UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION	:	**MDL No. 2002** **Case No: 08-md-02002**
THIS DOCUMENT APPLIES TO ALL DIRECT PURCHASER ACTIONS	:	

DIRECT PURCHASER PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT BETWEEN PLAINTIFFS AND DEFENDANTS UNITED EGG PRODUCERS AND UNITED STATES EGG MARKETERS, FOR CERTIFICATION OF CLASS ACTION FOR PURPOSES OF THE SETTLEMENT, AND FOR LEAVE TO FILE A MOTION FOR ATTORNEY'S FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Direct Purchaser Plaintiffs ("Plaintiffs") respectfully move the Court to: (1) preliminarily approve a settlement between Plaintiffs and Defendants United Egg Producers, Inc. ("UEP") and United States Egg Marketers, Inc. ("USEM") as set forth in the "Settlement Agreement Between Direct Purchaser Plaintiffs and Defendants United Egg Producers and United States Egg Marketers" ("Agreement" or "Settlement Agreement"), attached as Exhibit 1 to the Declaration of James J. Pizzirusso; (2) for certification of a class for purposes of the Settlement Agreement; and (3) for leave to file motions for attorney's fees, reimbursement of expenses, and reasonable incentive awards.

This motion is based on the accompanying Memorandum of Law in Support and the Declaration of James J. Pizzirusso submitted herewith, and is made on the following grounds:

1. The Settlement falls within the range of reasonableness, *In re Imprelis Herbicide Mktg., Sales Practices & Prods. Liab. Litig.*, 2013 U.S. Dist. LEXIS 18332, at *7 (E.D. Pa. Feb. 11, 2013), and is "sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard," the applicable standards for preliminary approval of a class action settlement, *see In re Auto.*

Refinishing Paint Antitrust Litig., MDL NO. 1426, 2004 WL 1068807, at *1 (E.D. Pa. May 11, 2004) (citation omitted).

2. The Settlement Agreement will provide the proposed class with valuable cash consideration, and require UEP and USEM to cooperate with Plaintiffs in the continued litigation of the case, as described in the Settlement Agreement and accompanying memorandum. Interim Co-Lead Counsel believe that this will greatly assist them in further analyzing and prosecuting the claims this Action. *See In re Ikon Office Supplies Inc. Sec. Litig.*, 194 F.R.D. 166 (E.D. Pa. 2000).

3. The Settlement is fair to the Class as a whole, treats Class Representatives the same as other Settlement Class members, and requires Interim Co-Lead Counsel to seek Court approval of an award for attorneys' fees and expenses from the Settlement Amount.

4. The Settlement is the result of extensive arm's-length negotiations by experienced antitrust and class action lawyers. *See In re Auto. Refinishing Paint Antitrust Litig.*, 2004 WL 1068807 at *1 (citations omitted); *Thomas v. NCO Fin. Sys.*, No. CIV.A. 00-5118, 2002 WL 1773035, at *5 (E.D. Pa. July 31, 2002).

5. The Settlement Agreement was negotiated and executed after fact discovery was significantly advanced.

6. The expense and uncertainty of continued litigation against UEP and USEM, and the likelihood of appeals, militates strongly in favor of approval. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 638 (E.D. Pa. 2003); *In re Remeron End-Payor Antitrust Litig.*, No. Civ. 02-2007, 2005 WL 2230314, at *17 (D.N.J. Sept. 13, 2005).

7. The Settlement Class, as defined in the Settlement Agreement, meets the requirements of Fed. R. Civ. P. 23(a) and (b)(3).

Dated: June 19, 2014

Respectfully submitted,

/s/ *Steven A. Asher*

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UNITED STATES DISTRICT COURT
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THIS DOCUMENT APPLIES TO ALL DIRECT PURCHASER ACTIONS	:	

DIRECT PURCHASER PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT BETWEEN PLAINTIFFS AND DEFENDANTS UNITED EGG PRODUCERS AND UNITED STATES EGG MARKETERS, FOR CERTIFICATION OF CLASS ACTION FOR PURPOSES OF THE SETTLEMENT, AND FOR LEAVE TO FILE A MOTION FOR ATTORNEY'S FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Direct Purchaser Plaintiffs ("Plaintiffs") respectfully submit this memorandum in support of their motion for (1) preliminary approval of a settlement between Plaintiffs and Defendants United Egg Producers, Inc. ("UEP") and United States Egg Marketers, Inc. ("USEM") as set forth in the "Settlement Agreement Between Direct Purchaser Plaintiffs and Defendants United Egg Producers and United States Egg Marketers" ("Agreement" or "Settlement Agreement"), attached as Exhibit 1 to the Declaration of James J. Pizzirusso; (2) for certification of a class for purposes of the Settlement Agreement; and (3) for leave to file motions for attorney's fees, reimbursement of expenses, and reasonable incentive awards.

I. INTRODUCTION

After many months of intense arm's-length negotiations, Plaintiffs successfully obtained a mutually agreeable settlement with UEP and USEM. In exchange for a release from this lawsuit, UEP and USEM have agreed to pay $500,000 into a fund to provide for the claims of members of the proposed Settlement Class. The UEP Agreement also requires that UEP and USEM provide cooperation with Class Counsel, including cooperation relating to depositions, production of documents previously withheld on grounds of privilege, production of pleadings and transcripts from the Kansas state action (under certain conditions), authentication and certification of documents, and trial testimony. The amount of the settlement is based primarily on UEP's and USEM's financial condition and the fact that it was not an egg producer.

Plaintiffs believe these commitments by UEP and USEM, which are in addition to paying money damages, will materially assist Plaintiffs in further analyzing and prosecuting this action against the remaining Defendants: Daybreak Foods, Inc., Hillandale Farms of Pa., Inc., Hillandale-Gettysburg, L.P., Rose Acre Farms, Inc., Michael Foods, Inc., NuCal Foods, Inc., Ohio Fresh Eggs, LLC, and R. W. Sauder, Inc. ("Non-Settling Defendants").

Plaintiffs respectfully move the Court for an Order ("Preliminary Approval Order"), for the Settlement Agreement, in substantially the same form as the proposed order submitted herewith, that provides, among other things:

- the settlement proposed in the Settlement Agreement has been negotiated at arm's length and is preliminarily determined to be fair, reasonable, adequate, and in the best interests of the Settlement Class;
- the Settlement Class defined in the Settlement Agreement be certified, designating Class Representatives and Settlement Class Counsel as defined therein, on the condition that the certification and designations shall be automatically vacated in the event that the Settlement Agreement is not approved by the Court or any appellate court; and
- a hearing on the settlement proposed in the Settlement Agreement shall be held by the Court to determine whether the proposed settlement is fair, reasonable, and adequate, and whether it should be finally approved by the Court.

These provisions will set in motion the procedures necessary to obtain final approval of the proposed settlements as required by Rule 23(e) of the Federal Rules of Civil Procedure.

At this time, in considering whether to grant preliminary approval of a proposed settlement, the Court need determine only whether the settlement is sufficiently fair, reasonable, and adequate to allow notice of the proposed settlement to be disseminated to the Settlement Class. A final determination of the settlement's fairness will be made at or after the Fairness Hearing, after Class Members have received notice of the settlement and have been given an opportunity to object to it or opt-out of the class. As set forth below, Plaintiffs submit that the Agreement amply satisfies the required standards.

II. BACKGROUND

A. The Litigation

This case concerns an alleged conspiracy among the nation's largest egg producers. Plaintiffs allege that Defendants and other named and unnamed co-conspirators violated the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq*., by engaging in an unlawful conspiracy to reduce

output and thereby artificially fix, raise, maintain and/or stabilize the prices of shell eggs and egg products in the United States. As a result of Defendants' alleged conduct, Plaintiffs and members of the Class paid prices for shell eggs and egg products that were higher than they otherwise would have been absent the conspiracy. The lawsuit seeks treble damages, injunctive relief, attorneys' fees, and costs from Defendants. UEP and USEM deny all allegations of wrongdoing in this action.

B. Previous Settlement History

On June 8, 2009, Sparboe Farms, Inc. ("Sparboe") entered into a settlement agreement with Plaintiffs providing for cooperation in the continued litigation of the case, and on July 16, 2012, this Court granted final approval of the settlement. ECF No. 698. On May 21, 2010, Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. entered into a settlement agreement with Plaintiffs providing for both continued cooperation and a cash settlement of $25,000,000.00, and on July 16, 2012, this Court granted final approval of the settlement. ECF No. 700. On August 2, 2013 Cal-Maine Foods, Inc., ("Cal-Maine") entered into a settlement agreement with Plaintiffs providing for continued cooperation and a cash settlement of $28,000,000.00. ECF No. 848-2. This Court granted preliminary approval of that settlement on February 28, 2014. ECF No. 908. On March 28, 2014, Plaintiffs entered into a settlement with Defendant National Food Corp. ("NFC") providing for continued cooperation and a settlement of $1,000,000.00. On March 31, Plaintiffs entered into a settlement with Midwest Poultry Services, LP ("MPS") providing for continued cooperation and a settlement of $2,500,000.00. On April 25, 2014, Plaintiffs moved this Court for preliminary approval of their settlements with NFC and MPS. ECF No. 952.

C. The Settlement Negotiations

Interim Co-Lead Counsel for Plaintiffs (also referred to herein as "Class Counsel") and UEP's and USEM's counsel, Jan Levine and Robin Sumner of Pepper Hamilton LLP, engaged in extensive arm's-length negotiations over the course of many months to reach the current settlement. The scope and details of the negotiations are described in the Declaration James J. Pizzirusso, filed herewith. Interim Co-Lead Counsel and UEP's and USEM's counsel, who are highly experienced and capable, vigorously advocated their respective clients' positions in the settlement negotiations.

Interim Co-Lead Counsel and UEP/USEM counsel had an initial discussion in the Summer of 2003. Interim Co-Lead Counsel then began to discuss a potential global mediation with all defense counsel. Pizzirusso Decl. at ¶¶ 5-6. In August 2013, the parties sought to stay the litigation to attend a joint mediation session in October. *Id.* at ¶ 6.

In January 2014, after the joint mediation appeared to be unsuccessful, Interim Co-Lead Counsel decided to approach several individual Defendants, including UEP/USEM, about a potential resolution. *Id.* These discussions led to substantive negotiations with UEP/USEM. *Id.* at ¶ 7. After several rounds of telephone calls and email exchanges, the parties eventually agreed to a tentative $500,000.00 settlement, based primarily on UEP/USEM's financial condition and the fact that it was not a producer. *Id.* In addition, UEP/USEM agreed to produce certain documents that had been previously withheld on the grounds of attorney-client privilege and provide other cooperation as well. *Id.*

On March 12, 2014, the parties reached an agreement in principle and signed a term sheet laying out the terms of their settlement. *Id.* at ¶ 8. Because UEP/USEM were unwilling to provide a proffer or allow Interim Co-Lead Counsel to preview the documents that they would produce as a term of the settlement, and because Interim Co-Lead Counsel wanted to ensure that

Direct Purchasers were getting valuable consideration in exchange for the broadly negotiated release, the parties agreed to allow Magistrate Judge Rice to facilitate the settlement by previewing the documents *in camera* and ensuring that they did provide value to the Class. *Id.*

On March 13, 2014, the parties discussed their proposal with Judge Rice who agreed to preview the materials, which were provided to him. *Id.* at ¶ 9. On March 19, 2014, Interim Co-Lead Counsel sent a letter to Judge Rice advising him of the types of materials that, if found in the UEP/USEM documents, they believed would provide value to the Class. *Id.* On March 25, 2014, Judge Rice called Interim Co-Lead Counsel to confirm that the UEP documents provided material value to the Class. *Id.* As such, the parties proceeded with a final agreement. *Id.*

On May 21, 2014, the Settlement Agreement was fully executed by the Co-Leads and UEP/USEM's Counsel. *Id.* at ¶ 10. Pursuant to ¶ 46 of the Settlement Agreement, UEP/USEM have also agreed to provide other cooperation, including the production of pleadings and transcripts from the Kansas state action (under certain conditions), assisting with questions regarding transactional data, authenticating documents, and making witnesses available to testify at trial, among other things. *Id.* at ¶¶ 10-11.

After factual investigation and legal analysis, it is the opinion of Class Counsel that the Settlement Amount of $500,000, combined with UEP's and USEM's obligation to cooperate with Plaintiffs, including by producing certain documents that had been previously withheld on the grounds of privilege and producing certain Kansas pleadings and transcripts, is fair, reasonable, and adequate to the Class. Plaintiffs respectfully submit that the Settlement is in the best interests of the Class and should be preliminarily approved by the Court, and that a class should be certified for purposes of the Settlement.

III. PROVISIONS OF THE SETTLEMENT AGREEMENT

A. The Settlement Class

The UEP Settlement Agreement defines the proposed Settlement Class as follows:

> All persons and entities that purchased Shell Eggs and Egg Products in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date on which the Court enters an order preliminarily approving the Agreement and certifying a Class for Settlement purposes.
>
> a.) Shell Egg SubClass
>
> All individuals and entities that purchased Shell Eggs in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date on which the Court enters an order preliminarily approving the Agreement and certifying a Class for Settlement purposes.
>
> b.) Egg Products SubClass
>
> All individuals and entities that purchased Egg Products produced from Shell Eggs in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date on which the Court enters an order preliminarily approving the Agreement and certifying a Class for Settlement purposes.
>
> Excluded from the Class and SubClasses are Defendants, Other Settling Defendants, and Producers, and the parents, subsidiaries and affiliates of Defendants, Other Settling Defendants, and Producers, all government entities, as well as the Court and staff to whom this case is assigned, and any member of the Court's or staff's immediate family.

Settlement Agreement, ¶ 25 (Pizzirusso Decl., Ex. 1). The Cal-Maine, Moark, Sparboe, NFC and MPS settlement agreements all similarly define the Settlement Class.[1]

[1] All of the settlement agreements define the Settlement Classes as "all persons and entities that purchased eggs . . . including Shell Eggs and Egg Products . . . directly from any producer . . . ." And all of the Settlement Agreements exclude from the class those who purchased exclusively "specialty shell eggs" or "hatching shell eggs." The Moark and Sparboe Agreements provide for those exclusions in the class definitions themselves, whereas the Settlement Agreement with Cal-Maine simply defines "shell eggs" and "egg products" as excluding specialty and hatching shell eggs in the definition of those terms in the Agreement,

B. Cash Consideration to the Proposed Class & Rescission Provisions

The UEP and USEM Settlement Agreement provides that, within 5 days of its execution, UEP and USEM will pay $500,000.00 in cash (the "Settlement Amount"). *See* Settlement Agreement ¶¶ 22, 40. This money shall be maintained in an escrow account controlled by UEP and USEM and Class Counsel pending approval of the settlement by the Court. UEP and USEM and Plaintiffs each have the right and option to rescind the Settlement Agreement for the reasons described in ¶ 37 of the Agreement, including in the event that the Court refuses to approve the Agreement or any part thereof, or if such approval is modified or set aside on appeal.

Additionally, the Settlement Agreement provides that Class Counsel may, at a time approved by the Court, seek from the Settlement Amount an award of attorney's fees, reimbursement of expenses, and incentive awards for class representatives, and that UEP and/or USEM shall have no obligation to pay any fees or expenses of Class Counsel. *Id.* at ¶ 42.

C. The Cooperation Provisions

In addition to the Settlement Amount, the Agreement requires that UEP and USEM cooperate with Plaintiffs in their prosecution of this case.

The Agreement requires that UEP and USEM: (1) produce certain documents withheld on grounds of attorney-client privilege or work product protection, pursuant to the Stipulation and Order entered by the Court on December 20, 2012; (2) not oppose the production of certain pleadings and transcripts from the Kansas state action; (3) clarify transactional data produced by UEP and/or USEM in discovery; (4) establish the authenticity of and/or admissibility as business records of documents produced by UEP and USEM and, to the extent possible, documents

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thus incorporating those exclusions into the class definition by reference. *Compare* Cal-Maine Settlement Agreement (ECF 848-2) ¶¶ 8, 18, 20 *with* Moark Settlement Agreement (ECF No. 349-1) ¶ 19, *and* Sparboe Settlement Agreement (ECF No. 172-2) ¶ 11.

produced by Non-Settling Defendants that were sent to or received by UEP or USEM; and (5) make available their current employees who are designated by Class Counsel to testify at trial regarding the facts and issues in dispute. Agreement ¶ 46. The Agreement also requires that UEP and USEM allow Class Counsel to participate in any UEP or USEM depositions, but not lead such depositions or question witnesses. *Id.*

D. Release Provisions

In exchange for the consideration described above, Plaintiffs have agreed to release UEP and USEM from any and all claims arising out of or resulting from: (i) any agreement or understanding between or among two or more Producers of eggs, including any Defendants; (ii) the reduction or restraint of supply, the reduction of or restrictions on production capacity; or (iii) the pricing, selling, discounting, marketing, or distributing of Shell Eggs or Egg Products in the United States or elsewhere. The full text of the proposed releases, including the limitations thereof, is set forth in the Settlement Agreement. Agreement ¶¶ 32-36.

