**UNITED STATES DISTRICT COURT**
**DISTRICT OF MARYLAND**

JUDY JIEN, *et al.*,

Plaintiffs,

v.

PERDUE FARMS, INC., *et al.*,

Defendants.

C.A. No. 1:19-CV-2521-SAG

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH WMS AND PECO DEFENDANTS**

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiffs Judy Jien, Kieo Jibidi, Elaisa Clement, Glenda Robinson, and Emily Earnest (collectively "Plaintiffs") move the court for preliminary approval of settlements with Defendants Webber, Meng, Sahl & Company, Inc. (hereinafter "WMS") and Peco Foods, Inc. (hereinafter "Peco"). These are the third and fourth settlements reached between Plaintiffs and defendant families, bringing the total recovery to date for the class to $37.8 million.[1] This Court granted preliminary approval to settlements between Plaintiffs and Defendants Pilgrim's Pride Inc. ($29 million) on July 20, 2021 and George's Inc. and George's Foods, LLC ($5.8 million) on October 5, 2021.[2]

In lieu of a monetary recovery, Plaintiffs settled with WMS for extraordinary cooperation, including a 109-page sworn declaration from WMS President Jonathan Meng (attached to the Farah Declaration as Exhibit C; "Meng Decl.") laying bare previously unknown facts about Defendants' conspiracy to suppress poultry processing workers' compensation. Among other crucial insights, Mr. Meng's declaration explains that:

- Jonathan Allen, then Corporate Human Resources Director of Fieldale Farms, repeatedly informed Mr. Meng that, before 2000, Defendant Processors "would meet in a private room and … exchange and discuss their compensation schedules." Meng Decl. ¶ 21.

- In 2000, Defendant Processors hired WMS to help them exchange compensation data. *Id.* ¶ 22. (At the time of filing the Second Amended Consolidated Complaint and at the most recent hearings with the Court, Plaintiffs believed that the processors' engagement with WMS began in 2009.)

- Mr. Meng believes that Defendant Processors hired WMS to "establish the *appearance* of compliance" with antitrust law while they "continued to exchange disaggregated and deanonymized compensation data and continued to discuss and harmonize their compensation practices." *Id.* ¶ 24.

[1] Declaration of George Farah in Support of Plaintiffs' Motion for Preliminary Approval of Settlement with WMS and Peco Defendants ("Farah Decl."), Ex. A (WMS Settlement Agreement) and Ex. B (Peco Settlement Agreement).

[2] *See* Order Granting Prelim. Approval of Settlement between Plaintiffs and Pilgrim's Pride, ECF No. 490 (July 20, 2021); Order Granting Prelim. Approval of Settlement between Plaintiffs and George's Inc. and George's Foods, LLC, ECF No. 529 (Oct. 5, 2021).

- From 2000 to 2019, a secret "Steering Committee" of poultry processing executives designed a detailed annual "Poultry Industry Compensation Survey" for Defendant Processors, and asked WMS to compile the survey results. *Id.* ¶¶ 40, 43-44.

- A WMS executive presented the results of the Poultry Industry Compensation Survey at an annual meeting; afterward, Defendant Processors excused the WMS executive from the room so they could hold hours of entirely private roundtable discussions (often spanning two days) to discuss the Survey results and their future compensation plans. *Id.* ¶¶ 182-188.

- To participate in the Poultry Industry Compensation Survey, Defendant Processors had to contribute compensation data not only for poultry processing plants, but also for poultry hatcheries and poultry feed mills. *Id.* ¶¶ 51, 52.

- In addition to the Poultry Industry Compensation Survey, Tyson paid for an additional survey that allowed Defendant Processors to exchange highly disaggregated data regarding compensation for hourly workers at poultry processing plants. *Id.* ¶¶ 144-166.

The proposed settlement with Peco provides for significant additional cooperation, including future document productions from Peco custodians and future deposition testimony from Peco executives. It also provides $3 million in monetary relief for the Class.

Because the settlement agreements with WMS and Peco (collectively "Settlement Agreements") achieve an excellent result for Plaintiffs, they fall within the range of possible approval under Federal Rule of Civil Procedure 23(e). And, like the settlement class previously certified by the Court, the one covered by the Settlement Agreements also satisfies the requirements of Rules 23(a) and (b).

Accordingly, Plaintiffs respectfully request that, once the Court has ruled on Plaintiffs' Motion to Amend and resolved any resulting pleadings motions, the Court enter an order: (1) preliminarily approving the Settlement Agreements; (2) certifying the Settlement Class defined below; (3) appointing Interim Co-Lead Counsel as Settlement Class Counsel; (4) appointing Plaintiffs as Settlement Class Representatives; (5) deferring notice of the Settlement Agreement to the Settlement Class until an appropriate future date; and (6) ordering a stay of all proceedings

against WMS and Peco except those proceedings provided for or required by the Settlement Agreement.

