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	:	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT BETWEEN PLAINTIFFS AND SPARBOE FARMS, INC. AND PRELIMINARY CERTIFICATION OF CLASS ACTION FOR PURPOSES OF SETTLEMENT

Dated: June 22, 2009

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, and for the reasons detailed herein, Direct Purchaser Plaintiffs ("Plaintiffs") respectfully submit this memorandum in support of their motion for: (1) preliminary approval of a settlement between Plaintiffs and Defendant Sparboe Farms, Inc. ("Sparboe") on the terms and conditions set forth in the "Settlement Agreement Between Plaintiffs and Sparboe Farms, Inc." ("Settlement" or "Settlement Agreement"), attached as Exhibit 1 to the Hausfeld Declaration, attached as Exhibit A; and (2) preliminary certification of a class for purposes of the Settlement.[1]

Pursuant to the Settlement Agreement, Plaintiffs cannot use any information obtained from Sparboe until this Court grants preliminary approval of the Settlement Agreement. Thus, Plaintiffs respectfully request that this Court rule as soon as is

[1] All capitalized terms not otherwise defined herein shall have the same meaning as set forth in the Settlement Agreement. Moreover, the term "class" refers collectively to the Subclasses identified in the CAC.

practicable on the Motion for Preliminary Approval and, if amenable, expedite the briefing schedule so that the Motion for Preliminary Approval could be heard at the July 1, 2009, hearing.

Plaintiffs have also filed a motion to vacate the briefing schedule pertaining to Defendants' pending motions to dismiss as set forth in Paragraphs 2 and 3 of the May 7, 2009 Order (Doc. 126), and to set a deadline of July 22, 2009 or five (5) days after the grant of preliminary approval, whichever is later, as the deadline for Plaintiffs to move for leave to file a Second Amended Complaint.

I. INTRODUCTION

After several months of intense arm's-length negotiations by the experienced and capable antitrust lawyers designated by this Court to serve as Interim Co-Lead Class Counsel, Plaintiffs reached a settlement with Sparboe. The Settlement requires substantial cooperation from Sparboe, including the production of critical documents and witnesses that Plaintiffs' Counsel believe will materially assist Plaintiffs in pursuing this litigation against the other defendants ("Non-Settling Defendants") and possibly others.

Specifically, Sparboe has already produced to Class Counsel for review documents that Class Counsel believe provide additional material in support of Plaintiffs' allegations regarding: the conspiracy to reduce output and artificially fix and/or inflate the prices of eggs; the true purposes of the conspiracy; the identities of the parties to the conspiracy; the dates and times of meetings among the conspirators; the identities of individuals who were invited to but refused to participate in the conspiracy; and the efforts of those participating in the conspiracy to police its enforcement and retaliate against the non-participants. Sparboe has agreed, once the Settlement Agreement has

been approved, to release the documents that Plaintiffs have reviewed to Plaintiffs. Sparboe has also agreed to allow Plaintiffs interview witnesses that Plaintiffs contend have information related to the allegations and documents in this case.[2]

As set forth in detail below, the Settlement is fair, reasonable and adequate. Morever, the benefit of the information supplied by Sparboe, reached before the commencement of discovery with the Non-Settling Defendants, vastly outweighs Sparboe's continued participation in the litigation as a defendant. Accordingly, Plaintiffs respectfully request that, pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court (1) preliminarily approve the Settlement Agreement; and (2) preliminarily certify a class for purposes of the Settlement.[3]

II. BACKGROUND

A. The Litigation

The operative complaint in this action is the Consolidated Amended Class Action Complaint ("Complaint"), filed on January 30, 2008. The Complaint alleges that Sparboe and the Non-Settling Defendants violated the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*, by engaging in an unlawful conspiracy to reduce output and artificially fix and/or inflate the price of eggs in the United States. As a result of Defendants' alleged conduct, the prices paid to Defendants by Plaintiffs and members of the putative class for

[2] Based on information already provided by Sparboe, Plaintiffs intend to amend their Consolidated Amended Class Action Complaint once the Court rules on Plaintiffs' motion for preliminary approval of the Settlement Agreement.

