ("[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources.") (*quoting In re Cardizem CD Antitrust Litig.,* 218 F.R.D. 508, 530 (E.D. Mich. 2003)); *In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 475 (S.D.N.Y 1998) ("Antitrust litigation in general, and class action litigation in particular, is

unpredictable."). Furthermore, any decisions on class certification or at trial may likely face an appeal, which compounds the uncertainty, delay, and costs associated with any recovery for the class. In comparison, the Settlement provides for substantial, direct, and certain benefits to the Class, including the benefit of JBS's continued cooperation and a substantial monetary payment. This is a highly favorable result in the face of uncertain continued litigation. This factor strongly favors approval of the Settlement.

Second, there is no indication that JBS's financial condition is not secure. After carefully reviewing the financial information JBS furnished, counsel concluded that JBS is capable of fulfilling its voluntary financial settlement obligations or of funding a vigorous defense to the litigation. Gustafson Decl. at ¶ 15.

Third, further litigation in this case will be complex and expensive and will place an enormous burden upon the parties and the Court. Counsel for all parties have vigorously represented their clients and will continue to do so. "In assessing a settlement, a district court must weigh the strength of a plaintiff's case on the merits in light of the litigation risks and substantial expense and delay of continued litigation without any guarantee of success to class members against the immediate and substantial benefits to the class." *Cleveland v. Whirlpool Corp*., No. 20-CV-1906 (WMW/JFD), 2022 WL 2256353, at *5 (D. Minn. June 23, 2022) (*quoting Holden v. Burlington N., Inc*., 665 F. Supp. 1398, 1414 (D. Minn. 1987)). This case will only get more expensive and complex as depositions and expert analyses begin to take place. This factor easily supports approval of the Settlement.

Finally, the Court should consider whether any opposition exists to the Settlement. Class notice was sent directly to 4,638 individual entities, using data provided by all of the Defendants, after those mailing addresses were standardized and updated, where applicable, using data from the United States Postal Service National Change of Address Database. Declaration of Eric Schachter in Support of Motion for Final Approval of the Class Action Settlement Between Direct Purchaser Plaintiffs and the JBS Defendants ("Schacter Decl.") at ¶¶ 3-4.[6] That mailed notice was supplemented by email notice sent to 1,174 email addresses contained within the potential Settlement Class member data files provided by Defendants, of which 1,099 were successfully delivered. *Id.* at ¶ 6. In addition, notice was effectuated through publication, digital media ad banners, and a news release disseminated via the *PR Newswire* distribution services. *Id*. at ¶ 7-9. After this extensive direct and publication notice program, no objections to the Settlement were received. *Id.* at ¶ 15. "The absence of any opposition to the settlement strongly supports final approval." *In re Zurn*, 2013 WL 716088 at *7 (granting final approval where there were no objections and 53 requests for exclusion). Only 106 entities requested exclusion from the Settlement. Schachter Decl. at ¶ 13. This is similar to or less than the amount of exclusion requests made in recent settlements that were approved in similar protein antitrust actions, including the settlement with JBS in the *In re Pork* action. *See*

[6] 527 notices were returned, and 339 of those were re-mailed to updated addresses obtained through the USPS, an authorized representative of the intended recipient, or third-party information services. Schachter Decl. at ¶ 5. Accordingly, only 188 of the mailed notices were ultimately undeliverable, leaving 4,450 mailed notices which presumably reached the intended recipient.

Gustafson Decl, Exhibit B (Pork Final Approval Order) (final approval granted for settlement with JBS with 85 entities opting out); *In re Broiler Chicken Antitrust Litig.*, Case No. 1:16-CV-08637 at Doc. No. 5397 (approving settlement with two defendants with 132 entities opting out of each, plus 54 partial assignees opting out of the settlement class), attached to Gustafson Decl. as Exhibit C. Assuming a similar class size to the classes in those cases, of approximately 30,000 class members,[7] the 106 entities that seek to opt out of this Settlement represent approximately only 0.35% of the total number of class members. "The fact that only a handful of class members objected to the settlement ... weighs in its favor*."* *DeBoer v. Mellon Mortg. Corp*., 64 F.3d 1171, 1178 (8th Cir.1995); *see Hashw v. Dep't Stores Nat'l Bank,* 182 F. Supp. 3d 935, 945 (D. Minn. 2016) (quoting same). The absence of any objections to and limited opt-outs from the Settlement especially favors approval when, as here, "much of the class consists of sophisticated business entities." *In re Cathode Ray Tube (CRT) Antitrust Litig*., No. 14-CV-2058 JST, 2015 WL 9266493, at *7 (N.D. Cal. Dec. 17, 2015) (*citing In re Linerboard Antitrust Litig*., 321 F. Supp. 2d 619, 629 (E.D. Pa. 2004)). This strongly positive reaction from the Class supports approval of the proposed Settlement.