IV. THE PROPOSED SETTLEMENTS ARE SUFFICIENTLY FAIR, REASONABLE AND ADEQUATE

A. Standard For Granting Preliminary Approval Of The Settlements

The approval of class action settlements involves a two-step process: (1) preliminary approval; and (2) a fairness hearing, after notice to the class, to determine final approval of the proposed settlement. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 562 (D.N.J. 1997); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL NO. 1426, 2004 WL 1068807, at *1 (E.D. Pa. May 11, 2004); 4 NEWBERG ON CLASS ACTIONS § 11:25, at 38-39 (4th ed. 2002).

When deciding preliminary approval, a court does not conduct a "definitive proceeding on fairness of the proposed settlement." *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp.

1379, 1384 (D.C. Md. 1983); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (holding that the "preliminary determination establishes an initial presumption of fairness"); *In re Am. Inv. Life Ins. Co. Annuity Mktg. and Sales Practices Litig.*, 263 F.R.D. 226, 238 (E.D. Pa. 2009) (same). That definitive determination must await the final hearing, at which the fairness, reasonableness, and adequacy of the settlement are more fully assessed. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 638 (E.D. Pa. 2003).[2] Indeed, as one court noted:

> In evaluating a settlement for preliminary approval, the court need not reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute . . . . Instead, the court must determine whether "the proposed settlement discloses grounds to doubt its fairness or otherwise obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and whether it appears to fall within the range of possible approval . . . . The analysis often focuses on whether the settlement is the product of 'arms-length negotiations.'

Thomas v. NCO Fin. Sys., No. CIV.A. 00-5118, 2002 WL 1773035, at *5 (E.D. Pa. July 31, 2002) (internal citations omitted). In determining at the preliminary approval stage whether an antitrust settlement falls within a "range of reasonableness," a court examines whether "'(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of

[2] The factors considered for final approval of a class settlement as "fair, reasonable and adequate" include: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best possible recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534-35 (3d Cir. 2004); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 562 (D.N.J. 1997); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 713 (E.D. Pa. 2001). At the preliminary approval stage, "the Court need not address these factors, as the standard for preliminary approval is far less demanding." *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 444 n.7 (E.D. Pa. 2008). Plaintiffs will thus fully address each of these factors in in their memorandum in support of their motion for final approval.

the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'"[3] *In re Imprelis Herbicide Mktg., Sales Practices & Prods. Liab. Litig.*, No. 11-md-2284, 2013 U.S. Dist. LEXIS 18332, at *7 (E.D. Pa. Feb. 11, 2013) (*quoting In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 638 (E.D. Pa. 2003) and *citing In re Gen. Motors Corp.*, 55 F.3d at 784). After making such findings, a settlement agreement is entitled to a presumption of fairness and should be preliminarily approved. *Id.* at *8.

Additionally, in reviewing a proposed settlement, courts may also consider the amount of relief provided, *see, e.g., In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 344 (E.D. Pa. 2007), and commitments of settling defendants to provide information or cooperation that assists the class in prosecuting the action against non-settling defendants, *see e.g., In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 643.

Finally, the Court should consider that "settlement of litigation is especially favored by courts in the class action setting." *In re Ins. Brokerage Antitrust Litig.*, Case No. 04-5184, 2013 WL 3956378 (D.N.J. Aug. 1, 2013) (citing *In re Gen. Motors Corp.*, 55 F.3d at 784 (holding that "the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation")); *Austin v. Pa. Dept of Corr.*, 876 F. Supp. 1437, 1455 (E.D. Pa. 1995) (explaining that "the extraordinary amount of judicial and private resources consumed by massive class action litigation elevates the general policy of encouraging settlements to 'an overriding public interest'").

As discussed below, the proposed Settlement Agreement with UEP and USEM is entitled to a presumption of fairness because it provides no preferential treatment of class representatives

[3] The last factor, the percentage of objections, is premature at this stage. *In re Imprelis*, U.S. Dist. LEXIS 18332, at *10.

or segments of the class, does not provide for excessive compensation of attorneys, provides significant relief to the Settlement Class, and requires that UEP and USEM provide significant additional information regarding the facts and events at issue in this case, which will assist Plaintiffs in prosecuting the case against the non-settling Defendants.

B. The Settlement Amount, the Cooperation Provision and the Terms of the Agreement Support Preliminary Approval.

The settlement amount provided in the proposed settlement agreement is fair and reasonable and represent a favorable result for the class. As noted above, the Agreement requires that UEP and USEM pay $500,000.00. This amount was agreed to after many months of intense arm's-length negotiations. Class Counsel believes it is in the best interest of the class to enter into the Agreement rather than continuing to pursue a judgment against UEP and USEM that may prove to be uncollectible. Moreover, the damages Plaintiffs suffered due to UEP's and USEM's alleged conduct remain in the case and are recoverable from other Defendants under joint and several liability. *See In re Auto. Refinishing Paint Antitrust Litig.*, MDL NO. 1426, 2004 WL 1068807, at *2 (preliminarily approving settlement agreement because, *inter alia*, "this settlement does not affect the joint and several liability of the remaining Defendants in this alleged conspiracy").

Also, as described above, the settlement agreement requires that UEP and USEM cooperate with Plaintiffs. Class Counsel expects that the production of documents previously withheld on grounds of privilege and the production of certain pleadings and transcripts from the Kansas state action, which UEP and USEM have agreed not to oppose, will also strengthen Plaintiffs' claims in this case while at the same time avoiding the risk and expense of continuing litigation against UEP and USEM. Class Counsel believes that the proposed settlement will significantly benefit Plaintiffs and will assist Class Counsel in analyzing and prosecuting their

claims in this case. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 643 ("The provision of such [cooperation] is a substantial benefit to the classes and strongly militates toward approval of the Settlement Agreement."); *In re Ikon Office Supplies Inc. Sec. Litig.*, 194 F.R.D. 166, 177 (E.D. Pa. 2000) (noting that cooperation agreements are valuable when settling a complex case); *In re Auto. Refinishing Paint Antitrust Litig.*, 2004 WL 1068807, at *2 (acknowledging the assistance that the settling defendants will provide "in pursuing this case against the remaining Defendants").[4]

Interim Co-Lead Counsel have substantial experience litigating antitrust class actions and strongly believe that the settlement amount is appropriate cash consideration for the discharge of the claims against UEP and USEM, and is a highly favorable result for the Class. This determination is based in part on the risk and likely expense of continuing to litigate the claims against UEP and USEM. Courts have accorded significant weight to the opinion of Class Counsel based on a thorough analysis of the facts. *See, e.g., In re Gen. Instruments Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001); *Stewart v. Rubin*, 948 F. Supp. 1077, 1099 (D.D.C. 1996), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997) ("A court should defer to the judgment of experienced counsel who have competently evaluated the strength of the proof."); *McGuiness v. Parnes*, No. 87-2728-LFO, 1989 WL 29814, at *1 (D.D.C. Mar. 22, 1989) ("While the evaluation of the fairness and adequacy of a settlement such as this is anything but a scientific

[4] *See also In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1386 (D.C. Md. 1983) ("[T]he commitment [the] Distributor defendants have made to cooperate with plaintiffs will certainly benefit the classes, and is an appropriate factor for the court to consider in approving a settlement"); *In re Corrugated Container Antitrust Litig.*, MDL 3101981, WL 2093, at *16 (S.D. Tex. June 4, 1981), *aff'd*, 659 F.2d 1322, 1329 (5th Cir. 1981) ("The settlement agreements provided for cooperation from the settling defendants that constituted a substantial benefit to the class. Those provisions were intended to save plaintiffs time and expense in the continuing litigation . . . [and] made certain information and expertise available to the class which might not have been available through normal discovery.").

process, there is nothing about this Settlement suggesting that the Court should second-guess the product of the negotiations between the skilled and conscientious lawyers who represented parties on both sides of this litigation."); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 659, 667 (D. Minn. 1974) ("The recommendation of experienced antitrust counsel is entitled to great weight.").

Finally, the settlement is fair to the class as a whole. It provides no preferential treatment to Class Representatives, and Class Counsel anticipate the allocation of settlement funds will be distributed *pro rata* based on each class member's (including Class Representative's) purchases of shell eggs and egg products. Class representatives benefit from the Settlement Agreement in the same way as any other Settlement Class member. *See* Allocation Order, Nov. 9, 2012 (ECF No. 761) (finding *pro rata* allocation of settlement funds to be fair, reasonable, and adequate). And, as noted above, the Agreement provides that Class Counsel must obtain approval from the Court to receive fees and expenses from the Settlement Amount, which may not be paid until final approval of the Agreement.

C. The Negotiation Process Supports Preliminary Approval.

Settlements that result from arm's-length negotiations between experienced counsel are generally entitled to deference from the court. *In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL 1426, 2003 WL 23316645, at *6 (E.D. Pa. Sept. 5, 2003); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 640 (holding that "[a] presumption of correctness is said to attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel" (*citing Hanrahan v. Britt*, 174 F.R.D. 356, 366 (E.D. Pa. 1997))); *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 628 (E.D. Pa. 1994) (giving "due regard to the recommendations of the experienced counsel in this case, who have negotiated this settlement at arms-length and in good faith"); *Petruzzi's Inc. v. Darling-Delaware Co.*, 880 F. Supp. 292, 301 (M.D. Pa. 1995) ("[T]he

opinions and recommendations of such experienced counsel are indeed entitled to considerable weight"); 2 NEWBERG ON CLASS ACTIONS, § 11.41 (3d ed. 1992) ("There is usually an initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval."). This deference reflects the understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness considerations of Rule 23(e).

As discussed above and in the accompanying Pizzirusso Declaration, the settlement is the result of hard-fought, arm's length negotiations between UEP's and USEM's counsel and Class Counsel, all of whom are experienced and capable in complex class action and antitrust matters.[5] UEP's and USEM's counsel and Class Counsel vigorously advocated their respective clients' positions in the settlement negotiations and were prepared to litigate the case fully if no settlement was reached. Nothing in the course of Plaintiffs' negotiations with UEP and USEM, or in the substance of the proposed Settlement Agreement, presents any reason to doubt the Agreement's fairness.

D. The Extent of Discovery at the Time the Settlement Agreement was Negotiated and Agreed to Supports Preliminary Approval.

Fact discovery was well advanced when this Settlement Agreement was reached. When Class Counsel and UEP and USEM resumed settlement discussions, Class Counsel had reviewed over 200,000 documents produced by UEP and USEM. Class Counsel had also deposed past and current UEP Presidents Chad Gregory, Gene Gregory, and Al Pope, as well as University of California Poultry Specialist Donald Bell, whose work is sponsored by UEP. Additionally, at the

[5] The experience and qualifications of Interim Co-Lead Class Counsel are described in Interim Co-Lead Counsel's Submission in Support of Permanent Appointment of Interim Leadership Structure. No. 08-cv-4653 (E.D. Pa.), ECF No. 26, and accompanying exhibits.

time of these Settlement Agreements, Defendants collectively had produced over 1 million documents, much of which had already been reviewed by Class Counsel. Accordingly, the amount of discovery completed supports a finding that the Settlement is within the range of reasonableness. *In re Imprelis*, 2013 U.S. Dist. LEXIS 18332, at *9-10 (finding settlement within range of reasonableness where "[a] considerable amount of preliminary discovery was conducted, including the review of some 500,000 pages of documents . . . , the hiring and consultation of several experts, and a deposition of [Defendant's] product manager").

E. The Expense and Uncertainty of Continued Litigation Against UEP and USEM Supports Preliminary Approval.

Interim Co-Lead Counsel have considered the complexities of this litigation, the risks, expense and duration of continued litigation against UEP and USEM, and the likely appeals if Plaintiffs do prevail at trial. After weighing these against the guaranteed recovery to the Class and the significant benefits of UEP's and USEM's obligations to cooperate with Plaintiffs in the continued litigation of this case, Interim Co-Lead Counsel strongly believe the Settlements are favorable to and in the best interests of the Plaintiffs and the Class.

The settlement is particularly reasonable given the inherent risks in moving forward with litigation towards trial. It has been often observed that "[a]n antitrust class action is arguably the most complex action to prosecute." *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 639 (citation omitted); *see also Weseley v. Spear*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (noting that antitrust class actions are "notoriously complex, protracted, and bitterly fought"). Continuing this litigation against either party would entail a lengthy and expensive legal battle, which has already consumed over five years. This case does not follow a Department of Justice investigation or any public indictment. Additionally, UEP and USEM have asserted various defenses, and a jury trial (assuming the case proceeded beyond pretrial motions) might well turn

on questions of proof, making the outcome inherently uncertain for both parties. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 639; *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475-76 (S.D.N.Y. 1998) ("Antitrust litigation in general, and class action litigation in particular, is unpredictable. . . . [T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal."). Moreover, even after trial is concluded, there could be one or more lengthy appeals. *In re Remeron End-Payor Antitrust Litig.*, No. Civ. 02-2007, 2005 WL 2230314, at *17 (D.N.J. Sept. 13, 2005). The degree of uncertainty supports preliminary approval of the proposed Settlement Agreement. *See In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995).

All of the relevant factors—the terms of the settlement itself, the nature of the negotiations, the degree of discovery at the time of settlement, the experience of Interim Co-Lead Counsel and the risks of proceeding against UEP and USEM—support the conclusion that the Settlement falls within the range of possible final approvals and is entitled to the presumption of fairness, permitting notice to issue to the Class.

V. PRELIMINARY CERTIFICATION OF THE PROPOSED SETTLEMENT CLASSES IS WARRANTED

It is well-established that a class may be certified for purposes of settlement. *In re Pet Food Prods. Liability Litig.*, No. 07-2867, 2008 WL 4937632, at *3 (D.N.J. Nov. 18, 2008) ("Class actions certified for the purposes of settlement are well recognized under Rule 23."); *Ikon*, 194 F.R.D. at 188 (class certified for purposes of settlement of securities class action). In the case of settlements, "tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge." *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995)

(internal quotation and citation omitted). The settlements here are fair, reasonable, and non-abusive. Therefore the Settlement Class should be certified by the Court.

Rule 23 governs the issue of class certification for both litigation and settlement classes. A settlement class should be certified where the four requirements of Rule 23(a)—numerosity, commonality, typicality and adequacy—are satisfied, and when one of the three subsections of Rule 23(b) is also met. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d at 527-30.

A. This Case Satisfies The Prerequisites Of Rule 23(a).

Certification is appropriate under Rule 23(a) if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). This Court has already held that the similarly-defined settlement class satisfies Rule 23(a)'s prerequisites in its July 16, 2012 Order granting final approval to the Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. settlement agreement:

> The Settlement Class is so numerous that joinder of all members is not practicable, there are questions of law and fact common to the Settlement Class, the claims of the Class Representatives are typical of the claims of the Settlement Class, and the Class Representatives will fairly and adequately protect the interests of the Settlement Class. For purposes of this settlement, questions of law and fact common to the members of the Settlement Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Order, July 16, 2012 (ECF No. 700) ¶ 4. The Court also found that Rule 23(a)'s requirements were satisfied for purposes of preliminary approval of the Settlement Class set forth in the Cal-Maine Settlement Agreement, which used the same Settlement Class provided in the UEP and USEM agreement. *See* Order, February 28, 2014 (ECF No. 908) ¶ 9.

1. <u>The Settlement Class is sufficiently numerous.</u>

Class certification under Rule 23(a)(1) is appropriate where a class contains so many members that joinder of all would be "impracticable." *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). There is no threshold number required to satisfy the numerosity requirement and the most important factor is whether joinder of all the parties would be impracticable for any reason. *Stewart v. Abraham*, 275 F.3d 220, 227-28 (3d Cir. 2001) (noting that there is no minimum number to satisfy numerosity and observing that generally the requirement is met if the number of plaintiffs exceeds 40). Moreover, numerosity is not determined solely by the size of the class but also by the geographic location of class members. *Marsden v. Select Med. Corp.*, 246 F.R.D. 480, 484 (E.D. Pa. 2007).

Here, the proposed Settlement Class is comprised of direct purchasers of hundreds of millions of cases of shell eggs and of direct purchasers of egg products. Third Consolidated Amended Class Action Complaint ("3CAC"), ¶ 108 (ECF No. 779). In the Moark Settlement, notice of the Settlement Agreement was sent to more than 13,000 potential class members, and nearly 700 class members filed claims and received distributions from the Settlement Fund. *See* Mem. in Supp. of DPP's Motion to Pay Costs of Settlement Administration (ECF No. 823-2) at 2, 6. *See also* ECF No. 975 (Affidavit of Jennifer M. Keogh Regarding Notice Dissemination and Claims Administration) (Cal-Maine notice mailed to over 16,700 potential class members). Moreover, Class Representatives are located in California, Illinois, Missouri, New York, North Carolina, Pennsylvania and Wisconsin. 3CAC, ¶¶ 32-38. Putative class members are also geographically dispersed. Thus, joinder of all class members would be impracticable and the Settlement Class is sufficiently numerous to satisfy Rule 23(a)(1). *Stewart*, 275 F.3d at 227-28 (observing that generally the requirement is met if the number of plaintiffs exceeds 40); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 508-09 (S.D.N.Y. 1996) (holding that

class members numbering a million made joinder impracticable); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 278 (S.D.N.Y. 1999) (numerosity requirement met where potential class exceeded 20,000).