[3] The Settlement Agreement provides that notice will be issued no earlier than 180 days following preliminary approval of the Settlement Agreement by the Court. Settlement Agreement, ¶ 27 (Hausfeld Decl., Ex. 1). Accordingly, Plaintiffs are not presently seeking approval of the form of the notice to be issued and hereby request permission from the Court to file the appropriate motion at a later date.

shell eggs and egg products were higher than they otherwise would have been. The lawsuit seeks injunctive relief, treble damages, attorneys' fees and costs from Defendants.

B. The Settlement Negotiations

Class Counsel and Sparboe's counsel, Stoel Rives LLP, began settlement negotiations in March 2009. The scope of the settlement negotiations is described in the Hausfeld Declaration, submitted concurrently herewith. Class Counsel and Sparboe's counsel, both highly experienced and capable, vigorously advocated their respective clients' positions in the settlement negotiations. The settlement negotiations spanned several months and included numerous telephone conferences and four in-person meetings.

On March 26, 2009, Sparboe's counsel made an initial proffer to Class Counsel describing what Sparboe's cooperation would be and how it would assist Plaintiffs in the prosecution of this lawsuit, identified current and former employees for interview by Class Counsel, and summarized what Sparboe's counsel expects the nature of the witnesses' testimony to be at the time of the interviews. On April 23, 2009, in a second proffer, Sparboe produced documents and permitted an interview with a Sparboe employee. Class Counsel and Sparboe's counsel engaged in several additional telephone conferences to further discuss the cooperation that Sparboe could provide and whether it was sufficiently beneficial to Plaintiffs to warrant settlement.

On May 26, 2009, Sparboe's counsel made a third proffer to Class Counsel including additional documents. Sparboe's counsel also reiterated what he expects the nature of the witnesses' testimony to be at the time of the interviews. On June 3, 2009, in a fourth proffer, Sparboe's counsel produced another set of additional documents and

reviewed what he expects the nature of the witnesses' testimony to be at the time of the interviews.

After in-person meetings and numerous telephone conferences, Class Counsel are convinced that the cooperation provided by Sparboe before the commencement of discovery, including production of documents and access to witnesses, will provide additional material in support of Plaintiffs' allegations as stated in the Complaint.

Based on the totality of the information supplied by Sparboe, Class Counsel have determined that Sparboe's cooperation will significantly enhance and strengthen the claims against the remaining Non-Settling Defendants. Moreover, the assistance provided by Sparboe far outweighs the continued participation by Sparboe as a defendant to the Class. The Sparboe Settlement will also avoid any risks associated with having to litigate against Sparboe, which promised to defend itself vigorously. Accordingly, Class Counsel determined that it was in the Plaintiffs' and the Class's best interests to obtain the assurance of prompt and significant cooperation from Sparboe to assist in the prosecution of this case against the Non-Settling Defendants, particularly where the opportunity to secure the benefit of such cooperation may have been lost without obtaining any greater benefit for Plaintiffs.

Ultimately, the parties drafted and circulated a settlement agreement after extensive negotiation. On June 8, 2009, the Settlement Agreement was fully executed by Class Counsel and Sparboe's counsel. On June 9, 2009, Sparboe made a first set of documents relating to the allegations in the Complaint available for inspection and review by Class Counsel, and Class Counsel have already begun reviewing those documents and

preparing for witness interviews. On June 22, 2009, Sparboe made additional boxes of documents and transactional information available for review by Class Counsel.

In sum, the Settlement is the result of extensive arm's-length negotiations, after factual investigation and legal analysis, and is, in the opinion of Class Counsel, fair, reasonable and adequate to the Class. Accordingly, 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 AGREMENT

A. The Settlement Class

The Settlement Agreement defines a Settlement Class as follows:

> All persons and entities that purchased eggs, including shell eggs and egg products, produced from caged birds in the United States directly from any producer during the Class Period from January 1, 2000 through the present.
>
> a.) Shell Eggs Subclass
> All individuals and entities that purchased shell eggs produced from caged birds in the United States directly from any producer during the Class Period from January 1, 2000 through the present.
>
> b.) Egg Products Subclass
> All individuals and entities that purchased egg products produced from shell eggs that came from caged birds in the United States directly from any producer during the Class Period from January 1, 2000 through the present.
>
> Excluded from the class and subclasses are the Defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, 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. Also excluded from the Class and Subclasses are purchases of "specialty" shell egg or egg products (such as "organic," "free-range" or "cage-free") and purchases of hatching eggs (used by poultry breeders to produce breeder stock or growing stock for laying hens or meat).