D. The Settlement Notice Satisfied Due Process and Rule 23 Requirements.

The notice program was thorough and effective, and satisfied the requirements of Rule 23(e), as well as due process requirements. *See* Fed. R. Civ. P. 23(e); *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, (1985). DPPs contracted A.B. Data, an

[7] *See* Preliminary Approval Motion at fn. 5.

experienced and well-regarded claims administrator, to serve as the notice provider for this Settlement. This Court appointed A.B. Data as notice provider and claims administrator in connection with the direct purchasers' settlements and the consumer indirect purchaser class in *In re Pork Antitrust Litig*. *See* 18-CV-1776 (D. Minn.), Doc. Nos. 631, 811, 832. Similarly, A.B. Data has also been appointed by the court as notice and claims administrator in *In re Broiler Chicken Antitrust Litig.*, for each of the three classes there: the Direct Purchaser Plaintiffs, the Commercial and Institutional Indirect Purchaser Plaintiffs, and the End-User Consumer Plaintiffs. *See* 16-CV-08637 (N.D. Ill.), Doc. No. 5234.

A.B. Data mailed the long form notice via first class mail, and email where available, to potential Class Members identified from information provided by JBS and all of the non-settling Defendants, as well as supplemental notice sent via email.[8] *See* Schachter Decl. at ¶¶ 3-5. But the Notice issued here went far beyond the benchmark of direct mail delivery. A.B. Data also posted the notice in trade journals targeting supply chain executives and food industry professionals as well as implementing a digital media banner campaign on major industry news websites. *Id.* at ¶ 7-8. A.B. Data also disseminated a news release via the PR Newswire distribution service, which distributes to more than 10,000 newsrooms, including print, broadcast, and digital media, across the

[8] As discussed thoroughly in DPPs' Memorandum of Law in Support of DPPs' Motion for Establishment of a Litigation Fund to Cover Current and Future Litigation Expenses, Doc. No. 559, the notice not only contained all the relevant information regarding the settlements, but also contained notice of DPPs' intent to seek to establish a $5 million litigation fund to be used to continue to prosecute this case against the remaining defendants. No objections were received to this request. Schacter Decl. ¶¶ 10, 15.

United States. *Id.* at ¶ 9. Publication notice in addition to mailed notice is a "multi-faceted approach to providing notice to settlement class members whose identity is not known to the settling parties" which constitutes "the best notice that is practicable under the circumstances" consistent with Rule 23(c)(2)(B). *In re Zurn*, 2013 WL 716088 at *9 (*citing In re Holocaust Victims Assets Litig.,* 105 F.Supp.2d 139, 144 (E.D.N.Y. 2000); *see DeBoer*, 64 F.3d 1171 at 1176 (approving notice by mail and publication even where the notice in that case was "neither extensive nor remarkably thorough," unlike the measures taken in the present Settlement). In addition, A.B. Data set up a case-specific Settlement website which provided general information in English and Spanish regarding the case and its current status; the ability for potential Settlement Class members to register their contact information for future updates; and downloadable copies of the notice documents, the Settlement Agreement, the Preliminary Approval Order, and the operative Complaint. *Id.* at ¶ 11. A.B. Data also established a case-specific toll-free phone number with an Interactive Voice Response system and live operators in both English and Spanish to provide additional help and information to callers. *Id.* at ¶ 12.

The Long-Form Notice, Email Notice and Short-Form Notice were written in plain language that clearly and concisely described, among other things: the definition of the Settlement Class; the binding effects of remaining part of the Settlement Class; the Settlement benefits; Co-Lead Counsel's contact information; and the costs and fees that Co-Lead Counsel would seek to be paid from the Settlement fund. *Id.* at ¶ 10.

Thus, the contents and dissemination of the Notice satisfy all applicable requirements, and there should be no concern whether the Class was adequately notified of the terms of the proposed Settlement.

On February 8, 2022, JBS notified the appropriate federal and state officials pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715(b), which requires that appropriate federal and state officials (in this case, the U.S. and state attorneys general) be notified of any proposed class action settlement. The statute provides that a court may not grant final approval to a proposed settlement sooner than 90 days after such notice is served. The 90-day waiting period has long passed, and none of the notified federal or state officials have objected to or otherwise commented on the proposed settlement. Gustafson Decl. at ¶ 19.

Because of this, and for all the previously stated reasons, this Court should grant Final Approval of the proposed Settlement.

V. CONCLUSION

Based on the foregoing and pursuant to the terms of the Settlement, Interim Co-Lead Counsel respectfully requests the Court to enter an Order:

1. Finally approving the Settlement as being a fair, reasonable, and adequate settlement for the Settlement Class within the meaning of Fed. R. Civ. P. 23, and directing the implementation, performance, and consummation of the Settlement;

2. Certifying the class reflected in the Settlement Agreement for settlement purposes pursuant to Fed. R. Civ. P. 23(e) because, as determined at Preliminary

Approval, the settlement class meets all of the requirements under Rule 23 for settlement class certification.

3. Determining that the Class Notice constituted the best notice practicable under the circumstances of the Settlement and the fairness hearing, and constituted due and sufficient notice for all other purposes to all persons entitled to receive notice;

4. Dismissing the action with prejudice as to JBS in all class action complaints asserted by DPPs or the Settlement Class, excluding any persons or entities who timely opted out of the Settlement;

5. Discharging and releasing the Released Parties, as defined in the Settlement, from all Released Claims, as defined in the Settlement;

6. Reserving continuing and exclusive jurisdiction over the Settlement for all purposes; and

7. Determining under Fed. R. Civ. P. 54(b) that there is no just reason for delay and directing that the judgment of dismissal as to JBS shall be final and appealable and entered forthwith.

Dated: July 22, 2022

Respectfully Submitted,

/s/ Daniel E. Gustafson

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