2. There are common questions of law and fact.

Antitrust cases like this one easily meet the commonality requirement of Rule 23(a)(2). *See In re K-Dur Antitrust Litig.*, No. 01-1652, 2008 WL 2699390, at *4 (D.N.J. Apr. 14, 2008) (holding that common issues predominate with respect to whether defendants violated antitrust law); *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D 136, 141 (D.N.J. 2002) (holding that conspiracy to restrain trade subject to common proof); *In re OSB Antitrust Litig.*, 2007 WL 2253418, at *4 (E.D. Pa. Aug. 3, 2007); *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D 180, 186-87 (D.N.J. 2003) (holding that common issues predominated on issue of alleged antitrust violation). Moreover, to satisfy commonality:

> The members need not have identical claims to have common legal or factual issues that satisfy commonality. Instead, all that is required is that the litigation involve some common questions and that plaintiffs allege harm under the same theory.

In re Microcrystalline Cellulose Antitrust Litig., 218 F.R.D. 79, 83-84 (E.D. Pa. 2003) (internal citations omitted).

Whether Defendants entered into an illegal agreement to reduce production and fix the prices of eggs is a factual question common to all class members because this question is an essential element of proving an antitrust violation. Common legal questions include whether, if such an agreement was reached, Defendants violated antitrust laws. "Indeed, consideration of the conspiracy issue would, of necessity focus on Defendants' conduct, not the individual conduct of the putative class members." *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 484 (W.D. Pa. 1999); *Transamerican Refining Corp. v. Dravo Corp.*, 130 F.R.D. 70, 75 (S.D. Tex. 1990)

("[T]he conspiracy issue … is susceptible of generalized proof since it deals primarily with what the Defendants themselves did and said."); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1039 (N.D. Miss. 1993) ("Evidence of a national conspiracy . . . would revolve around what the defendants did, and said, if anything, in pursuit of a price fixing scheme."); *In re Warfarin*, 391 F.3d at 528 ("In other words, while liability depends on the conduct of DuPont, and whether it conducted a nationwide campaign of misrepresentation and deception, it does not depend on the conduct of individual class members."). Because there are several common legal and factual questions related to potential liability, the commonality requirement of Rule 23(a)(2) is met.

3. The Representative Plaintiffs' claims are typical of those of the Settlement Class.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." As the Third Circuit described in *Baby Neal v. Casey*, 43 F.3d 48 (3d Cir. 1994):

> The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented. The typicality criterion is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to the claims of the named plaintiffs as to the claims of the absentees."
>
> Typicality entails an inquiry whether "the named plaintiff's individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." Commentators have noted that cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims.

Id. at 57-58 (internal citations omitted).

Moreover, "factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members,

and if it is based on the same legal theory." *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 923 (3d Cir. 1992) (internal citations omitted). "Even if there are 'pronounced factual differences among the plaintiffs, typicality is satisfied as long as there is a strong similarity of legal theories and the named plaintiff does not have any unique circumstances.'" *Microcrystalline*, 218 F.R.D. at 84; *see also Mercedez-Benz*, 213 F.R.D at 185 ("[W]hile the Court must ensure that the interests of the plaintiffs are congruent, the Court will not reject the plaintiffs' claim of typicality on speculation regarding conflicts that may arise in the future.").

Here, typicality is satisfied because the claims of the Class Representatives and absent class members rely on the same legal theories and arise from the same alleged conspiracy and illegal agreement by Defendants, namely, Defendants' agreement to reduce production and artificially fix and/or inflate the prices of eggs. 3CAC, ¶¶ 536. Moreover, Plaintiffs allege that all putative class members were direct purchasers of eggs and/or egg products and suffered injury as a result of Defendants' alleged anticompetitive conduct. *Id.* ¶¶ 32-38. The Class is also divided into subclasses to address any differences between shell egg purchases and purchases of processed egg products. Accordingly, the Rule 23(a)(3) typicality requirement is satisfied.

4. The Representative Plaintiffs will fairly and adequately protect the interests of the Class.

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). As the Third Circuit explained in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), the adequate representation requirement of Rule 23(a)(4):

> [guarantees] that the representatives and their attorneys will competently, responsibly, and vigorously prosecute the suit and that the relationship of the representative parties' interest to those of the class are such that there is not likely to be divergence in viewpoint or goals in the conduct of the suit.

Id. at 449.

Here, Interim Co-Lead Counsel have extensive experience and expertise in antitrust disputes, complex litigation and class action proceedings throughout the United States. They are qualified and able to conduct this litigation, as this Court recognized when appointing them as Interim Co-Lead Counsel. Class Counsel have vigorously represented Plaintiffs in the settlement negotiations with UEP and USEM and have vigorously prosecuted this action. Moreover, the named Class Representatives have adequately represented the absent Class Members' interests, actively participating in discovery by responding to document production requests and interrogatories, and have no conflicts with them. Adequate representation under Rule 23(a)(4) is therefore satisfied.

B. The Representative Plaintiffs' Claims Satisfy The Prerequisites Of Rule 23(b)(3).

In addition to satisfying Rule 23(a), Plaintiffs must show that each putative class falls under at least one of the three subsections of Rule 23(b). Here, the Settlement Class qualifies under Rule 23(b)(3), which authorizes class certification if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[6] Fed. R. Civ. P. 23(b)(3). This Court has already found that a similar settlement class satisfies Rule 23(b)'s prerequisites in its July 16, 2012 Order approving the Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. settlement classes. Order, July 16, 2012 (ECF No. 700); *see also* Mem. in Supp. of Order (ECF No. 699). This

[6] Since this is a settlement class, the Court need not examine the manageability of the class at trial. "[I]n a settlement-only class action . . . the court certifying the class need not examine issues of manageability. *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 306 (3d Cir. 2005) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S.591, 620 (1997)) (explaining that issues of individual liability and damages are even less likely to defeat predominance in settlement-only class actions).

Court has also found that Rule 23(b)(3)'s requirements were satisfied for purposes of preliminary approval of the Settlement Class in the Cal-Maine Settlement Agreement, which defines the same Settlement Class provided in the UEP and USEM Settlement Agreement. *See* Order, February 28, 2014 (ECF No. 908) ¶ 9(b).

Rule 23(b)(3) is "designed to secure judgments binding all class members, save those who affirmatively elect[] to be excluded," where a class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997). Certification of the proposed Settlement Class under Rule 23(b)(3) will serve these purposes.

1. Common legal and factual questions predominate.

The Rule 23(b)(3) predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation . . . ." *Sullivan v. DB Inv., Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) *cert. denied,* 132 S. Ct. 1876 (2012) (quoting *In re Ins. Broker. Antitrust Litig.*, 579 F.3d 241, 266 (3d Cir. 2009) (internal quotations omitted)); *In re Hydrogen Peroxide Antitrust Litig.* 552 F.3d 305, 311 (3d Cir. 2008); *see also Mercedes-Benz*, 213 F.R.D. at 186 ("Predominance requires that common issues be both numerically and qualitatively substantial in relation to the issues peculiar to individual class members.").

A plaintiff seeking certification of an antitrust class action must show that common or class-wide proof will predominate with respect to: "(1) a violation of the antitrust laws… ,(2) individual injury resulting from that violation, and (3) measurable damages." *In re Hydrogen Peroxide*, 552 F.3d at 311; *Danny Kresky Enter. Corp. v. Magid*, 716 F.2d 206, 209-10 (3d Cir. 1983); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 156 (3d Cir. 2002). The Rule 23(b)(3) test of predominance can be "readily met" in antitrust cases. *Amchem Products*, 521 U.S. at 625.

The Third Circuit discussed the predominance inquiry in the specific context of Section 1 antitrust settlements in *In re Ins. Brokerage Antitrust Litigation*, 579 F.3d 241 (3d Cir. 2009) (applying *Hydrogen Peroxide* in a settlement context). That case involved allegations of bid rigging and steering among brokers and insurers in the property and casualty insurance industry. As here, plaintiffs brought class action claims arising under Section 1 of the Sherman Act. On review, the Third Circuit examined the propriety of the standards applied by the district court in certifying two settlement-only classes against individual defendants. The district court had granted certification to both classes.

In evaluating a challenge to the predominance of common issues for each settlement class, the Third Circuit first noted that "because the 'clear focus' of an antitrust class action is on the allegedly deceptive conduct of defendant and not on the conduct of individual class members, common issues necessarily predominate." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d at 267; *see also Sullivan*, 667 F.3d at 299 (finding that *Wal-Mart Stores Inv. v. Dukes*, 131 S. Ct. 2541 (2011), bolstered a finding that common issues predominated in an antitrust case where the answers to the questions of alleged anticompetitive conduct and the harm it caused are common as to all class members). The court then turned to the specific common issues identified by the district court with respect to the antitrust claims:

> (1) whether the … Defendants entered into a conspiracy to allocate the market for the sale of insurance; (2) whether the … Defendants' alleged conspiracy had the purpose and effect of unlawfully restraining competition in the insurance industry; [and] (3) whether the . . . Defendants' conduct violated Section 1 of the Sherman Act.

In re Ins. Brokerage Antitrust Litig., 579 F.3d at 267.

Finding these issues satisfied predominance, the court "examine[d] [each of] the elements of plaintiffs' claim through the prism of Rule 23." The court analyzed whether common questions of law or fact existed with respect to the four elements of a Sherman Act Section One

conspiracy claim, which require a plaintiff to show: "(1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action." *Id.*

The court found that "[b]ecause the first and third elements of a Sherman Act violation focus on the conduct of the defendants . . . common questions abound with respect to whether the defendants engaged in illegal, concerted action" and that "[t]he second element of a Sherman Act violation, which focuses on the effects of the defendants' challenged conduct, also involves common questions in the present case, including whether the …Defendants' actions reduced competition for insurance, whether the . . . Defendants' actions resulted in a consolidation of the insurance industry, and whether the . . . Defendants' actions produced an increase in the cost of premiums for commercial insurance." *Id.* at 268.

Thus, as here, the issues common to the class in *Insurance Brokerage* concerned whether Defendants "engaged in illegal concerted action" and whether that action "reduced competition," and "produced an increase in the cost" of the commodity in the relevant market. *Id*. There, as here, it is clear that the same core set of operative facts and theory of liability apply to each class member. As discussed above, whether Defendants entered into an illegal agreement to reduce production and artificially fix, raise, maintain, and/or stabilize the prices of eggs is a factual question common to all class members. If Class Representatives and potential class members were to bring individual actions, they would each be required to prove the same wrongdoing by Defendants in order to establish liability. Therefore, common proof of the first three elements of Defendants' violation of antitrust law will predominate.

After examining the first three elements of the Sherman Act conspiracy claim, the court in *Insurance Brokerage* turned to the final element: injury or antitrust impact. The court found that "the task for plaintiffs is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Id.* The plaintiffs in that case argued antitrust injury was a common question because the overcharge attributable to the conspiracy was "built into every commercial premium for commercial insurance products, and the conspiratorial conduct of all Defendants reduced or eliminated competition for insurance products, thereby raising the insurance premiums paid by Plaintiffs and all members of the class." *Id.* The court agreed, finding that "whether the named plaintiffs and absent class members were proximately injured by the conduct of the . . . Defendants is a question that is capable of proof on a class-wide basis" *Id.* After a brief discussion of the flow of injury through the insurance brokerage market, the court concluded that "we are satisfied that the element of antitrust injury—that is, the fact of damages—is susceptible to common proof, even if the amount of damage that each plaintiff suffered could not be established by common proof." *Id.*

The *Insurance Brokerage* decision, expressly accounting for the Third Circuit's earlier ruling in *Hydrogen Peroxide*, also accords with earlier cases holding that the fact of antitrust injury is susceptible to common proof, even where individual damages may differ. *See e.g., K-Dur*, 2008 WL 2699390, at *20; *Flat Glass*, 191 F.R.D. at 486 ("[T]he proof plaintiffs must adduce to establish a conspiracy to fix prices, and that defendants' base price was higher than it would have been absent the conspiracy, would be common to all class members."); *In re Plywood Antitrust Litig.*, 76 F.R.D 570, 584 (E.D. La. 1976) ("[I]f the members of each of the classes prove they purchased softwood plywood during the relevant period and that defendants

conspiratorially increased or stabilized plywood prices, then the trier of fact may conclude that the requisite fact of injury occurred."); *Hedges Enters., Inc. v. Cont'l Grp., Inc.*, 81 F.R.D. 461, 475 (E.D. Pa. 1979) (proof of a conspiracy to establish a "base" price would establish at least the fact of damage, even if the extent of the damages suffered by the plaintiffs would vary).

Moreover, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), poses no barrier to certification here. In that case, injury was premised on four theories of impact (each theory may have affected some but not all class members); although all but one theory was rejected by the court, the damages model did not isolate injury tied to the remaining theory and thus impact could not be proven class-wide. 133 S. Ct. at 1430, 1434-35. Here, DPPs offer just one theory of liability—Defendants conspired to curtail supply and thus artificially inflated egg prices—which will be capable of measurement on a class-wide basis since all class members purchased eggs or egg products.

Here, the alleged conspiracy is the overriding predominant question in this case. And, as alleged in the Complaint, the conspiracy permitted all Defendants to artificially maintain or inflate the price of eggs by eliminating the risk that customers would be able to avoid the non-competitive price, thus working an antitrust injury onto the entire class. *See* 3CAC, ¶¶ 496, 530-531. Accordingly, common or class-wide proof will also predominate with respect to the fact of injury or impact in this case.[7]

[7] Regarding the amount of damages, "[a]ntitrust cases nearly always require some speculation as to what would have happened under competitive conditions, to estimate the damage done by restraints on trade or other collusion, but this is not fatal to class certification." *Microcrystalline*, 218 F.R.D. at 92 (*citing In re Fine Paper Antitrust Litig.*, 82 F.R.D 143, 151-52 (E.D. Pa. 1979)) (noting that diversity of product, marketing practices, and pricing have not been fatal to class certification in numerous cases where conspiracy is "the overriding predominant question"). Accordingly, the need to determine the amount of damage sustained by each plaintiff is an insufficient basis for which to decline class certification. *In re Cmty. Bank of*

2. A class action is superior to other methods of adjudication.

"The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternate available methods of adjudication." *In re The Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 316 (3d Cir. 1998), *cert. denied*, *Krell v. Prudential Ins. Co. of Am.*, 525 U.S. 1114 (1999). In evaluating the superiority of a class action, the Court should inquire as to the class members' interest in individually controlling the prosecution of separate actions, the extent and nature of any litigation concerning the controversy already commenced by members of the class, and the desirability or undesirability of concentrating the litigation of the claims in the particular forum. Fed. R. Civ. P. 23(b)(3).

Here, a class action is superior to other available methods for the fair and efficient adjudication of class claims, "because litigating all of these claims in one action is far more desirable than numerous separate actions litigating the same issues." *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d at 259. Absent class action certification, the Court may be faced with dozens of individual lawsuits, all of which would arise out of the same set of operative facts. By proceeding as a class action, resolution of common issues alleged in one action will be a more efficient use of judicial resources and bring about a single outcome that is binding on all class members. Also, as in most antitrust lawsuits, potential plaintiffs are likely to be geographically dispersed, as are the Class Representatives. As such, the realistic alternative to a class action is many scattered lawsuits with possibly contradictory results for some plaintiffs and Defendants.

N. Va., 418 F.3d at 305-306 ("Although the calculation of individual damages is necessarily an individual inquiry, the courts have consistently held that the necessity of this inquiry does not preclude class action treatment where class issues predominate."); *In re Warfarin Sodium Antitrust Litigation*, 212 F.R.D. 231, 242 (D. Del 2003) ("[T]he need for individual damages calculations does not defeat predominance and class certification") *aff'd*, 391 F.3d 516, 534-35 (3d Cir. 2004).

These very issues led the Supreme Court to acknowledge that the unique qualities of antitrust litigation often mean that a class action is superior to individual lawsuits. *Amchem*, 521 U.S. at 617. Finally, this is an appropriate forum to litigate the case because two of the Class Representatives are located in the district, many of the Defendants resided or transacted business in the district during the Class Period, and a substantial portion of the affected interstate trade and commerce was carried out in the district. 3CAC, ¶ 26. This is also the forum selected by the Judicial Panel on Multidistrict Litigation.

VI. PLAINTIFFS' MOTION FOR LEAVE TO FILE MOTION FOR ATTORNEYS' FEES AND EXPENSES AND INCENTIVE AWARDS

Plaintiffs also seek leave to file a motion for an award of attorneys' fees, reimbursement of expenses, and for reasonable incentive awards, as appropriate, from the Settlement Amount (the "Fee Petition").[8] As explained below, Plaintiffs' proposed Notice Plan will provide potential Class members with both sufficient notice of the Fee Petition and a reasonable opportunity to review it prior to determining whether to object to the Fee Petition or to opt-out of the Class.