Settlement Agreement, ¶ 11 (Hausfeld Decl., Ex. 1).

B. Release Provisions In The Settlement Agreement

In exchange for the consideration provided by Sparboe, Plaintiffs have agreed to release Sparboe from any and all claims arising out of or resulting from the conduct asserted in this lawsuit. The full text of the proposed release, including the limitations thereof, are set forth in the Settlement Agreement, ¶¶ 17-19 (Hausfeld Decl., Ex. 1).

C. Cooperation Provision In The Settlement Agreement[4]

As provided in the Settlement Agreement, Sparboe has agreed to produce documents related to Plaintiffs' allegations in the Complaint and to make witnesses available for informal interviews before the start of formal discovery and, if necessary, to testify at depositions and trial. Settlement Agreement, ¶ 23 (Hausfeld Decl., Ex. 1). Under the cooperation agreement, important information and witnesses that bolster Plaintiffs' claims against the Non-Settling Defendants and possibly others has been made available to Plaintiffs without the time and expense involved in pursuing formal discovery, and sooner than would be possible under the current scheduling orders of the Court and stay of discovery.

In fact, immediately after executing the Settlement Agreement, Sparboe's counsel provided a first round of additional documents to Class Counsel that substantiate the allegations contained in the Complaint. Beginning the week of June 22, 2009, Sparboe began to produce additional documents for review by Class Counsel relevant to this litigation.

[4] If required for adjudication of preliminary approval, Sparboe and Plaintiffs will further describe the nature and scope of the cooperation provided by Sparboe *in camera* if requested by the Court. *See* Settlement Agreement, ¶ 25 (Hausfeld Decl., Ex. 1).

IV. THE PROPOSED SETTLEMENT IS SUFFICIENTLY FAIR, REASONABLE AND ADEQUATE

A. Standard For Granting Preliminary Approval Of The Settlement

The approval of class action settlements involves a two-step process: (1) a preliminary approval is obtained; and (2) the court schedules 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.*, 2004 WL 1068807 at *1 (E.D. Pa. May 11, 2004); 4 NEWBERG ON CLASS ACTIONS § 11:25, at 38-39 (4th ed. 2002). In this case, given the unique circumstances of the settlement, Plaintiffs are proposing that the Court preliminarily approve the settlement, but delay a ruling on approval of notice. *See* n.3, *supra*. If the Court approves the notice proposal once submitted, and after notice has been disseminated, then Plaintiffs will seek final approval.

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); *In re General 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"). That determination must await the final hearing, at which the fairness, reasonableness, and adequacy of the settlement is assessed. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 638 (E.D. Pa. 2003).[5] Indeed:

[5] The factors considered for final approval of a class settlement as "fair, adequate and reasonable" 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

> 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.'"

In re Auto. Refinishing Paint Antitrust Litig., 2004 WL 1068807 at *2 [citations omitted]; *Thomas v. NCO Financial Sys.*, 2002 WL 1773035 at *5 (E.D. Pa. July 31, 2002).

A settlement falls within the "range of possible approval" under Rule 23 if there is a conceivable basis for presuming that the standard applied for final approval will be satisfied. The standard for final approval of a settlement is that the settlement is fair, adequate and reasonable to the class. *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 965 (3d Cir. 1983).

Finally, in reviewing the proposed settlement, the Court should consider that "there is an overriding public interest in settling class action litigation, and it should therefore be encouraged." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534-35 (3d Cir. 2004); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (holding that "the law favors settlement, particularly in

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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). Each of these factors will be addressed fully in connection with final approval.

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 Settlement here clearly is "sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard," the legal standard for preliminary approval of a class action settlement. *In re Auto. Refinishing Paint Antitrust Litig.*, 2004 WL 1068807 at *1 (E.D. Pa. May 11, 2004) (quotation omitted).