Contemporaneously with this motion, Plaintiffs have filed their Motion for (1) Preliminary Approval of the Second Amendment to the Sparboe Settlement Agreement, and (2) Approval of Notice Plan for the Settlements with Midwest Poultry Services, LP, National Food Corporation, United Egg Producers and United States Egg Marketers, and The Proposed Second Sparboe Amendment ("Notice Plan Motion"). The Notice Plan Motion proposes dissemination of a Long-Form Notice that will notify Class Members of Plaintiffs' intention to

[8] *See* Order, July 18, 2012 (ECF No. 704) n.1 (directing Plaintiffs, pursuant to CMO No. 1, to seek leave of Court prior to filing a motion for fees and expenses).

file a Fee Petition seeking (a) an award of attorneys' fees not to exceed 30% of the $4 million obtained in the settlements with NFC, Midwest Poultry, and UEP/USEM; (b) reimbursement of fees and costs incurred in prosecuting the litigation; and (c) incentive awards not to exceed $25,000 for each of the Class Representatives or $225,000 in total. *See* Notice Plan Motion, Ex. D at Question 11. The proposed Long-Form Notice also informs Class Members of the date that the Fee Petition will be filed and that it will be available on the settlement website. *See id.*

The Notice Plan Motion outlines the proposed schedule for settlement administration, including a deadline for filing of a Fee Petition. *See* Notice Plan Motion at Part III.b (The Proposed Notice Plan Timeline). Under Plaintiffs' proposed schedule, which also is incorporated into the Proposed Order attached as Ex. C to the Notice Plan Motion, Class Members will have 40 days to review the Fee Petition and either file any objections thereto or opt out of the settlement. *See* Notice Plan Motion, Ex. C at ¶¶ 6.i-m. This is approximately the same period of time approved by the Court in connection with the fee petition for the Cal-Maine Settlement. *See* ECF No. 908 ¶ 16.e-i (providing a period of 42 days between the fee petition and the opt-out and objection deadlines).

Accordingly, Plaintiffs respectfully request leave to file a motion for an award of attorneys' fees, reimbursement of expenses, and for reasonable incentive awards, and to do so according to the schedule proposed in the Notice Plan Motion.

VII. CONCLUSION

For the reasons set forth above, Plaintiffs request that the Court: (1) preliminarily approve the Settlement Agreement; (2) certify a class for purposes of the Settlement; and (3) grant Plaintiffs leave to file a motion for attorneys' fees and reimbursement of expenses and reasonable incentive awards as provided in the proposed Order.

Dated: June 19, 2014

Respectfully submitted,

/s/ *Steven A. Asher*

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UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION	:	**MDL No. 2002** **Case No: 08-md-02002**
THIS DOCUMENT APPLIES TO DIRECT PURCHASER ACTIONS	:	

DECLARATION OF JAMES J. PIZZIRUSSO IN SUPPORT OF DIRECT PURCHASER PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT BETWEEN DIRECT PURCHASER PLAINTIFFS AND DEFENDANTS UNITED EGG PRODUCERS AND UNITED STATES EGG MARKETERS

I, James J. Pizzirusso, declare as follows:

1) I am one of the founding partners of the law firm Hausfeld LLP and am one of the attorneys at my firm principally responsible for handling this case. My firm is appointed Interim Co-Lead Counsel for Direct Purchasers in the above captioned action, along with counsel from Weinstein Kitchenoff & Asher LLC, Susman Godfrey LLP, and Bernstein Liebhard LLP.

2) I submit this declaration in support of the accompanying motion for preliminary approval of the proposed settlement agreement between United Egg Producers ("UEP") and United States Egg Marketed ("USEM") and Direct Purchaser Class Plaintiffs.

3) I was among the principal negotiators of the proposed Settlement Agreement with UEP/USEM along with other Interim Co-Lead Counsel for Direct Purchasers, who were actively and directly involved in these negotiations.

4) The settlement negotiations with UEP/USEM were conducted by experienced counsel on both sides during a period of many months of intense arm's-length negotiations.

5) Interim Co-Lead Counsel and counsel for UEP/USEM had an initial discussion in the Summer of 2013.

6) Interim Co-Lead Counsel then began to discuss a potential global mediation with defense counsel. In August 2013, the parties sought to stay the litigation to attend a joint mediation session in October. In January 2014, after the joint mediation appeared to be unsuccessful, Interim Co-Lead Counsel decided to approach several individual Defendants, including UEP/USEM, about a potential resolution of the claims.

7) These discussions led to substantive negotiations with UEP/USEM. After several rounds of telephone calls and email exchanges, the parties eventually agreed to a tentative $500,000.00 settlement based primarily on UEP/USEM's financial condition and the fact that it was not a producer. In addition, UEP/USEM agreed to produce certain documents that had been previously withheld on the grounds of attorney-client privilege and provide other cooperation, as well.

8) On March 12, 2014, the parties reached an agreement in principle and signed a term sheet laying out the terms of their settlement. Because UEP/USEM were unwilling to provide a proffer or allow Interim Co-Lead Counsel to preview the documents that they would produce as a term of the settlement, and because Counsel wanted to ensure that Direct Purchasers were getting valuable consideration in exchange for the broadly negotiated release, the parties agreed to allow Magistrate Judge Rice to facilitate the settlement discussions by previewing the documents in camera and ensuring that they did provide value to the class.

9) On March 13, the parties discussed their proposal with Judge Rice and Judge Rice agreed to preview the materials, which were provided to him. On March 19, 2014, Interim Co-Lead Counsel sent a letter to Judge Rice advising him of the types of materials that, if found in the

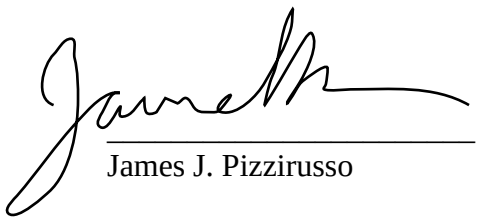
UEP/USEM documents, they believed would provide value to the Class. On March 25, 2014, Judge Rice called Interim Co-Lead Counsel to confirm that the UEP documents provided material value to the Class. As such, the parties proceeded with a final agreement.

10) On May 21, 2014, the Settlement Agreement was fully executed by the Co-Leads and UEP/USEM's Counsel. A true and complete copy of this Agreement is attached as Exhibit A. The cooperation that UEP and USEM have agreed to provide is set forth in Paragraph 46 of this Agreement.

11) UEP/USEM have also agreed to provide other cooperation relating to the production of certain pleadings and transcripts from the Kansas state action, assisting with questions regarding transactional data, authenticating documents, and making witnesses available to testify at trial, among other things.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June18, 2014



James J. Pizzirusso

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION	:	**MDL No. 2002 08-md-02002**
THIS DOCUMENT APPLIES TO: All Direct Purchaser Actions	:	

SETTLEMENT AGREEMENT BETWEEN DIRECT PURCHASER PLAINTIFFS AND DEFENDANTS UNITED EGG PRODUCERS AND UNITED STATES EGG MARKETERS

This Settlement Agreement ("Agreement") is made and entered into as of this 21st day of May 2014 (the "Execution Date") by and between United Egg Producers ("UEP") and United States Egg Marketers ("USEM") and Direct Purchaser Plaintiffs' Class representatives ("Plaintiffs") (as defined herein at Paragraph 18), both individually and on behalf of a Class (as defined herein at Paragraph 4) of direct purchasers of Shell Eggs and Egg Products (as defined herein at Paragraphs 8 and 24).

WHEREAS, Plaintiffs are prosecuting the above-captioned Direct Purchaser Plaintiff actions currently pending and consolidated in the Eastern District of Pennsylvania, and including all actions transferred for coordination, and all direct purchaser actions currently pending such transfer (including, but not limited to, "tag-along" actions) on their own behalf and on behalf of the Class against UEP, USEM and other Defendants (the "Action");

WHEREAS, Plaintiffs allege that UEP and USEM participated in an unlawful conspiracy to raise, fix, maintain, and/or stabilize the price of Shell Eggs and Egg

Products in the United States at artificially inflated levels in violation of Section 1 of the Sherman Act;

WHEREAS, UEP and USEM deny all allegations of wrongdoing in the Action;

WHEREAS the Parties have conducted an investigation into the facts and the law regarding the Action and have engaged in extensive discovery;

WHEREAS, despite their belief that they are not liable for, and have good defenses to, the claims alleged in the Action, UEP and USEM desire to settle the Action in view of their financial condition and resources, and thus avoid the expense, risk, exposure, inconvenience, and distraction of continued litigation of the Action, or any action or proceeding relating to the matters being fully settled and finally put to rest in this Agreement;

WHEREAS Class Counsel has evaluated the inability of UEP and USEM to pay a significant judgment and has reached settlement terms reflecting the financial condition of UEP and USEM;

WHEREAS, Class Counsel and Counsel for UEP and USEM have engaged in arm's-length settlement negotiations, and this Agreement has been reached as a result of these negotiations; and

WHEREAS Plaintiffs have concluded that settlement with UEP and USEM on the terms set forth below is the best that is practically attainable, that it is in the best interests of the Class to enter into this Agreement now rather than continue to pursue a judgment that may prove uncollectible as against UEP and USEM, and that, under the circumstances, the Agreement is fair, reasonable, and adequate, and beneficial to and in the best interests of Plaintiffs and the Class;

NOW, THEREFORE, in consideration of the covenants, agreements, and releases set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, it is agreed by and among the undersigned that the Action be settled, compromised and dismissed on the merits with prejudice as to UEP and USEM only, without costs as to Plaintiffs, the Class, UEP or USEM, and subject to the approval of the Court, on the following terms and conditions:

A. Definitions

The following terms, as used in this Agreement, have the following meanings:

1. "Class Counsel" shall refer to the law firms of Weinstein Kitchenoff & Asher LLC, 1845 Walnut Street, Suite 1100, Philadelphia, PA 19103; Hausfeld LLP, 1700 K Street NW, Suite 650, Washington, DC 20006; Bernstein Liebhard LLP, 10 East 40th Street, 22nd Floor, New York, NY 10016; and Susman Godfrey, 654 Madison Avenue, 5th Floor, New York, NY 10065-8404. "Plaintiffs' Counsel" shall refer to the law firms identified on pages 147-151 of the Third Consolidated Amended Class Action Complaint filed in the Action on January 4, 2013.

2. "Counsel for UEP and USEM" shall refer to the law firm of Pepper Hamilton LLP, 3000 Two Logan Square, Eighteenth and Arch Streets, Philadelphia, Pennsylvania, 19103-2799.

3. "Claims Administrator" shall mean the Garden City Group, Inc.

4. "Class Member" or "Class" shall mean each member of the Settlement Class, as defined in Paragraph 25 of this Agreement, who does not timely elect to be excluded from the Class, and includes, but is not limited to, Plaintiffs.

5. "Class Period" shall mean the period from and including January 1, 2000 up to and including the date on which the Court enters an order preliminarily approving the Agreement and certifying a Class for settlement purposes.

6. "Defendant(s)" shall refer to the parties listed as defendants in the Third Consolidated Amended Complaint filed on January 4, 2013 and each of their corporate parents, subsidiaries, and affiliated companies.

7. "Direct Action Plaintiffs' Action" shall mean all actions brought by direct purchasers of Shell Eggs and Egg Products that are not brought on behalf of a class of direct purchasers and are currently pending in the Eastern District of Pennsylvania.

8. "Egg Products" shall mean the whole or any part of Shell Eggs that have been removed from their shells and then processed, with or without additives, into dried, frozen or liquid forms.

9. "Escrow Account" shall mean the account with the Escrow Agent that holds the Settlement Fund.

10. "Escrow Agent" shall mean the bank into which the Settlement Fund shall be deposited and maintained as set forth in Paragraph 38 of this Agreement.

11. "Escrow Agreement" shall mean Agreement Between Citibank, N. A. as 'Escrow Agent' and United Egg Producers and United States Egg Marketers and Bernstein Liebhard LLP, Hausfeld LLP, Susman Godfrey LLP, and Weinstein Kitchenoff & Asher LLC as Interim Co-Lead Counsel for Direct Purchaser Plaintiffs executed contemporaneously with this Agreement.

12. "Fairness Hearing" shall mean a hearing on the settlement proposed in this Agreement held by the Court to determine whether the proposed settlement is fair, reasonable, and adequate, and whether it should be finally approved by the Court.

13. "Final Approval" shall mean an Order entered by the Court finally approving this Agreement under Rule 23(e) of the Federal Rules of Civil Procedure.

14. "Indirect Purchaser Plaintiff Action" shall mean the action brought by indirect purchasers of Shell Eggs and Egg Products in the Fifth Amended Consolidated Class Action Complaint Filed by Indirect Purchaser Plaintiffs (ECF No. 866) currently pending in the Eastern District of Pennsylvania, and including all indirect purchaser actions transferred for coordination, and all indirect purchaser actions currently pending such transfer (including, but not limited to, "tag-along" actions) on their own behalf and on behalf of the Class against UEP, USEM and other Defendants.

15. "Non-Settling Defendants" shall mean Defendants other than UEP and USEM.

16. "Other Settling Defendants" shall mean Moark LLC, Norco Ranch, Inc., Land O'Lakes, Inc., and Sparboe Farms, Inc.

17. "Parties" shall mean UEP, USEM, and Plaintiffs.

18. "Plaintiffs" shall mean each of the following proposed named Class representatives: T.K. Ribbing's Family Restaurant, LLC; Eby-Brown Company LLC; Goldberg and Solovy Foods, Inc.; Karetas Foods, Inc.; Nussbaum-SF, Inc.; Somerset Industries, Inc.; Wixon, Inc.; John A. Lisciandro d/b/a/ Lisciandro's Restaurant, and SensoryEffects Flavor Co. d/b/a SensoryEffects Flavor Systems.

19. "Producer" shall mean any person or entity that owns, contracts for the use of, leases, or otherwise controls hens for the purpose of producing eggs for sale, and the parents, subsidiaries, and affiliated companies of such Producer.

20. "Releasees" shall refer, jointly and severally, and individually and collectively to: UEP; USEM; all current employees of UEP and USEM, and former employees of UEP and USEM during the period January 1, 2000 through the Execution Date that are neither employees of Non-Settling Defendants nor employees of Other Settling Defendants; and each of the foregoing Releasees' respective past and present officers, directors, parents, subsidiaries, affiliates, partners, agents, attorneys, and insurers, and their predecessors, successors, heirs, executors, administrators, and assigns. In addition, "Releasees" shall include current and former members of UEP and USEM listed on Exhibit A, which are neither Non-Settling Defendants nor Other Settling Defendants.

21. "Releasors" shall refer, jointly and severally, and individually and collectively, to Plaintiffs, the Class Members, each of their respective past and present officers, directors, parents, subsidiaries, affiliates, partners, agents, attorneys and insurers, and the predecessors, successors, heirs, executors, administrators, and assigns of each of the foregoing.

22. "Settlement Amount" shall refer to five-hundred thousand ($500,000) U.S. dollars.

23. "Settlement Fund" shall refer to the funds accrued in the Escrow Account established in accordance with Paragraph 38 below.

24. "Shell Eggs" shall mean eggs produced from caged birds that are sold in the shell for consumption or for breaking and further processing, excluding "specialty" Shell Eggs (certified organic, nutritionally enhanced, cage free, free range, and vegetarian fed types) and "hatching" Shell Eggs (used by poultry breeders to produce breeder stock or growing stock for laying hens or meat).

B. Settlement Class Certification

25. The Parties to this Agreement hereby stipulate for purposes of settlement only that the requirements of Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure are satisfied, and, subject to Court approval, the following Class shall be certified for settlement purposes as to UEP and USEM only:

> All persons and entities that purchased Shell Eggs or Egg Products in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date on which the Court enters an order preliminarily approving the Agreement and certifying a Class for Settlement purposes.
>
> a.) Shell Egg SubClass
>
> All individuals and entities that purchased Shell Eggs in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date on which the Court enters an order preliminarily approving the Agreement and certifying a Class for Settlement purposes.
>
> b.) Egg Products SubClass
>
> All individuals and entities that purchased Egg Products produced from Shell Eggs in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date on which the Court enters an order preliminarily approving the

Agreement and certifying a Class for Settlement purposes.

Excluded from the Class and SubClasses are Defendants, Other Settling Defendants, and Producers, and the parents, subsidiaries and affiliates of Defendants, Other Settling Defendants, and Producers, all government entities, as well as the Court and staff to whom this case is assigned, and any member of the Court's or staff's immediate family.

C. Approval of this Agreement and Dismissal of Claims

26. The Parties shall use their best efforts to effectuate this Agreement, including cooperating in promptly seeking Court approval of this Agreement and securing both the Court's certification of the Class and the Court's approval of procedures, including the giving of Class notice under Federal Rules of Civil Procedure 23(c) and (e), to secure the prompt, complete, and final dismissal with prejudice of the Action as to UEP and USEM.

27. Within two (2) business days after the execution of this Agreement by all Parties, the Parties shall jointly file with the Court a stipulation for suspension of all proceedings against UEP and USEM in the Action pending approval of this Agreement. Within twenty (20) business days after execution of the Agreement by UEP and USEM, Plaintiffs shall submit to the Court a motion (the "Motion") for an Order granting preliminary approval of the Agreement, appointing Settlement Class Counsel as lead counsel for purposes of this Settlement Agreement, and certifying a Class for settlement purposes ("Preliminary Approval"). As a courtesy, a substantially final draft of the Motion shall be provided to UEP and USEM at least two (2) business days before filing. If UEP and USEM suggest changes to the Motion, Plaintiffs shall have no obligation to accept those changes. Plaintiffs shall submit the Motion requesting entry of a

Preliminary Approval Order, substantially in the form of Exhibit B, attached hereto, which shall provide that, *inter alia*:

a. the settlement proposed in the Settlement Agreement has been negotiated at arm's length and is preliminarily determined to be fair, reasonable, adequate, and in the best interests of the Settlement Class;

b. the Settlement Class defined herein be certified, designating Class Representatives and Settlement Class Counsel as defined herein, on the condition that the certification and designations shall be automatically vacated in the event that the Settlement Agreement is not approved by the Court or any appellate court;

c. a Fairness Hearing on the settlement proposed in this Settlement Agreement shall be held by the Court to determine whether the proposed settlement is fair, reasonable, and adequate, and whether it should be finally approved by the Court.

28. After Preliminary Approval, and subject to approval by the Court of the form of and means for dissemination of notice, individual notice of the Agreement ("Class Notice") shall be mailed to persons and entities who are located in the United States and who purchased Shell Eggs or Egg Products directly from any Non-Settling Defendant(s) in the Action or Other Settling Defendants during the Class Period that were previously identified by Other Settling Defendants and are identified by Plaintiffs and Plaintiffs' Counsel or Non-Settling Defendants in the Action. In addition, after Preliminary Approval, and subject to Court approval of the form of and means for dissemination of notice, Class Notice shall also be published once in the *Wall Street Journal* and in such other trade journals targeted towards direct purchasers of Shell Eggs and Egg Products, if any, proposed by Class Counsel. Plaintiffs shall use reasonable best efforts to, subject to approval by the Court, combine dissemination of notice of the certification of the Class for settlement purposes and of the Agreement with the

dissemination of notice of other settlement agreements that may be reached with other Defendants in the Action.

29. Plaintiffs shall, following Preliminary Approval, seek entry of an order and final judgment, the text of which shall be proposed by Plaintiffs subject to the agreement of UEP and USEM, which agreement shall not be unreasonably withheld, which shall:

a. approve finally this Agreement and its terms as being a fair, reasonable, and adequate settlement as to the Class Members within the meaning of Rule 23 of the Federal Rules of Civil Procedure and directing its consummation according to its terms;

b. determine that the Class Notice constituted, under the circumstances, the most effective and best practicable notice of this Agreement and of the Fairness Hearing, and constituted due and sufficient notice for all other purposes to all Persons entitled to receive notice;

c. reconfirm the appointment of Class Representatives and Settlement Class Counsel as defined herein;

d. direct that, as to UEP and USEM only, the Action be dismissed with prejudice and, except as explicitly provided for in this Agreement, without costs;

e. reserve to the United States District Court for the Eastern District of Pennsylvania exclusive jurisdiction over the settlement and this Agreement, including the administration and consummation of this settlement;

f. determine under Federal Rule of Civil Procedure 54(b) that there is no just reason for delay, and directing that the final judgment of dismissal as to UEP and USEM shall be entered; and

g. require Class Counsel to file with the Clerk of the Court a record with the names and addresses of Class Members who timely excluded themselves from the Class, and provide a copy of the record to counsel for UEP and USEM.

30. This Agreement shall become final only when (a) the Court has entered an order granting Final Approval to this Agreement; (b) the Court has entered final

judgment dismissing the Action against UEP and USEM on the merits with prejudice as to all Class Members and without costs; and (c) the time for appeal or to seek permission to appeal from the Court's approval of this Agreement and entry of a final judgment as described in clause (b) above has expired or, if appealed, approval of this Agreement and the final judgment have been affirmed in their entirety by the Court of last resort to which such appeal has been taken and such affirmance has become no longer subject to further appeal or review. It is agreed that neither the provisions of Rule 60 of the Federal Rules of Civil Procedure nor the All Writs Act, 28 U.S.C. § 1651, shall be taken into account in determining the above-stated times. On the Execution Date, Plaintiffs, UEP and USEM shall be bound by the terms of this Agreement, and the Agreement shall not be rescinded except in accordance with Paragraph 35 of this Agreement.

31. Should UEP, USEM or Plaintiffs be required to submit any of UEP's or USEM's confidential information or documentation to the Court to obtain preliminary or final approval, such submission shall be, to the full extent permitted by law or the Court, for review by the court in camera only.

D. Release and Discharge

32. In addition to the effect of any final judgment entered in accordance with this Agreement, upon Final Approval of this Agreement, and for other valuable consideration as described herein, Releasees shall be completely released, acquitted, and forever discharged from any and all claims, demands, actions, suits and causes of action, whether Class, individual or otherwise in nature, that Releasors, or each of them, ever had, now has, or hereafter can, shall, or may have, including any and all known and unknown, foreseen and unforeseen, concealed or hidden, suspected or unsuspected

injuries or damages, and the consequences thereof, on account of, arising out of, or resulting from: (i) any agreement or understanding between or among two or more Producers of eggs, including any Defendants and/or their members and any entities or individuals that may later be added as a defendant to the Action, (ii) the reduction, restraint or restriction of supply and/or production capacity of Shell Eggs or Egg Products, or (iii) the pricing, selling, discounting, marketing, or distributing of Shell Eggs or Egg Products in the United States or elsewhere, including but not limited to any conduct alleged and causes of action asserted (or that could have been alleged or asserted) in the Complaints filed in the Action (the "Complaints"), that in whole or in part arise from or are related to the facts and/or actions described in the Complaints, including under any federal or state antitrust, unfair competition, unfair practices, price discrimination, unitary pricing, trade practice, consumer protection, fraud, RICO, civil conspiracy law, or similar laws, including, without limitation, the Sherman Antitrust Act, 15 U.S.C. § 1 et seq., from January 1, 2000 to the Execution Date (the "Released Claims"). Releasors shall not, after the date of this Agreement, seek to recover against any of the Releasees for any of the Released Claims. Notwithstanding anything in this Paragraph, Released Claims shall not include, and this Agreement shall not and does not release, acquit or discharge, claims based solely on purchases of Shell Eggs and Egg Products outside of the United States on behalf of persons or entities located outside of the United States at the time of such purchases.

33. This Release is made with full recognition of the possibility of subsequent discovery or existence of different or additional facts. Each Releasor waives California Civil Code Section 1542 and similar or comparable present or future law or principle of

law of any jurisdiction. Each Releasor hereby certifies that he, she, or it is aware of and has read and reviewed the following provision of California Civil Code Section 1542 ("Section 1542"): "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." The provisions of the release set forth above shall apply according to their terms, regardless of the provisions of Section 1542 or any equivalent, similar, or comparable present or future law or principle of law of any jurisdiction. Each Releasor may hereafter discover facts other than or different from those which he, she, or it knows or believes to be true with respect to the claims that are the subject matter of this Agreement, but each Releasor hereby expressly and fully, finally and forever waives and relinquishes, and forever settles and releases any known or unknown, suspected or unsuspected, contingent or non-contingent, claim whether or not concealed or hidden, with full recognition of the possibility of the subsequent discovery or existence of such different or additional facts, as well as any and all rights and benefits existing under (i) Section 1542 or any equivalent, similar or comparable present or future law or principle of law of any jurisdiction and (ii) any law or principle of law of any jurisdiction that would limit or restrict the effect or scope of the provisions of the release set forth above, again with full recognition of the possibility of the subsequent discovery or existence of such other or different facts.

34. In addition to the provisions of Paragraphs 31 and 32, each Releasor hereby expressly and irrevocably waives and releases, upon this Agreement becoming finally approved by the Court, any and all defenses, rights, and benefits that each

Releasor may have or that may be derived from the provisions of applicable law which, absent such waiver, may limit the extent or effect of the release contained in Paragraphs 29 and 30. Each Releasor also expressly and irrevocably waives any and all defenses, rights, and benefits that the Releasor may have under any similar statute in effect in any other jurisdiction that, absent such waiver, might limit the extent or effect of the release.

35. The release and discharge set forth in Paragraphs 31 through 33 herein do not include claims relating to payment disputes, physical harm, defective products, or bodily injury (the "Excepted Claims") and do not include any Non-Settling Defendant or Other Settling Defendant.

36. Each Plaintiff, and each Class Member who submits a claim to participate in the distribution of the Settlement Amount, shall represent and warrant that their portion of the Released Claims is their property and they have not assigned or transferred to any person or entity any right to recovery for any claim or potential claim that would otherwise be released under this Agreement. Each Plaintiff, and each Class Member who submits a claim to participate in the distribution of the Settlement Amount, shall further represent and warrant that each of them has a valid and existing right to release such claims and is releasing such claims pursuant to their participation in the settlement.

E. Rescission

37. If the Court refuses to approve this Agreement or any part hereof, or if such approval is modified or set aside on appeal, or if the Court does not enter the final judgment provided for in Paragraph 30 of this Agreement, or if the Court enters the final judgment and appellate review is sought, and on such review, such final judgment is not affirmed, then UEP, USEM, and Plaintiffs shall each, in their sole discretion, have the

option to rescind this Agreement in its entirety within ten (10) business days of the action giving rise to such option, and shall, within that same time period, submit written notice to the other Parties and to the Escrow Agent of their decision to rescind the Agreement. If this Agreement is rescinded, UEP and USEM shall submit written instructions to the Escrow Agent regarding wire transfer of the amounts remaining in the Settlement Fund with simultaneous notice of such instructions provided to Class Counsel, and Class Counsel shall, within five (5) business days of receipt of such notice, notify the Escrow Agent of any objections to the instructions of UEP and USEM. The Escrow Agent shall, within ten (10) business days of receipt of written instructions by UEP and USEM to the Escrow Agent regarding wire transfer, wire transfer all amounts in the Escrow Account created pursuant to Paragraph 38 hereof, less any expenses authorized pursuant to this Agreement, pursuant to their instructions; provided, however, no funds shall be wire transferred until expiration of the deadline by which Class Counsel may object to UEP and USEM's instructions to the Escrow Agent, as provided in this paragraph. If Class Counsel object to the wire transfer instructions, the provisions of Article First, subsection H of the Escrow Agreement shall govern.

38. If Final Approval of this Agreement is not obtained, or if the Court does not enter the final judgment provided for in Paragraph 30 of this Agreement, Class Counsel, UEP and USEM agree that this Agreement, including its exhibits, and any and all negotiations, documents, information, and discussions associated with it, shall be without prejudice to the rights of UEP, USEM, or Plaintiffs; shall not be deemed or construed to be an admission or denial, or evidence or lack of evidence of any violation of any statute or law or of any liability or wrongdoing, or of the truth or falsity of any of

the claims or allegations made in this Action in any pleading; and shall not be used directly or indirectly, in any way, whether in this Action or in any other proceeding, unless such documents and/or information is otherwise obtainable by separate and independent discovery permissible under the Federal Rules of Civil Procedure.

39. In the event of rescission, all documents produced pursuant to Paragraph 44(b) shall be returned to UEP and USEM or destroyed by Class Counsel at their own expense, provided however that such documents may be destroyed rather than returned if an affidavit of such destruction is promptly provided by Class Counsel to Counsel for UEP and USEM. Class Counsel further agree that the fact of the agreement by UEP and USEM to produce, and the production of, documents pursuant to Paragraph 44(b) does not constitute waiver of the attorney-client privilege or work-product protections that UEP or USEM may assert apply to those documents. UEP and USEM further agree that if the Agreement is rescinded, Plaintiffs may seek production of documents produced pursuant to Paragraph 44(b) and any other documents withheld by UEP and/or USEM as privileged or protected on any other basis, and Plaintiffs agree that if they seek such production, they may not use, refer to or rely on in any way information as to those documents' content that was learned by Plaintiffs as a result of their review of the documents produced pursuant to this Agreement.

F. Payment

40. UEP and USEM shall pay or cause to be paid the Settlement Amount in settlement of the Action. Three-fifths of Settlement Amount ($300,000) shall be wire transferred by UEP and USEM or its designee within five (5) business days of the Execution Date into the Settlement Fund, which shall be established as an Escrow

Account at a bank selected by Class Counsel and administered in accordance with the Escrow Agreement entered into by the Parties. The remaining two-fifths of the Settlement Amount ($200,000) shall be wire transferred by UEP and USEM or its designee on or before January 5, 2015.

41. Each Class Member shall look solely to the Settlement Amount for settlement and satisfaction, as provided herein, of all claims released by the Releasors pursuant to this Agreement.

42. Class Counsel may, at a time approved by the Court, seek an award of attorneys' fees and reasonable litigation expenses, not to exceed one-third of the Settlement Amount, and incentive awards for class representatives approved by the Court, to be paid out of the Settlement Amount after the Final Approval of the Agreement. UEP and USEM agree not to object to Class Counsel's petition to the Court for payment of attorneys' fees, costs, expenses (in an amount consistent with this Paragraph), and incentive awards for class representatives from the Settlement Amount. In the event the Court does not approve Class Counsel's petition for payment of attorneys' fees, costs, expenses, or awards an amount less than that sought in Class Counsel's petition, such denial or reduction shall have no effect on this Agreement. Except to the extent that the Court may award attorneys' fees and litigation expenses to be paid out of the Settlement Amount, UEP and USEM shall have no obligation to pay any fees or expenses of Class Counsel.

43. Upon entry of an order by the Court approving the request for an award of attorneys' fees and expenses and incentive awards for class representatives ("Attorneys' Fees Order") made pursuant to Paragraph 40 above, attorneys' fees may be distributed

from the Settlement Fund pursuant to the terms of the fee order, provided however that any Class Counsel seeking to draw down their share of the attorneys' fees prior to Final Approval and the Attorneys' Fees Order becoming final shall secure the repayment of the amount drawn down by a letter of credit or letters of credit on terms, amounts, and by banks acceptable to UEP and USEM, which acceptance shall not be unreasonably withheld. The Attorneys' Fees Order becomes final when the time for appeal or to seek permission to appeal from the Attorneys' Fees Order has expired or, if appealed, has been affirmed by the Court of last resort to which such appeal has been taken and such affirmance has become no longer subject to further appeal or review.

44. In order to receive distribution of funds pursuant to Paragraph 40 prior to Final Approval and the Attorneys' Fees Order becoming final above, each Class Counsel shall be required to provide the Claims Administrator the approved letter(s) of credit in the amount of Class Counsel's draw-down, and shall be required to reimburse the Settlement Fund within thirty (30) business days all or the pertinent portion of the draw-down with interest, calculated as the rate of interest published in the *Wall Street Journal* for 3-month U.S. Treasury Bills as of the close on the date that the draw-down was distributed, if Final Approval is not granted or if the award of attorneys' fees is reduced or overturned on appeal. The Claims Administrator may present the letter(s) of credit in the event the Class Counsel fails to honor the obligation to repay the amount withdrawn.

45. Disbursements for any payments and expenses incurred in connection with taxation matters relating to this Settlement Agreement shall be made from the Settlement Amount pursuant to section H of this Agreement upon written notice to the Escrow Agent by Class Counsel of such payments and expenses, and such amounts shall not be

refundable to UEP or USEM in the event that this Settlement Agreement is disapproved, rescinded, or otherwise fails to become effective.

G. Cooperation

46. UEP and USEM shall provide cooperation in accordance with the terms and provisions of this Agreement. Cooperation obligations of UEP and USEM shall apply only to Releasors who act with, by or through Class Counsel pursuant to this Agreement in this Action. Such cooperation shall be as follows:

a. **Depositions**: Class Counsel may participate in any depositions of UEP or USEM, but agree that they will not lead such depositions nor question the witnesses. Plaintiffs agree to withdraw their notice of deposition, pursuant to Federal Rule of Civil Procedure 30(b)(6), as to UEP and USEM.

b. **Production of** Documents **Withheld on Grounds of Attorney-Client Privilege or Work Product Protection**: The parties have agreed that UEP and USEM will, within five (5) business days of the Execution Date and pursuant to the Stipulation and Order Pursuant to Federal Rule of Evidence 502(d) signed by the Court on December 20, 2012, produce or authorize the production of the logged documents on the list agreed to by the Parties and attached to this Agreement as Exhibit C, which include, but are not limited to, the documents created between January 1, 1999 to September 23, 2008 regarding the Capper-Volstead immunity in their possession which include (a) any documents to or from attorneys at Brann & Isaacson; (b) any documents to or from other UEP counsel and; (c) any documents that reference such legal advice provided by attorneys at Brann & Isaacson or other UEP counsel. In addition, Defendants will not oppose the production of such documents in the possession of other non-settling defendants or in the possession of any third-party that has been subpoenaed prior to August 31, 2013. If Plaintiffs identify other privileged UEP or USEM documents that fall within the parameters of this Paragraph 46(b) that were not reflected on privilege logs served prior to the Execution Date, the parties will work in good faith to determine if such documents should be produced to Plaintiffs pursuant to the terms of this Agreement. All such documents shall be marked "Highly Confidential" pursuant to the Case Management Order No. 10 (Protective Order) signed by the Court on February 12, 2009. In exchange, Plaintiffs agree to not to seek relief relating to privilege disputes including the disputes identified in Plaintiffs' letter to UEP and USEM dated July 31, 2013, attached hereto as Exhibit D, until or unless this Agreement is rescinded pursuant to Paragraph 35.