B. The Negotiation Process With Sparboe Supports A Finding That The Settlement Is Fair, Reasonable And Adequate

Settlements negotiated by experienced counsel that result from arm's-length negotiations are generally entitled to deference from the court. *In re Auto. Refinishing Paint Antitrust Litig.*, 2003 WL 23316645 at *6 (E.D. Pa. Sept. 5, 2003); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) (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) ("the 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 Hausfeld Declaration, the Settlement with Sparboe is the result of several months of hard-fought, arm's-length negotiations between Class Counsel and Sparboe's counsel, all experienced and capable lawyers. Class Counsel and Sparboe's counsel vigorously advocated their respective clients' positions in the settlement negotiations and were prepared to litigate the case fully if no settlement was reached. Only after Sparboe's counsel made hundreds of pages of documents available for review, provided summaries of expected witness testimony, and made a Sparboe employee available for an interview, was the Settlement reached. Nothing in the course of the negotiations or in the substance of the proposed Settlement presents any reason to doubt its fairness.

All of these factors strongly support the conclusion that the Settlement is fair, reasonable and adequate to Plaintiffs and falls within the range of possible final approvals.

C. The Expense And Uncertainty Of Continued Litigation Against Sparboe Supports A Finding That The Settlement Is Fair, Reasonable And Adequate

"An antitrust class action is arguably the most complex action to prosecute." *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003) (citation omitted); *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"). This action is no different. Continuing this litigation against Sparboe would entail a lengthy and expensive legal battle, involving legal and factual issues specific to Sparboe.[6] It is reasonable to expect that all such matters would be sharply disputed and vigorously contested, as they were in the settlement negotiations. Additionally, Sparboe would assert various defenses, and a jury trial (assuming the case proceeded beyond pretrial motions) might well turn on close questions of proof making the outcome of such trial uncertain for both parties.[7] *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003); *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 neglible damages, at trial, or on appeal.").

Moreover, even after trial is concluded, there would very likely be one or more lengthy appeals. *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314 at *17 (D.N.J. Sept. 13, 2005). Given this uncertainty, a certain "bird in the hand in this litigation is surely worth more than whatever birds are lurking in the bushes." *In re*

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[6] For exaple, Sparboe maintains that effective service of process has not yet been perfected on Sparboe, such that the claims against Sparboe may be time barred. Sparboe also maintains that this Court lacks personal jurisdiction over it and that venue may not be proper as to claims against Sparboe in the Eastern District of Pennsylvania. In the event that preliminary approval is not granted, Sparboe expects to assert these defenses.

[7] *See, e.g., U.S. Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("the jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages"), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1166-67 (7th Cir. 1982) (remanding antitrust judgment for new trial and damages).

Chambers Dev. Sec. Litig., 912 F. Supp. 822, 838 (W.D. Pa. 1995). All of these factors have particular weight here, where Sparboe has provided Plaintiffs' counsel with documents indicating that Sparboe actually withdrew from the alleged conspiracy by 2005.

Balancing the complexities of this litigation, the substantial risk, expense and duration of continued litigation against Sparboe and the likely appeal if Plaintiffs did prevail against Sparboe at trial, with the significant benefits of Sparboe's cooperation, Class Counsel firmly believe the Settlement represents a very good resolution of this litigation as to Sparboe. Moreover, it is well established that significant weight should be attributed to the belief of experienced counsel that settlement is in the best interests of the class, as here. *In re General Instruments Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001).

D. The Settlement Agreement's Cooperation Provision Supports A Finding That The Settlement Is Fair, Reasonable And Adequate

An evaluation of the benefits of settlement must be tempered by a recognition that any compromise involves concessions on the part of all of the settling parties. Indeed, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice v. Civil Service Com'n of City and County of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted). As the Fifth Circuit noted in *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977):

> The trial court should not make a proponent of a proposed settlement "justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained . . . ."

Id. at 1330 (citation omitted).

As discussed above, the Settlement Agreement provides for Sparboe's substantial and immediate cooperation, which will enhance and strengthen Plaintiffs' claims against the Non-Settling Defendants and possibly others while avoiding the risk, expense and duration of continued litigation against Sparboe. In the opinion of Class Counsel, the Settlement significantly benefits Plaintiffs and will materially assist Class Counsel in the prosecution of claims against the Non-Settling Defendants. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) ("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 (E.D. Pa. May 11, 2004) (acknowledging the assistance that the settling defendants will provide "in pursuing this case against the remaining Defendants"); *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.*, 1981 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.").[8]

In addition, here, the early nature of Sparboe's cooperation has significant value in and of itself to Plaintiffs as an "ice-breaker" settlement that "should increase the likelihood of future settlements." *In re Linerboard Antitrust Litig*., 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) ("The Court also notes that this settlement has significant value as an "ice-breaker" settlement--it is the first settlement in the litigation--and should increase the likelihood of future settlements."). The fact that the settlement occurred early in the litigation in advance of the Court's ruling on the Non-Settling Defendants' motions for dismissal for lack of specificity adds enormous value to the Settlement Agreement and may allow Plaintiffs an opportunity to survive motions to dismiss that may have otherwise presented a hurdle to proceeding against the Non-Settling Defendants.

Sparboe has already provided information and documents, and has committed to provide additional information and access to witnesses, that Plaintiffs intend to use to amend the Complaint to strengthen the antitrust claims against the Non-Settling

[8] *In re Beef Industry Antitrust Litig.*, 607 F.2d 167, 180 (5th Cir. Tex. 1979) (court approved settlement in which settling defendant agreed to assist plaintiffs by providing access to witnesses), *cert. denied*, 452 U.S. 905 (1981); *In re Ivan F. Boesky Sec. Litig*., 948 F.2d 1358, 1362 (2nd Cir. 1991) (acknowledging the importance of the defendant's agreement to "provide information to the plaintiffs potentially useful in the litigation against the nonsettling defendants."); *In re Amicillin Antitrust Litig*., 82 F.R.D. 652, 654 (D.D.C. 1979) ("It is apparent that Beecham's assistance in the case against Bristol will prove invaluable to the plaintiffs, and adds substantially to the economic value of the settlement package to the plaintiff classes"); *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 324, 339 (S.D.N.Y. 2005) ("Although the settlement fund by itself represents a fair and reasonable recovery, I note that the settlement also includes significant non-monetary benefits. Pursuant to the settlement, Jenkens has agreed to provide (and has already provided) discovery on plaintiffs' claims. The value of this agreement is hard to determine, but it is not negligible."), *aff'd in part, vacated in part, Denny v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006); *Minpeco, S.A. v. Hunt*, 127. F.R.D. 460, 463 (S.D.N.Y. 1989) ("[A]greements involving a settling defendant's assistance in procuring the testimony of its employees have been approved in other cases.").

Defendants and possibly add additional defendants. Thus, there can be no question of the Settlement's benefit.

E. Plaintiffs Will Submit a Notice Plan

Although under the Settlement Agreement Plaintiffs currently have access to review the materials from Sparboe, Plaintiffs are only entitled to "use" Sparboe's materials, such as in an Amended Complaint, after the Court preliminarily approves the settlement. If the Court declines to grant preliminary approval, Plaintiffs are not entitled to use the information they have learned through the settlement negotiations or post-execution document reviews. Sparboe requested this provision to ensure it would not find itself in the untenable position of having provided the cooperation that is the consideration for the settlement, only then to have preliminary approval denied. Because the Settlement Agreement also provides that notice will be issued no earlier than 180 days following preliminary approval of the Settlement Agreement by the Court, Settlement Agreement, ¶ 27 (Exhibit 1 hereto), Plaintiffs have not included a formal notice plan as part of these preliminary approval papers.[9]

Plaintiffs believe that the announcement of this Agreement, particularly if the Court grants preliminary approval, might spur other Defendants to also seek to settle with the Class. As such, rather than submit a notice plan that will need to be amended (or require an additional, but substantially similar second notice of any subsequent settlement), it is in the interests of the Class and judicial economy to issue one notice with as many settling Defendants as possible. If no other settlements are obtained within

[9] However, if the Court requires a notice plan to be submitted to it *before* it will grant preliminary approval of the Sparboe Settlement, Plaintiffs can and will do so.