Class Counsel agree that, except upon order of a court or the consent of UEP or USEM, they will neither provide copies of documents produced pursuant to this subparagraph nor share their contents with any person, plaintiff, counsel, class counsel or plaintiffs' counsel in any state or other federal action (other than Plaintiffs' Counsel), including counsel in the Indirect Purchaser Plaintiffs' Action, the Direct Action Plaintiffs' Action, or counsel for any person or entity that elects to exclude themselves from the Agreement, or with any third party not associated with Class Counsel or Plaintiffs' Counsel in prosecuting this action.

Plaintiffs may use documents produced pursuant to this Paragraph in litigating the Action, provided, however, that limitations on the use of material qualifying as Highly Confidential pursuant to the Protective Order in the Action entered on February 12, 2009 (ECF No. 50) shall apply as provided under that Order.

c. **Production of Documents Produced and Deposition Transcripts in the Kansas State Action**: Plaintiffs have served a subpoena seeking production of documents produced by UEP and USEM, Settling Defendants, and Non-Settling Defendants in litigation against Settling Defendants, Non-Settling Defendants, and UEP and USEM, pending in the District Court of Wyandotte County, Kansas ("Kansas Action"), along with pleadings filed in, and deposition transcripts from, the Kansas Action. Plaintiffs agree to withdraw their subpoena as to documents produced by UEP and USEM in the Kansas Action. UEP and USEM agree that, in the event Plaintiffs and Non-Settling Defendants reach agreement providing for, or a court orders, production of pleadings or transcripts from that litigation, UEP and USEM will not oppose the production of such transcripts or pleadings, provided, however, that UEP and USEM may redact, at their election, references in such transcripts or pleadings to documents created by UEP and USEM after September 23, 2008.

d. **Transactional Data**: UEP and USEM shall, upon request by Class Counsel, clarify to the best of its ability transactional and other data produced by them in discovery in the Action, including providing, upon reasonable request by Plaintiffs, follow-up information in response to questions Plaintiffs may reasonably have concerning such data. UEP and USEM will not be required to file a formal response to this request, and Plaintiffs agree to use reasonable efforts to minimize the burdens associated with this request.

e. **Authentication of Documents & Certifications as to Business Records**: Prior to trial in this Action, UEP and USEM shall, at the request of Class Counsel and through reasonable means (including, but not limited to, affidavits and declarations by persons qualified to testify as to authenticity and/or as to business records (pursuant to Federal Rules of Evidence 902(11) and (12)) establish the authenticity of documents and/or admissibility as business records produced by UEP and USEM, and, to the extent possible, any documents produced by Non-Settling Defendants or the alleged co-conspirators in this Action authored or created by UEP or USEM or sent to or received by UEP or USEM.

f. **Trial Testimony**: Upon the request of Class Counsel, and with expenses to be borne by UEP and USEM, UEP and USEM shall make available their current employees who are designated by Class Counsel to testify at trial in this Action. UEP and USEM shall use reasonable efforts to assist Class Counsel in arranging for the appearance of their former employees, who are designated by Class Counsel to testify at trial in this Action.

H. Notice of Settlement to Class Members

47. Class Counsel shall take all necessary and appropriate steps to ensure that notice of this Settlement Agreement ("Notice") and the date of the hearing scheduled by the Court to consider the fairness, adequacy, and reasonableness of this Agreement is provided in accordance with the Federal Rules of Civil Procedure and any Court orders. Class Counsel will undertake all reasonable efforts to obtain from Non-Settling Defendants the names and addresses of those persons that purchased Shell Eggs or Egg Products directly from any Non-Settling Defendant during the Class Period. Class Notice will be issued after Preliminary Approval by the Court and subject to any Court orders regarding the means of dissemination of notice.

48. Subject to court approval, disbursements for any payments and expenses incurred in connection with the costs of Notice and administration of the Agreement by the Claims Administrator shall be made from the Settlement Amount upon written notice to the Escrow Agent by Class Counsel of such payments and expenses. If Notice of the Agreement is combined with dissemination of notice of other settlement agreements as provided for under Paragraph 28, the costs of the combined notice and settlement administration shall be apportioned equally to the settlement amounts of each such settlement agreement. For example, if the Notice of the Agreement is combined with notice of one other settlement agreement and UEP and USEM's Settlement Amount

accounts for ten (10) percent of the combined total amount of the two settlements, then ten (10) percent of such costs shall be paid from the Settlement Amount. In the event that this Agreement is disapproved, rescinded, or otherwise fails to become effective, only the costs of the combined notice and settlement administration that have been apportioned to UEP and USEM will be non-refundable to UEP and USEM.

I. Taxes

49. Class Counsel shall be solely responsible for directing the Claims Administrator to file all informational and other tax returns necessary to report any taxable and/or net taxable income earned by the Settlement Amount. Further, Class Counsel shall be solely responsible for directing the Escrow Agent to make any tax payments, including interest and penalties due, on income earned by the Escrow Funds ("Tax Expenses"). Class Counsel shall be entitled to direct the Escrow Agent in writing to pay customary and reasonable Tax Expenses, including reasonable professional fees and expenses incurred in connection with carrying out their responsibilities as set forth in this Paragraph, from the applicable Escrow Fund by notifying the Escrow Agent in writing and as provided in paragraph 43 herein. UEP and USEM shall have no responsibility to make any tax filings relating to this Agreement.

50. For the purpose of § 468B of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, the "Administrator" of the Settlement Amount shall be the Claims Administrator, who shall timely and properly file or cause to be filed on a timely basis, all tax returns necessary or advisable with respect to the Settlement Amount (including, without limitation, all income tax returns, all informational returns, and all returns described in Treas. Reg. § 1.468B 2(1)).

51. The Parties to this Agreement and their Counsel shall treat, and shall cause the Claims Administrator to treat, the Settlement Amount as being at all times a "qualified settlement fund" within the meaning of Treas. Reg. § 1.468B 1. In addition, the Claims Administrator and, as required, the parties, shall timely make such elections as necessary or advisable to carry out the provisions of this Paragraph, including the "relation-back election" (as defined in Treas. Reg. § 1.468B 1(j)) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Claims Administrator to timely and properly prepare and deliver the necessary documentation for signature by all necessary parties and thereafter to cause the appropriate filing to occur. All provisions of this Agreement shall be interpreted in a manner that is consistent with the Settlement Amount being a "qualified settlement fund" within the meaning of Treas. Reg. § 1.468B 1.

J. Miscellaneous

52. This Agreement does not settle or compromise any claim by Plaintiffs or any Class Member asserted in the Action against any Non-Settling Defendant or any potential defendant other than the Releasees. All rights of any Class Member against Non-Settling Defendants or any other person or entity other than the Releasees are specifically reserved by Plaintiffs and the Class Members. The sales of Shell Eggs and Egg Products by UEP or USEM, if any, to Class Members shall remain in the case against the Non-Settling Defendants in the Action as a basis for damage claims and shall be part of any joint and several liability claims against Non-Settling Defendants in the Action or other persons or entities other than the Releasees.

53. Subject to Court approval, the United States District Court for the Eastern District of Pennsylvania shall retain jurisdiction over the implementation, enforcement, and performance of this Agreement, and shall have exclusive jurisdiction over any suit, action, proceeding, or dispute arising out of or relating to this Agreement or the applicability of this Agreement that cannot be resolved by negotiation and agreement by Plaintiffs, UEP and USEM. This Agreement shall be governed by and interpreted according to the substantive laws of the Commonwealth of Pennsylvania without regard to its choice of law or conflict of laws principles. UEP and USEM submit to the jurisdiction in the Eastern District of Pennsylvania only for the purposes of this Agreement and the implementation, enforcement, and performance thereof. UEP and USEM otherwise retain all defenses to the Court's exercise of personal jurisdiction over them.

54. This Agreement and the terms of the settlement embodied in this Agreement represent a compromise of disputed claims, and the negotiations, discussions and communications in connection with or leading up to and including this Agreement are agreed to be confidential, non-discoverable, and within the protection of Federal Rule of Evidence 408 and corresponding state statutes and rules of evidence and shall not be construed as admissions or concessions by the Parties, or any of them, either as to any liability or wrongdoing or as to the merits of any claim or defense. Neither the existence of this Agreement nor any of its provisions shall be offered into evidence by any person or its agents in this or any other action, arbitration or proceeding as admissions or concessions of liability or wrongdoing of any nature on the part of any Party hereto, or as admissions or concessions concerning the merits of any claim or defense.

55. This Agreement constitutes the entire agreement among Plaintiffs (and the other Releasors), UEP, and USEM (and the other Releasees) pertaining to the settlement of the Action against UEP and USEM only, and supersedes any and all prior and contemporaneous undertakings of Plaintiffs, UEP, and USEM in connection therewith. In entering into this Agreement, Plaintiffs, UEP, and USEM have not relied upon any representation or promise made by any of the Parties not contained in this Agreement. This Agreement may be modified or amended only by a writing executed by Plaintiffs, UEP, and USEM, and approved by the Court.

56. This Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of Releasors and Releasees. Without limiting the generality of the foregoing: (a) each and every covenant and agreement made herein by Plaintiffs, Class Counsel, or Plaintiffs' Counsel shall be binding upon all Class Members and Releasors; and (b) each and every covenant and agreement made herein by Releasees shall be binding upon all Releasees.

57. This Agreement may be executed in counterparts by Class Counsel and Counsel for UEP and USEM, and an electronically-scanned (in either .pdf or .tiff format) signature will be considered an original signature for purposes of execution of this Agreement.

58. The headings in this Agreement are included for convenience only and shall not be deemed to constitute part of this Agreement or to affect its construction.

59. In the event this Agreement is not approved, or in the event that the order and final judgment approving the settlement is entered but is substantially reversed, modified, or vacated, the pre-settlement status of the litigation (including, without

limitation, any applicable tolling of all statutes of limitations) shall be restored, and the Agreement shall have no effect on the rights of Plaintiffs, UEP, or USEM to prosecute or defend the pending Action in any respect, including the right to litigate fully the issues related to Class certification, raise personal jurisdictional defenses, or any other defenses, which rights are specifically and expressly retained by UEP and USEM.

60. Neither UEP, USEM, nor Plaintiffs shall be considered to be the drafter of this Agreement or any of its provisions for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Agreement.

61. Nothing expressed or implied in this Agreement is intended to or shall be construed to confer upon or give any person or entity other than Class Members, Releasors, and Releasees any right or remedy under or by reason of this Agreement.

62. Any putative Class Member that does not opt out of the Class created pursuant to the Agreement may remain in the Class without prejudice to the right of such putative Class Member to opt out of any other past, present, or future settlement class or certified litigation class in the Action.

63. Where this Agreement requires any party to provide notice or any other communication or document to any other party, such notice, communication, or document shall be provided by electronic mail or overnight delivery to:

For the Class:
Steven A. Asher
WEINSTEIN KITCHENOFF & ASHER LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
asher@wka-law.com

For UEP and USEM:
Jan P. Levine
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, Pennsylvania 19103-2799
levinej@pepperlaw.com

64. Each of the undersigned attorneys represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Agreement, subject to Court approval.

Dated: May 21, 2014

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(Interim Co-Lead Counsel for the Class)

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(215) 981-4750 (fax)
levinej@pepperlaw.com

(On Behalf of UEP and USEM)

Exhibit A

EXHIBIT A

UEP and USEM Member Entities

Ace Farms, Inc.
Baer's Poultry Company
Berne Hi-Way Hatchery, Inc.
Big Stone Colony, Inc.
Boeckner Enterprises, Inc.
Bowden Egg Farm
Braswell Egg Company, Inc.
Brown Brothers Produce Company, Inc.
Caldwell Foods LLC
Cashton Farm Supply
Cedar Valley Egg Farm, LLP
Center Fresh Egg Farm, LLP
Centrum Valley Farms, LLP
Centurion Poultry, Inc.
Chestnut Mtn. Egg Farms, Inc.
Chickenville USA, Inc.
CHS, Inc.
Coffee Street Acres
Colorado Egg, LLC
Cooper Farms, Inc.
Country Charm Eggs, LLC
Creighton Bros.LLC
Dakota Layers, LLP
Demler Enterprises
Deweerdt Poultry Farm, LLC
Dooyema & Sons, Inc.
Eagle Creek Colony, Inc.
Egg Innovations, LLC
Farm Crest Foods, Inc.
Fassio Egg Farms, Inc.
Feather Crest Farms, Inc.
Featherland Egg Farms, Inc.
Featherland Farms, Inc.
Flieg's Poultry Farm
Forsman Farms, Inc.
Freitas Fresh Eggs, Inc.
Fremont Farms of Iowa, LLP
Fremont Farms, LC
Ft. Recovery Equity Exchange Co.
GCB Foods, LLC
Gemperie Enterprises
Girard Brothers, LLC
Giroux's Poultry Farm, Inc.
Green Valley Poultry Farm, Inc.
Harold Heins & Sons, Inc.
Hawkeye Pride Egg Farm, LLP
Hemmelgarn & Sons, Inc.
Herbruck's Poultry Ranch, Inc.
Hertzfeld Poultry Farms, Inc.
Hickman's Egg Ranch, Inc.
Hickman's Family Farms of CA, LLC
Hidden Villa Ranch
Hillside Poultry Farms, Inc.
Hy-Line North America, LLC
Iowa Cage Free, LLP
ISE America, Inc.
ISE Newberry, Inc.
J&A Farms, LLC
James Farm, Inc.
JEM Eggs, LLC
Jenkins Poultry Farms
Jordan Egg Farm, Inc.
Junction Farms, Inc.
King, Elmer J.
Konos, Inc.
Kreher's Farm Fresh Eggs, LLC
L. R. F., Inc.
Larkin Poultry, LLC
Lathem Farms, Inc.
Latta's Egg Ranch, Inc.
Layer's, Inc.
Ledge Farms
M&C Anderson Pullets, Inc.
Mahard Egg Farm, Inc.
MCM Poultry Farm
Mercer Landmark, Inc.
Merrill's Poultry Farm, Inc.
Michael Farms
Minnich Poultry, LLC
Missouri Egg Farm LLC
MJ Homan Poultry Farm
Mobo Farms, Inc.
Morning Fresh Farms Inc.
Mussman's Back Acres, Inc.

Nature Pure, LLC
Nature's Best Egg Company, LLC
NC Layer Performance & Mgmt Program
Nebraska Eggs, LTD
Nelson Poultry Farms, Inc.
Novus International, Inc.
Oakdell Egg Farms, Inc.
Old Pike Farm, LLC
Olivera Egg Ranch, LLC
P & R Farms, Inc.
PCF Poultry, LLC
Pearl Valley Farms, Inc.
Phil Overdorf Farms, Inc.
Phil's Fresh Eggs, Inc.
Pollock Poultry
Powl Associates
Premier Eggs
Prime Foods, LLC
Puglisi Egg Farms of Delaware, LLC
Puglisi Egg Products, Inc.
R & S Farms
Railside Farms, LLC
Rembrandt Enterprises, Inc.
Rigtrup Egg Farm, LLC
Rindler Poultry, LLC
Ritewood, Inc.
Riverview Farms, Inc.
Ross-Medford Farms, LLC
S & R Egg Farms, Inc.
Schipper Eggs, LLC
Schmidt Poultry
Shepherd Poultry Farm, LLC
Simpson's Eggs, Inc.
Sioux County Egg Farm, LLP
SKS Enterprises, Inc.
Smith Quality Eggs, LLC
Soncrest Egg Company
Sperry Farm, Inc.
Sterup Poultry Farms, LLC
Stiebrs Farms, Inc.
Stoller Farms, Inc.
Strickland Partnership
Sunny Side Farms, Inc.
Sunny Yolk Egg Ranch, LLC
Sunrise Acres, Inc.
Sunrise Farms, LLC
The Country Hen
Thomas Poultry Farm of Schoylerville, Inc.
Trillium Farm Holdings, LLC
United Egg Marketing Corp.
Valley Fresh Foods, Inc.
Vermont Egg Farms, Inc.
Vorderstrasse Farms, LLC
Warnock, Melvin (Al)
Warren Farms, LLP
Wayne County Eggs, LLC
Weaver Brothers, Inc.
Wharton County Foods, LLC
Whitesville Poultry, LLC
Wilcox Farms, Inc.
Willamette Egg Farms, Inc.
Winchester Egg Farms, LLC
Wuebker Poultry, Inc.
Wuebker, Melvin
Zeilinger Farms, LLC
Zoet Poultry, Inc.

Exhibit B

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION	**MDL No. 2002** **Case No: 08-md-02002**
THIS DOCUMENT APPLIES TO ALL DIRECT PURCHASER ACTIONS	

[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT WITH UNITED EGG PRODUCERS AND UNITED STATES EGG MARKETERS, CERTIFYING THE CLASS FOR PURPOSES OF SETTLEMENT, AND GRANTING LEAVE TO FILE MOTION FOR FEES AND EXPENSES

It is hereby ORDERED AND DECREED as follows:

1. The motion of Direct Purchaser Plaintiffs for preliminary approval of the proposed settlement, which Defendants United Egg Producers ("UEP") and United States Egg Marketers ("USEM") do not oppose, is hereby GRANTED.

2. The Court finds that the proposed settlement with UEP and USEM, as set forth in the settlement Agreement, subject to final determination following an approved form of and plan for notice and a Fairness Hearing,[1] falls within the range of reasonableness and is sufficiently fair, reasonable and adequate to the following settlement class (the "Settlement Class"), for settlement purposes only:

> All persons and entities that purchased Shell Eggs or Egg Products in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date on which the Court enters an order preliminarily approving the Agreement and certifying a Class for Settlement purposes.
>
> a.) Shell Egg SubClass

[1] The capitalized terms used in this Order that are defined in the settlement Agreement are, unless otherwise defined herein, used in this Order as defined in the Agreement.

> All individuals and entities that purchased Shell Eggs in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date on which the Court enters an order preliminarily approving the Agreement and certifying a Class for Settlement purposes.

b.) Egg Products SubClass

> All individuals and entities that purchased Egg Products produced from Shell Eggs in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date on which the Court enters an order preliminarily approving the Agreement and certifying a Class for Settlement purposes.

Excluded from the Class and SubClasses are Defendants, Other Settling Defendants, and Producers, and the parents, subsidiaries and affiliates of Defendants, Other Settling Defendants, and Producers, all government entities, as well as the Court and staff to whom this case is assigned, and any member of the Court's or staff's immediate family.

3. For purposes of settlement and on the basis of the entire record before the Court, the Court finds that the Settlement Class fully complies with the requirements of Federal Rule of Civil Procedure 23. Specifically, the Court finds: (1) the Settlement Class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the Settlement Classes; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Settlement Classes; and (4) the representative parties will fairly and adequately protect the interests of the class. Additionally, for purposes of settlement, the Court finds that Federal Rule of Civil Procedure 23(b)(3) is also met and that there are questions of law or fact common to class members which predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. In accordance with the holding in *In re Community*

Bank of Northern Virginia, 418 F.3d 277, 306 (3d Cir. 2005), this Court makes no determination concerning the manageability of this action as a class action if it were to go to trial.

4. Plaintiffs T.K. Ribbing's Family Restaurant, LLC; Eby-Brown Company LLC; Goldberg and Solovy Foods, Inc.; Karetas Foods, Inc.; Nussbaum-SF, Inc.; Somerset Industries, Inc.; Wixon, Inc.; John A. Lisciandro d/b/a/ Lisciandro's Restaurant, and SensoryEffects Flavor Co. d/b/a Sensory Effects Flavor Systems (collectively, "Plaintiffs"), will serve as Class Representatives on behalf of the Settlement Class.

5. The Court confirms the appointment of Class Counsel for purposes of the Settlement Class as the law firms Weinstein Kitchenoff & Asher LLC, 1845 Walnut Street, Suite 1100, Philadelphia, PA 19103; Hausfeld LLP, 1700 K Street NW, Suite 650, Washington, DC 20006; Bernstein Liebhard LLP, 10 East 40th Street, 22nd Floor, New York, NY 10016; and Susman Godfrey, 654 Madison Avenue, 5th Floor, New York, NY 10065-8404.

6. Direct Purchaser Plaintiffs' request for leave to file a motion for attorneys' fees and litigation expenses is hereby approved and shall be filed in accord with the deadline to be proposed by Class Counsel as set forth in paragraph 7 herein that shall be at least 90 days prior to the date on which the final Fairness Hearing is held and at least 45 days prior to the date by which potential Class Members must exclude themselves from or object to the Agreement.

7. Class Counsel shall submit for the Court's approval (a) a Proposed Notice to the Class, including a proposed schedule for Class Members to opt out or object to the proposed Settlement, (b) a proposed Plan of Notice that includes the proposed manner of Notice, a proposed Administrator for Notice and Claims, (c) a proposed date for the Court's Fairness Hearing to determine whether the Settlement is fair, reasonable, and adequate, and whether it should be finally approved by the Court, (d) a proposed deadline by which Plaintiffs must file

their motion for an award of attorneys' fees and reimbursement of litigation expenses, (e) a proposed deadline by which Plaintiffs must file their Motion for Final Approval of the Settlement Agreement, and (f) proposed deadlines by which Class Members must object to or request exclusion from the Settlement Agreement.

8. Interim Co-Lead Counsel for Direct Purchaser Plaintiffs shall include in the text of their proposed Direct Mail Notice and Publication Notice of the Settlement Agreement the deadline by which Direct Purchaser Plaintiffs must file their motion for an award of attorneys' fees and litigation expenses and a statement that Class Members may review the motion at the www.eggproductssettlement.com website prior to the objection and opt-out deadlines set forth below.

BY THE COURT:

_____
Gene E.K. Pratter
United States District Judge

Date:_____

Exhibit C

EXHIBIT C

Entries on 5.13.13 UEP/USEM/UEA Hard Copy Document Privilege Log
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Entries on 5.13.13 UEP/USEM/UEA Privilege Log for Documents in Possession of UEP and USEM's Co-Defendants
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25-27
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122-163
165-171
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Entries on UEP Privilege Log for Documents in Possession of Golden Oval

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Exhibit D

EXHIBIT D

quinn emanuel trial lawyers | new york

51 Madison Avenue, 22nd Floor, New York, New York 10010-1601 | TEL: (212) 849-7000 FAX: (212) 849-7100

WRITER'S DIRECT DIAL NO.
(212) 849-7152

WRITER'S INTERNET ADDRESS
steigolson@quinnemanuel.com

July 31, 2013

VIA E-MAIL

Eli Segal
Pepper Hamilton LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799

Re: *In re Processed Egg Products Antitrust Litigation*

Dear Eli:

I write on behalf of the Direct Purchaser Plaintiffs ("Plaintiffs") regarding documents that Defendants UEP, USEM, and UEA (together for the purposes of this letter "UEP") have either withheld or redacted on the grounds of attorney-client privilege or work-product doctrine. Based on a review of UEP's privilege logs and the redacted documents produced by UEP, Plaintiffs have determined that UEP's assertion of privilege or protection over certain documents, portions of documents, and categories of documents, appears unjustified, as detailed below.

A. Documents concerning the "Compassion Over Killing" lawsuit against UEP

UEP has withheld or redacted numerous documents concerning the lawsuit brought by Compassion Over Killing against UEP. UEP's own description of many of these documents facially indicates that they are not privileged. For example:

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- Document No. 60 on UEP's Electronic Document Privilege Log (dated May 13, 2013) ("Electronic Privilege Log") is an email from Gene Gregory of UEP to Howard Magwire of UEP, copying Al Pope of UEP, which UEP describes as a "Confidential email discussing defense of COK lawsuit regarding UEP animal welfare program." No attorney were copied on the email, which does not purport to contain the advice of counsel, yet UEP has withheld this document on the grounds of "UEP Work Product."

- Document No. 76 on UEP's Privilege Log for Documents in Possession of UEP and USEM's Co-Defendants (dated May 13, 2013) ("Co-Defendant Privilege Log") is a memorandum from Gene Gregory of UEP to the members of UEP's Executive Committee Members. No attorneys are listed in the author or recipient fields for this memorandum, which UEP describes as a "Confidential memorandum reporting on mediation conference in COK lawsuit regarding UEP animal welfare program and containing UEP counsel's legal advice regarding the same." UEP has withheld this document on the grounds of "Attorney-Client" privilege and "Work Product."

- Document No. 172 on UEP's Co-Defendant Privilege Log is a document authored by Gene Gregory of UEP, which UEP describes as "Confidential notes regarding NAD Review Board hearing and NAD action initiated by COK regarding UEP animal welfare program." Although an attorney did not prepare these notes, UEP has withheld them on the grounds of "UEP Work Product."

None of these documents appear to be communications with counsel requesting or reflecting legal advice that would fall within the bounds of the attorney-client privilege. (*See* Docket Entry No. 585, Mem. & Opinion in Support of Order re: Direct Purchaser Plaintiffs' Motion to Compel Production of Sparboe Documents and Other Information [hereinafter "Magistrate Judge Rice Privilege Order"], Oct. 19, 2011, at 2 ("Were any of the communications at issue made for the purpose of obtaining or providing legal advice? If not, they cannot fall within the bounds of the attorney-client privilege").) Merely discussing a lawsuit does not make the content of that discussion privileged.

Moreover, Gene Gregory of UEP is not an attorney and his notes, mental impressions, and/or communications with other non-attorneys cannot be withheld as Attorney Work Product. As Magistrate Judge Rice explained: "'The work-product doctrine 'is designed to protect material *prepared by an attorney* acting for his client in anticipation of litigation.'" (*See* Magistrate Judge Rice Privilege Order at 9 (quoting *United States v. Rockwell Int'l*, 897 F.2d 1255, 1265 (3d Cir. 1990).)

Plaintiffs have the same concerns about the following entries on UEP's privilege logs: Document Nos. 36, 37, 38, 42, 43, 49, 50, 59, 60, 69, 87, 88, 117-119, 124, 125, and 128 on UEP's Electronic Privilege Log; Document Nos. 34, 45-48, 61, 96, 97, 103, and 104 on UEP's Hard Copy Document Privilege Log (dated May 13, 2013) ("Hard Copy Privilege Log"); Document Nos. 11, 13, 16, 24, 33, 50-52, 60-63, 76-81, 92-99, and 172-190 on UEP's Co-Defendant Privilege Log.

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We believe these documents should be produced. If, after a review of these documents, UEP intends to maintain its claim of privilege or protection over any of them, please state with specificity the basis for each such assertion.

B. Privilege log entries for withheld email chains involving multiple parties

UEP also has withheld numerous documents that are described as "Confidential email exchange[s]" among various individuals, some of whom are counsel and some of whom are not. However, Plaintiffs are unable to evaluate the basis for UEP's assertion of privilege over these documents based on the minimal information provided by UEP. For example:

- Document No. 118 on UEP's Electronic Privilege Log is described as an email from Howard Magwire of UEP to Gene Gregory of UEP. The privilege log entry indicates that no other person was copied on this particular email. However, the description of the document states that this document is a "confidential email exchange among Gene Gregory, Howard Magwire," and several other persons, including Kevin Haley (UEP counsel) "containing legal advice of Haley regarding petition filed by COK with FDA regarding egg labeling requirements and attaching draft UEP response prepared by Haley." UEP has withheld this email exchange on the grounds of "Attorney-Client" privilege.

- Document No. 166 on UEP's Co-Defendant Privilege Log is an email from UEP Long Range Planning Committee Chairman Roger Deffner to Chad Gregory of UEP. The privilege log entry indicates that no other person was copied on this particular email. However, the description of the document provided by UEP states that this document is a "confidential email exchange among Roger Deffner, Chad Gregory, Kevin Haley (UEP counsel), Gene Gregory (UEP President) and Mike McGriff (UEP Dir. Member Services) requesting and discussing request for legal advice regarding Capper-Volstead." UEP has withheld this email exchange on the grounds of "Attorney-Client" privilege.

It is unclear from these privilege log entries how many emails the "exchanges" contain, who if anyone was copied on each email in the chain and, most importantly, whether counsel was copied on all or only some of the emails in the exchange. No attorneys are identified in the "Author/From" or "To" fields provided for these email exchanges, suggesting that counsel was not on every single email in the chain. An entire series of email exchanges cannot be withheld as privileged merely because one or multiple emails in the chain constitute privileged communications with counsel; rather, the emails should be produced with any privileged communications redacted. *See, e.g., Rhoads Indus. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 238, 242 (E.D. Pa. 2008)

In addition to the specific examples provided, Plaintiffs have the same concern about the following entries on UEP's privilege logs: Document Nos. 33, 118, 119, 124-25, 128, and 371-73 on UEP's Electronic Privilege Log; Document Nos. 92-99, 161, 165, 166, 168, and 169 on UEP's Co-Defendant Privilege Log. Please review these documents and either produce the email exchanges, with any appropriate redactions, or provide amended privilege log entries that adequately explain with specificity UEP's basis for withholding each of these email exchanges in full and not only the privileged portions. *See Rhoads Indus., supra.*

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C. **Communications with nonmembers**

UEP has withheld or redacted communications with individuals who were apparently not members of UEP at the time of the communication. For example:

- Document No. 43 (UE0142186-89) on UEP's Hard Copy Privilege Log is a redacted email from Justin Whaley of Country Creek Farms to Gene Gregory, copying other employees of Country Creek Farms. UEP has redacted this document on the grounds of "UEP Attorney-Client Privilege" and identifies Justin Whaley as a UEP member on the privilege log. Yet UEP stated in response to DPP's Joint Interrogatory No. 7 that Country Creek Farms never was a member of UEP. Thus, communications with representatives of Country Creek Farms are not privileged.

- Document No. 82 on UEP's Co-Defendant Privilege Log is identified as a "confidential email forwarding and discussing confidential memorandum from Brann & Isaacson (UEP counsel) providing legal advice regarding settlement of COK lawsuit." However, the email recipients include "UEP Animal Welfare Committee Observers" such as nonmembers Kevin Whaley of Country Creek Farms and Jason Wadsworth of Wegman's Food Markets, Inc. Communications with these nonmember "observers" are not privileged.

It is well-established that communications with third-parties are not privileged, and that disclosing otherwise privileged communications to third-parties waives any claim of privilege. *In re Teleglobe Commcn's Corp.*, 493 F.2d 345, 361 (3d Cir. 2007). UEP has no basis for withholding communications with nonmembers under the purview of the "UEP Attorney-Client Privilege." Nor can UEP withhold minutes of meetings that were attended by nonmembers or otherwise privileged communications that have been disclosed to nonmembers.

In addition to the specific examples provided, Plaintiffs have the same concerns about the following entries on UEP's privilege logs: Document Nos. 82-93, 95, 98, 109-122, 129-33, 134-40, 147, 150-53, 191, and 192 on UEP's Co-Defendant Privilege Log; Document Nos. 137-139, and 143 of UEP's Electronic Privilege Log; Document Nos. 120 and 162 on UEP's Hard Copy Privilege Log.

We believe these documents should be produced. If, after a review of these documents, UEP intends to maintain its claim of privilege or protection over any of them, please state with specificity the basis for each such assertion.

D. **Meeting minutes and related documents**

UEP has redacted certain portions of the minutes of various UEP committee meetings, as well as other documents related to those meetings. For example:

- Document No. 53 (UE0944732-33) on UEP's Hard Copy Privilege Log are minutes from an undated meeting held by the UEP Committee for Egg Products Market

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Discovery. Attendees at this meeting included UEA Chairman Toby Catherman. UEP's privilege log states that this was a confidential meeting, and that the redacted portion of the document "reflect[s] request for legal advice from and provision of legal advice by Martin Eisenstein (UEP counsel) regarding Capper-Volstead."

- Document No. 122 (MOARK0039248-251) on UEP's Co-Defendant Privilege Log are minutes from a February 27, 2007 meeting of the Long Range Planning Committee. The minutes identify nonmember Kevin Whaley of Country Creek Foods as a participant in this meeting, and thus any communications that took place at this meeting could not have been privileged.

    - Document UE0144760-68 identified in UEP's clawback letter dated April 29, 2013 ("Clawback Letter") appears to be a copy of Chad Gregory's handwritten minutes and notes the same Long Range Planning Committee meeting. Various portions of the handwritten notes are redacted, but nothing in this document suggests that it contains anything more than Chad Gregory's own mental impressions of what transpired at this meeting. As explained above, the presence of a nonmember at this meeting eliminates any claim of privilege over the communications that took place at the meeting, as well as any related documents.

    - Documents Nos. 129 (MFI0633678-81) and 150 (MFI0633682-85) on UEP's Co-Defendant Privilege Log are emails sent by Chad Gregory forwarding the same minutes of the Long Range Planning Committee to various recipients, including UEP's public relations firm Golin Harris). Comments from these recipients, none of whom were counsel, were requested, and counsel was only copied. These emails do not contain "confidential" or "attorney-client" markings, nor does the content of these emails otherwise suggest that the attached meeting minutes should be kept confidential.

UEP has no basis for asserting privilege over minutes taken at UEP committee or board meetings, or over the handwritten notes and mental impressions of a non-attorney from those open meetings. Both Gene Gregory and Al Pope of UEP testified that UEP meetings were open meetings (*see* Tr. of June 22, 2013 Dep. of Gene Gregory at 781; Tr. of May 21, 2013 Dep. of Al Pope at 79-80.) and, as set forth above, both UEP's privilege log entries and the meeting minutes that have been produced in this litigation make clear that nonmembers participated in many of these meetings. Moreover, Magistrate Judge Rice has held previously that UEP meetings were open to the public and the trade press until at least 2009. (*See* Magistrate Judge Rice Privilege Order at 21.) The fact that the meeting minutes of the Long Range Planning Committee identified above were circulated to various non-attorneys for comments, without any indication that they should be kept confidential, only further demonstrates that they are not protected communications.

In addition to the specific examples provided, Plaintiffs have the same concerns about the following entries on UEP's privilege logs: Document Nos. 90, 137, 138, 143, and 145 on UEP's

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Electronic Privilege Log; Document Nos. 120, 139, 158, and 162 on UEP's Hard Copy Privilege Log; Document Nos. 19, 129, 134, 136, 147, 150, and 155 on UEP's Co-Defendant Privilege Log.