180 days, however, Plaintiffs will seek leave to distribute notice to the class of the Sparboe settlement and will present a detailed notice plan to this Court for consideration. Although this may ultimately delay final approval of this settlement for a few months, Plaintiffs' Counsel believe that this provides the ultimate benefit to the Class while similarly providing efficiencies and conservation of judicial and counsel's resources. Accordingly, Plaintiffs are not presently seeking approval of the form of the notice to be issued and will file the appropriate motion at a later date.

Rule 23(e), which regulates the dismissal or compromise of class actions, provides: "[t]he class action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." While it is a general practice, there is no requirement that a notice plan be considered and approved as part of the *preliminary* approval papers.[10] Notice must be approved and distributed, where required, prior to *final* approval of a settlement and Plaintiffs will do so here, in accordance with the Settlement Agreement, after 180 days. Plaintiffs are merely seeking to delay notice of the settlement to see if any notice may be combined with other potential settlements.

[10] Indeed, courts have recognized that in some instances, notice is not required at all as part of preliminary approval. *See generally* "Notice to Class Members," 3 NEWBERG ON CLASS ACTIONS § 8:18 (4th ed.). For example, in *Green v. American Express Co.*, 200 F.R.D. 211 (S.D.N.Y. 2001), the court approved a class settlement and dispensed with notice requirements where there was no evidence of collusion between the parties and when the settlement provided no monetary relief to the class. *Id.* at 212-213. Here, the Settlement provides no direct compensation to the Class Members, but significant cooperation that will aid in prosecution of Plaintiffs' claims against the Non-Settling Defendants. Nevertheless, Plaintiffs are not seeking to dispense with notice requirements here.

V. PRELIMINARY CERTIFICATION OF THE PROPOSED SPARBOE SETTLEMENT CLASS IS WARRANTED

The proposed Settlement Class consists of all persons and entities that purchased eggs, including shell eggs and egg products, produced from caged birds in the United States directly from any producer during the Class Period from January 1, 2000 through the present. The Shell Eggs Subclass consists of all individuals and entities that purchased shell eggs from caged birds in the United States directly from any producer during the Class Period from January 1, 2000 through the present. The Egg Products Subclass consists of all individuals and entities that purchased egg products produced from shell eggs that came from caged birds in the United States directly from any producer during the Class Period from January 1, 2000 through the present. The Settlement Class excludes Defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, 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 families. Also excluded are purchases of "specialty" shell egg or egg products (such as "organic," "free-range" or "cage-free") and purchases of hatching eggs (used by poultry breeders to produce breeder stock or growing stock for laying hens or meat). Settlement Agreement, ¶ 11 (Hausfeld Decl., Ex. 1).

It is well-established that a class may be certified for purposes of settlement. *In re Pet Food Products Liability Litig.*, 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) (quoting *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 174 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981)). Here, there is no likelihood of abuse of the class action device, and the settlement is fair and reasonable and is subject to approval by the Court.

Rule 23 governs the issue of class certification, whether the proposed class is a litigation class or, as here, a settlement class. All the criteria for certification of a class for litigation purposes, except manageability, apply to certification for settlement purposes. Thus, 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 516, 527-30 (3d Cir. 2004).

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).

1. The Settlement Class is sufficiently numerous

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 Medical Corp.*, 246 F.R.D. 480, 484 (E.D. Pa. 2007).

Here, the Settlement Class is comprised of purchasers of hundreds of millions of cases of shell eggs. Complaint, ¶ 121. Moreover, Representative Plaintiffs are located in California, Illinois, Missouri, New York, North Carolina, Pennsylvania and Wisconsin. Complaint, ¶¶ 12-21. Putative class members are also likely to be 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. <u>There are common questions of law and fact</u>

"[A]llegations concerning the existence, scope and efficacy of an alleged conspiracy present questions adequately common to class members to satisfy the commonality requirement." *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 478 (W.D. Pa. 1999), citing 4 NEWBERG ON CLASS ACTIONS, § 18.05-15 (3d ed. 1992). Moreover, to satisfy commonality:

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

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

Antitrust cases like this one easily meet the commonality requirement of Rule 23(a)(2). *In re K-Dur Antitrust Litig.*, 2008 WL 2699390, at *4 (D.N.J. April 14, 2008) (holding that common issues predominate with respect to whether defendants violated antitrust law); *Weisfeld v. Sun Chemical 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. August 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).