We believe these documents should be produced. If, after a review of these documents, UEP intends to maintain its claim of privilege or protection over any of them, please state with specificity the basis for each such assertion.

E. Communications to which counsel was not a party and which do not otherwise appear to be contain privileged information

UEP has redacted numerous communications to which no counsel was a party and which contain no other "attorney-client privilege" or "confidential" markings or other indications that they contain privileged communications. None of these documents appear to have been prepared for the purpose of obtaining or providing legal advice. For example:

- Documents UE0200467-69 and UE0661331-33, identified in UEP's Clawback Letter are copies of a letter from Gene Gregory of UEP to the President of Moark's Egg Products Division explaining the role and goals of UEP's Price Discovery Committee. The letter does not request or contain legal advice and contains no "confidential" or "attorney-client privilege" markings. The letter appears to be a non-privileged communication from one executive to another with no apparent involvement of an attorney, and no indication that it was prepared for the purpose of obtaining or providing legal advice. UEP has not produced a privilege log setting forth the basis for this redaction, and on its face the document does not appear to contain any privileged information.

- Document No. 2 (UE0946358) on UEP's Electronic Privilege Log is a one-page email from Gene Gregory of UEP to Mike Bynum and Paul Bahan. The unredacted portions of the email provide an update of recent developments concerning the Certified program. The privilege description provided by UEP states that the redacted portion reflects a "request for legal advice from Irving Isaacson," but Isaacson is not copied on the email, nor is any other attorney.

- Document No. 10 (UE0945198) on UEP's Electronic Privilege Log is an email exchange between Chad Gregory of UEP and Linda Reickard of UEP regarding a "Producer Questionnaire." UEP's privilege log describes the document as a "redacted portion of a confidential email exchange between Chad Gregory and Linda Reickard reflecting request for legal advice from Irving Isaacson (UEP counsel) regarding UEP membership agreement." However, counsel was not copied on this email exchange, and nothing about the email exchange suggests it was prepared for the purpose of obtaining or providing legal advice.

- Document No. 14 (UE0945158-60) on UEP's Electronic Privilege Log is a memorandum from Gene Gregory to members of the Producer Committee for Animal Welfare. UEP's privilege log describes the document as a "redacted portion of a confidential memorandum reflecting legal advice of and request for legal advice from

Irving Isaacson (UEP counsel) regarding UEP animal welfare program." However, the unredacted portions of the memorandum merely update the committee on pending issues and motions requiring a vote; it thus seems unlikely that the redacted portion of the document reflects legal advice by or a request for legal advice from counsel, particularly in light of the fact that the memorandum contains no "confidential" designations and because of the fact that counsel was not copied on the memorandum.

- Document No. 88 (UE0946956-57) on UEP's Electronic Privilege Log is an email exchange between Gene Gregory of UEP and Linda Reickard of UEP regarding invoices and income. UEP's privilege log describes the document as a "redacted portion of a confidential email exchange between Gene Gregory and Linda Reickard discussing potential settlement of legal challenges to UEP animal welfare program." Internal discussions of legal matters are not privileged, and counsel was not involved in this email exchange.

- Document No. 6 (CM00717798-804) on UEP's Co-Defendant Privilege Log appears to be a packet of materials that was faxed by UEP to Cal-Maine Foods. One of the redacted pages is a fax cover sheet. The unredacted portion indicates that the fax was sent by Gene Gregory of UEP to Dolph Baker and Ken Looper of Cal-Maine Foods. No attorney was a recipient of the fax, yet the fax description box is redacted and stamped "attorney-client privilege." Moreover, the faxed material appears to contain the type of non-privileged material regularly sent to UEP members, including a letter calling for a voluntary flock reduction, supply/demand statistics, and a commitment sheet. Nothing about the documents suggests they were prepared for the purpose of obtaining or providing legal advice.

- Document No. 11 (CM00717700-03) on UEP's Co-Defendant Privilege Log is a set of documents that includes an email from Gene Gregory to the members of the UEP Animal Welfare Committee. Counsel was not copied on the email, but UEP's Co-Defendant Privilege Log described it as a "redacted portion of confidential email within document compilation, containing legal advice of Kevin Haley (UEP counsel) and providing an update regarding NAD action initiated by COK regarding UEP animal welfare program." None of the other documents in the set of documents – an egg advertisement/coupon, a non-privileged UEP letter to a third-party price discovery entity, and a memorandum on Urner Barry PCT Survey findings – were prepared for the purposes of obtaining or providing legal advice, but instead were of the type that were widely distributed and populate the Joint Document Depository.

In addition to the specific examples provided, Plaintiffs have the same concerns about the following entries on UEP's privilege logs: Document Nos. 47 and 147 on UEP's Electronic Privilege Log; and Document Nos. 31 and 43 on UEP's Hard Copy Privilege Log.

We believe these documents should be produced. If, after a review of these documents, UEP intends to maintain its claim of privilege or protection over any of them, please state with specificity the basis for each such assertion.

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F. Communications to which counsel is a party but that do not appear to request or seek legal advice

UEP has also redacted documents that are communications copying counsel but do not appear to be the type of communication that is protected by the attorney-client privilege:

- Document NL000819-21, identified in UEP's Clawback Letter, is an email exchange between Gene Gregory and the employees of several Defendants regarding the marketing of certified products by non-certified producers. UEP counsel Irving Isaacson is copied on only the last email in the exchange, but nothing about the email suggests it was prepared for the purpose of requesting or obtaining legal advice or reflects any legal advice previously given. Various portions of the email chain are redacted, including portions of an email to which counsel was not a party and which appear to be merely discussions of one membes' views. There are no "confidential" or "attorney-client privilege" markings on this email chain.

- Document No. 21 (MOARK0039217-22) in UEP's Co-Defendant Privilege Log is a near-duplicate of NL000819-21 and does not appear privileged for the same reasons.

As the Court previously has explained, "merely copying an attorney on a communication does not establish that the communication is privileged." (Magistrate Judge Rice Privilege Order at 10-11 (quotation and alterations omitted).) Magistrate Judge Rice rejected UEP's claim of privilege over a memorandum from Sparboe's president to Gene Gregory of UEP and certain producers even though Irving Isaacson was one of the recipients of the memorandum, because nothing in the document suggested that it was prepared in connection with a request for or the provision for legal advice. (*Id.* at pp. 11-13.) Like the non-privileged Sparboe documents addressed in Magistrate Judge Rice's Privilege Order, the documents above contain no indication that they were prepared for the purpose of obtaining or providing legal advice. To the contrary, the unredacted portions suggest that Irving Isaacson was merely copied on the final email of a chain that discussed UEP's policies for permitting non-certified companies to market certified eggs.

We believe these documents should be produced. If, after a review of these documents, UEP intends to maintain its claim of privilege or protection over any of them, please state with specificity the basis for each such assertion.

G. Documents not available on the JDD

UEP has provided bates numbers in its privilege logs for certain documents that have been redacted on grounds of privilege, but which are not available at the identified bates numbers on the Joint Document Depository. Plaintiffs request that UEP clarify whether it intends to withhold these documents in their entirety or will produce them in redacted form. If a redacted document should have been produced, please produce it promptly. The following documents identified on UEP's Co-Defendant Privilege Log are not available:

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Begbates	Endbates
RA85520	RA85542
NL012000455	
NL012000453	NL012000454
NL012000448	NL012000452
NL012000456	NL012000458
NL012000437	NL012000443
NL012000429	NL012000432
NL012000422	NL012000424
NL012000495	NL012000497
NL012000498	NL012000500
RA85543	RA85545

In addition, the following two documents identified on UEP's Electronic Privilege Log not only have been entirely redacted, but appear to have been redacted without legitimate grounds. Plaintiffs request that UEP produce these documents:

- Document No. 1 (UE0753734) on UEP's Electronic Privilege Log is a one-page document that has been entirely redacted. The document is described in UEP's Electronic Privilege Log as the "redacted portion of a confidential letter reflecting legal advice from Irving Isaacson (UEP counsel) regarding Capper-Volstead," but it was sent by Al Pope to Bob Dominic, Board member of Dissolving UEP Member Northwest Egg Producers. Counsel was not a party to the communication. Based on UEP's own description of the document, it appears it was not a document prepared for the purpose of obtaining or providing legal advice.

- Document No. 151 (UE0619325-26) on UEP's Electronic Privilege Log also is entirely redacted. The document is described in UEP's Electronic Privilege Log as a "confidential email exchange reflecting provision of and request for legal advice from Kevin Haley (UEP counsel) regarding Capper-Vostead," but the email was from McGriff to Gene Gregory, copying Chad Gregory. Again, counsel was not a party to the communication. Based on UEP's own description of the document, it appears it was not a document prepared for the purpose of obtaining or providing legal advice.

H. Documents regarding the Capper-Volstead Act

UEP has withheld and redacted many documents on the grounds that they purportedly request, provide, or reflect legal advice from counsel regarding the Capper-Volstead Act. This position is, however, inconsistent with UEP's defense in this action that UEP and its members had a good faith belief that their conduct was exempt from the federal antitrust laws under the Capper-Volstead Act. (*See* Docket Entry No. 748, Defs.' Statement of Law, at 47.)

Since Defendants undeniably received legal advice from UEP counsel about this issue, the nature of that advice is necessarily relevant to the question of whether Defendants, in fact, had a good-faith belief that their conduct was protected by the Capper Volstead Act. Indeed, several

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Defendants expressly represented in response to Plaintiffs' Joint Interrogatory No. 6 that their purported good-faith belief in Capper-Volstead immunity was based on communications that UEP had with its counsel on this issue – some of which admittedly have been withheld as privileged. (*See, e.g.*, National Food Corp.'s Response to Joint Interrogatory No. 6 ("NFC personnel were aware that UEP and USEM regularly consulted their attorneys on antitrust and Capper-Volstead issues. . . . These communications, some of which have been produced while others have been withheld by UEP or USEM as privileged, formed a significant part of the basis for [NFC's] belief.").)

UEP cannot use the attorney-client privilege as both "a sword" and "a shield" by arguing that it had a good-faith belief that its actions were protected by Capper-Volstead, and then refusing to disclose communications with counsel that bear directly on that issue. *See, e.g., Merck Sharp & Dohme Pharmaceuticals SRL v. Teva Pharmaceuticals USA*, 2008 U.S. Dist. LEXIS 89661, at *2 (D.N.J. Nov. 5, 2008); *Moran v. Davita, Inc.* 2008 U.S. Dist. LEXIS 74326, at *2-3 (D.N.J. Sept. 26, 2008) ("Defendants cannot claim that all of their actions with respect to Plaintiff were taken for legitimate business reasons related to [an applicable statute] . . . and then refuse to disclose the opinion sought regarding the application of [that statute]. . . . Defendants seek to use the privilege as a shield, by refusing to disclose the [] opinion letter authored by [their outside counsel], and as a sword, by arguing that they acted upon a good faith business reason . . . .").

Accordingly, to the extent UEP intends to maintain its "good faith" defense, UEP must produce all documents regarding legal advice from counsel regarding Capper-Volstead that have been withheld or redacted as privileged. Please let us know whether UEP will agree to do so, or whether it will agree to withdraw its good faith defense.

* * *

In addition, please let us know when UEP will be providing an updated Log reflecting the clawed-back documents identified in your April 29, 2013 letter.

Finally, we confirm Plaintiffs' understanding that the parties are at an impasse regarding UEP's claim of privilege over document UE0153457 (which is Pope Exhibit 14). We trust there is no disagreement about this given our extensive correspondence.

Very truly yours,

Steig D. Olson

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION	:	**MDL No. 2002** **Case No: 08-md-02002**
THIS DOCUMENT APPLIES TO ALL DIRECT PURCHASER ACTIONS	:	

[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT WITH DEFENDANTS UNITED EGG PRODUCERS AND UNITED STATES EGG MARKETERS, CERTIFYING THE CLASS FOR PURPOSES OF SETTLEMENT, AND GRANTING LEAVE TO FILE MOTION FOR ATTORNEY'S FEES, REIMBURSEMENT OF EXPENSES, AND INCENTIVE AWARDS FOR CLASS REPRESENTATIVES

It is hereby ORDERED AND DECREED as follows:

1. The motion of Direct Purchaser Plaintiffs for preliminary approval of the proposed settlement, which Defendants United Egg Producers ("UEP") and United States Egg Marketers ("USEM") do not oppose, is hereby **GRANTED**.

2. The Court finds that the proposed settlement with UEP and USEM, as set forth in the Settlement Agreement, subject to final determination following an approved form of and plan for notice and a Fairness Hearing,[1] falls within the range of reasonableness and is sufficiently fair, reasonable and adequate to the following settlement class (the "Settlement Class"), for settlement purposes only:

> All persons and entities that purchased Shell Eggs or Egg Products in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date on which the Court enters an order preliminarily approving the Agreement and certifying a Class for Settlement purposes.

[1] The capitalized terms used in this Order that are defined in the Settlement Agreement are, unless otherwise defined herein, used in this Order as defined in the Agreement.

a.) Shell Egg SubClass

> All individuals and entities that purchased Shell Eggs in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date on which the Court enters an order preliminarily approving the Agreement and certifying a Class for Settlement purposes.

b.) Egg Products SubClass

> All individuals and entities that purchased Egg Products produced from Shell Eggs in the United States directly from any Producer, including any Defendant, during the Class Period from January 1, 2000 through the date on which the Court enters an order preliminarily approving the Agreement and certifying a Class for Settlement purposes.

Excluded from the Class and SubClasses are Defendants, Other Settling Defendants, Producers, and the parents, subsidiaries and affiliates of Defendants, Other Settling Defendants, and Producers, all government entities, as well as the Court and staff to whom this case is assigned, and any member of the Court's or staff's immediate family.

3. For purposes of settlement and on the basis of the entire record before the Court, the Court finds that the Settlement Class fully complies with the requirements of Federal Rule of Civil Procedure 23. Specifically, the Court finds: (1) the Settlement Class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the Settlement Classes; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Settlement Classes; and (4) the representative parties will fairly and adequately protect the interests of the class. Additionally, for purposes of settlement, the Court finds that Federal Rule of Civil Procedure 23(b)(3) is also met and that there are questions of law or fact common to class members which predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and

efficiently adjudicating the controversy. In accordance with the holding in *In re Community Bank of Northern Virginia*, 418 F.3d 277, 306 (3d Cir. 2005), this Court makes no determination concerning the manageability of this action as a class action if it were to go to trial.

4. Plaintiffs T.K. Ribbing's Family Restaurant, LLC; Eby-Brown Company LLC; Goldberg and Solovy Foods, Inc.; Karetas Foods, Inc.; Nussbaum-SF, Inc.; Somerset Industries, Inc.; Wixon, Inc.; John A. Lisciandro d/b/a/ Lisciandro's Restaurant, and SensoryEffects Flavor Co. d/b/a Sensory Effects Flavor Systems (collectively, "Plaintiffs"), will serve as Class Representatives on behalf of the Settlement Class.

5. The Court confirms the appointment of Class Counsel for purposes of the Settlement Class as the law firms Weinstein Kitchenoff & Asher LLC, 1845 Walnut Street, Suite 1100, Philadelphia, PA 19103; Hausfeld LLP, 1700 K Street NW, Suite 650, Washington, DC 20006; Bernstein Liebhard LLP, 10 East 40th Street, 22nd Floor, New York, NY 10016; and Susman Godfrey, 654 Madison Avenue, 5th Floor, New York, NY 10065-8404.

6. Direct Purchaser Plaintiffs' request for leave to file a motion for attorneys' fees, litigation expenses, and incentive awards is hereby approved. Such motion shall be filed in accordance with the schedule set forth in this Court's Order Granting Preliminary Approval of the Proposed Second Amendment to Settlement Agreement Between Direct Purchaser Plaintiffs and Sparboe Farms, Inc. and Approving the Parties' Notice Plan. Class Counsel shall also provide for notice to the Class of such motion in accordance with that Order.

BY THE COURT:

_____
Gene E.K. Pratter
United States District Judge

Date:_____

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of June, 2014, the following documents were served electronically on (1) all counsel registered on this Court's ECF; and (2) the below-listed Liaison Counsel for Defendants, Indirect Purchaser Plaintiffs, and Direct Action Plaintiffs:

Documents Served

1. Direct Purchaser Plaintiff Karetas Foods, Inc.'s Objections and Responses to Defendants' First Interrogatories;
2. Direct Purchaser Plaintiff John A. Lisciandro d/b/a Lisciandro's Restaurant's Objections and Responses to Defendants' First Interrogatories;
3. Direct Purchaser Plaintiff SensoryEffects Flavor Company d/b/a SensoryEffects Flavor Systems's Objections and Responses to Defendants' First Interrogatories; and
4. Direct Purchaser Plaintiff Somerset Industries, Inc.'s Objections and Responses to Defendants' First Interrogatories.

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Direct Action Plaintiffs' Liaison Counsel

Date: January 10, 2013

BY: /s/ Mindee J. Reuben
WEINSTEIN KITCHENOFF & ASHER LLC