Whether Defendants entered into an illegal agreement to reduce production and artificially fix and/or inflate the prices of eggs is a factual question common to all class members because it 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." *Flat Glass*, 191 F.R.D. at 484. 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." Fed. R. Civ. P. 23(a)(3). 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. [Citation omitted.] 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. [Citation omitted.]
>
> 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." [Citations omitted.] 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. [Citation omitted.]

Id. at 57-58.

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) (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 Representative Plaintiffs 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. Complaint, ¶¶ 1, 2, 9, 96, 102, 104. Moreover, Plaintiffs allege that all putative class members suffered injury as a result of Defendants' alleged anticompetitive conduct. Complaint, ¶ 1. 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, Class Counsel have extensive experience and expertise in antitrust disputes, complex litigation and class action proceedings throughout the United States, and are qualified and able to conduct this litigation, as this Court recognized when appointing them as Co-Lead Counsel. Class Counsel have vigorously represented Plaintiffs in the

settlement negotiations with Sparboe and have vigorously prosecuted this action. Moreover, the named class representatives have adequately represented the absent Class Members' interests 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." Fed. R. Civ. P. 23(b)(3). 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); *K-Dur*, 2008 WL 2699390, at *11 ("At its essence, Rule 23(b)(3) requires that '[i]ssues common to the class must predominate over individual issues, and the class action device must be superior to other means of handling the litigation.'" [citations omitted]). Certification of the Settlement Class under Rule 23(b)(3) will serve these purposes.

1. Common legal and factual questions predominate

The Rule 23(b)(3) requirement that common issues predominate insures that a proposed class is "sufficiently cohesive to warrant certification." *Newton v. Merrill*

Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 187 (3d Cir. 2001). "Predominance requires that common issues be both numerically and qualitatively substantial in relation to the issues peculiar to individual class members." *Mercedes-Benz*, 213 F.R.D. at 186. A plaintiff seeking certification of an antitrust class action must show that common or class-wide proof will predominate with respect to: (1) violation of the applicable antitrust law; (2) fact of injury or impact; and (3) the amount of damages. *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 is "readily met" in antitrust cases. *Amchem Products*, 521 U.S. at 625.

Here, it is clear that the same set of core 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 and/or inflate the prices of eggs is a factual question common to all class members because it is an essential element of proving an antitrust violation. Common legal questions include whether, if such an agreement was reached, Defendants violated antitrust laws. If Representative Plaintiffs 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 Defendants' violation of antitrust law will predominate.

The fact of damage has been held susceptible to common proof in antitrust class actions. *See 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 Enterprises, Inc. v. Continental Group, 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). Here, the alleged conspiracy is the overriding predominant question in this case. Moreover, as alleged in the Complaint, the conspiracy permitted all of the Defendants to artificially fix 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 on the entire class. Complaint, ¶¶ 1, 5-8, 157-168, 406. Accordingly, common or class-wide proof will predominate with respect to the fact of injury or impact in this case.

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"). Nor does the need for individualized damages calculations preclude class certification, especially in the context of an ice-breaker settlement with no monetary component. Accordingly, the need to determine the amount of damage sustained by each Plaintiff is an insufficient basis for which to decline class certification.

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 America 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 this litigation because 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 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 Representative Plaintiffs. Accordingly, the realistic alternative to a class action is many scattered lawsuits with possibly contradictory results for some plaintiffs. These very issues led the Supreme Court to acknowledge that the unique qualities of antitrust litigation mean that a class action is superior to individual lawsuits. *Amchem*, 521 U.S. at 617. Finally, this is the appropriate forum to litigate the case because two of the Representative Plaintiffs 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. Complaint, ¶¶ 11, 16, 18.

VI. CONCLUSION

For the reasons set forth above, Plaintiffs request that the Court: (1) preliminarily approve the Settlement Agreement; and (2) preliminarily certify a class for purposes of the Settlement. A proposed order is attached as Exhibit B.

Dated: June 22, 2009

Respectfully submitted,

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