## I. SUMMARY OF LITIGATION

Plaintiffs allege that the nation's leading poultry processors and two consulting companies conspired to depress the compensation paid to poultry processing workers. Specifically, Plaintiffs allege that Defendants entered into two unlawful agreements in violation of the Sherman Act, 15 U.S.C. § 1: (1) a *per se* illegal agreement to suppress compensation for poultry processing workers; and (2) an agreement to exchange competitively sensitive compensation information in violation of the rule of reason.

Plaintiffs filed their original complaint in August 2019.[3] Defendants moved to dismiss and the Court granted those motions in part and denied them in part, without prejudice.[4] On November 2, 2020, Plaintiffs filed their Second Amended Consolidated Complaint ("SAC"), which, as the Court later found, cured the pleading defects that the Court had identified in the First Amended Complaint.[5] Defendants have filed their Answers, and the parties have recently commenced discovery, serving and responding to document requests and interrogatories.

Concurrently with this motion for preliminary approval, Plaintiffs have moved to file a Third Amended Consolidated Complaint (ECF No. 544; "TAC"), incorporating new information learned from WMS as well as documents recently obtained from Defendants George's Inc. and George's Foods, LLC ("George's") and Agri Stats. Farah Decl. ¶ 5 The expanded allegations in the TAC will give Plaintiffs the opportunity to secure significant additional relief for Class Members. *See* Farah Decl. ¶¶ 8-12.

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[3] Class Action Compl., ECF No. 1 (Aug. 30, 2019).
[4] Order, ECF No. 379 (Sept. 16. 2020) ("First MTD Order").
[5] Second Amended Consolidated Compl., ECF No. 386 (Nov. 2, 2020) ("SAC"); Order, ECF No. 415 (Mar. 10, 2021) ("Second MTD Order").

## II. SUMMARY OF SETTLEMENT NEGOTIATIONS AND TERMS

Each of the Settlement Agreements was the product of confidential, arms-length negotiations and includes substantial cooperation in Plaintiffs' litigation against the non-settling Defendants, who each remain jointly and severally liable. Farah Decl. ¶¶ 4 The settlement discussions were predicated on an understanding of the strengths and weaknesses of Plaintiffs' cases against Peco and WMS, including key facts gleaned from an extensive pre-filing investigation and from the substantial cooperation provided by WMS. *Id.*

### A. WMS Settlement Agreement

#### 1. WMS Settlement Consideration

Settlement discussions between Plaintiffs and WMS began in the summer of 2021. Over several months, the parties negotiated the terms of their written settlement agreement, including the details and scope of the cooperation required of WMS in the litigation against the remaining Defendants. Farah Decl., ¶ 7.

As a part of the cooperation process, on multiple occasion in the fall, counsel for WMS and Mr. Meng sat with Plaintiffs' counsel (via video) and proffered extensive facts about, and responded to questions regarding, the scope and implementation of the conspiracy and its operations. Farah Decl., ¶ 8. Plaintiffs were able to test the veracity of Mr. Meng's statements by reviewing and analyzing documents that WMS subsequently shared from the files of WMS's three employees (Jonathan Meng, Scott Ramsey, and Cynthia Porter). *Id.*

At the end of the process, on November 12, 2021, Mr. Meng executed and provided a 109-page declaration to Plaintiffs detailing the scope and breadth of WMS's role in the alleged conspiracy to depress compensation. *Id.* ¶ 9. The statements in that declaration, confirmed by Plaintiffs' document review, provided significant insight into the scope and implementation of the conspiracy, including that: (1) in 2000, a group of poultry processors retained WMS to conduct

annual compensation surveys of the group's membership; (2) each year from 2000 through 2019, multiple poultry processors participated in those annual compensation surveys administered by WMS; (3) each year from at least 2001 through 2019, poultry processors held private roundtable meetings to discuss both the results of compensation surveys and their compensation practices; (4) hatchery workers and feed mill workers were essential components of both the compensation surveys administered by WMS and the annual private roundtable meetings; and (5) seven poultry processors that Plaintiffs have sought to add as Defendants in the TAC were active participants in the conspiracy, including through their participation in the compensation surveys administered by WMS and in the annual private roundtable meetings. *Id.*

On November 19, 2021, Plaintiffs and WMS executed a long-form settlement agreement, in which WMS agreed to additional cooperation, including:

- the depositions of all three of WMS's current employees: Mr. Meng, Scott Ramsey, and Cynthia Porter;
- the participation of those three employees as witnesses at trial;
- the production of documents responsive to particular search terms; and
- the authentication of documents that WMS produces in this action. *Id.* ¶ 10

On December 13, 2021, in compliance with its cooperation requirements, WMS collected and produced to Plaintiffs over 400,000 documents from the files of Jonathan Meng, Scott Ramsey, and Cynthia Porter. *Id.* ¶ 11

This cooperation against the remaining Defendants, which each remain jointly and severally liable for *all* damages caused by the members of the alleged conspiracy, has been, and will continue to be, invaluable to the Settlement Class. *Id.* ¶ 12

**2. WMS Settlement Class**

The WMS Settlement Agreement defines the Settlement Class as: "All persons employed by Defendant Processors, their subsidiaries and/or related entities at poultry processing plants, poultry hatcheries, poultry feed mills and/or poultry complexes in the continental United States from January 1, 2000 until July 20, 2021." Farah Decl., Ex. A at 12 (section II(E)(3)). This is co-extensive with the class alleged in Plaintiffs' proposed TAC. Should the Court reject the Plaintiffs' proposed expansion of the putative litigation class, then the Settlement Class definition will revert to the definition from Plaintiffs' current operative complaint (Second Amended Complaint ("SAC"), ECF No. 386 (Nov. 2, 2020), and will be defined as: "All persons employed by Defendant Processors, their subsidiaries and/or related entities at poultry processing plants in the continental United States from January 1, 2009 until July 20, 2021." Farah Decl., Ex. A at 12 (section II(E)(3)).

**3. WMS Release**

In exchange for the cooperation consideration from WMS, upon entry of a final judgment approving the Settlement Agreement, Plaintiffs and the Settlement Class will release and discharge WMS from any and all claims arising out of or relating to "an alleged or actual conspiracy or agreement between Defendants relating to reducing competition for the hiring and retaining of, or to fixing, depressing, restraining, exchanging information about, or otherwise reducing the Compensation paid or provided to, the" Settlement Class. Farah Decl., Ex. A at 9 (section II(B)(2)). This release covers both claims that were asserted and claims that could have been asserted.

The Settlement Agreement, however, does nothing to abrogate the rights of any member of the Settlement Class to recover from any other Defendant. The Settlement Agreement also expressly excludes from this release "any claims wholly unrelated to the allegations or underlying conduct alleged in the Action that are based on personal injury, bailment, failure to deliver lost

goods, damaged or delayed goods, product defect, discrimination, COVID-19 safety protocols, or securities claims." *Id*.

**B. The Peco Settlement Agreement**

Over several weeks, Peco and Plaintiffs negotiated the particular terms of their written settlement agreement, including the details and scope of the cooperation required of Peco in the litigation against the remaining Defendants. Farah Decl. ¶¶ 13-14. The Peco Settlement Agreement was executed on December 16, 2021. *Id.*

In anticipation of and during the settlement negotiations with Peco, Plaintiffs had the benefit of having reviewed substantial materials produced by two other settling defendants that provided insight into the extent of Peco's participation in the conspiracy. First, while negotiating the settlement against Peco, Plaintiffs had the benefit of the production and declaration made by WMS, and were able to confirm Peco's representation that it did not participate in surveys administered by WMS during the expanded class period proposed by the TAC. Farah Decl. ¶ 15. Second, while negotiating the settlement against Peco, Plaintiffs had the benefit of George's November 12, 2021 document production, which shed further insight into the contours of the conspiracy and Peco's involvement in it. *Id.*

The basic terms of the Peco Settlement Agreement include:

**1. The Peco Settlement Amount**

The proposed Settlement Agreement provides that Peco will pay $3 million dollars ($3,000,000) for the benefit of the Settlement Class. This amount will be deposited in an escrow account by Peco within 14 business days after entry of the preliminary approval order. Farah Decl., Ex. B at 8 (section II(A)(1)). This is a non-reversionary fund; once the Settlement Agreement is finally approved by the Court and after administrative costs, litigation expenses, and attorneys'

fees are deducted, the net funds will be distributed to Settlement Class members with *no amount* reverting back to Peco.

**2. Peco Cooperation Requirements**

In addition to providing a substantial monetary payment, the Settlement Agreement obligates Peco to cooperate with Plaintiffs in the further prosecution of their claims against the remaining Defendants, which each remain jointly and severally liable for *all* damages caused by the members of the alleged conspiracy. This cooperation will include, *inter alia*:

- the deposition of two current employees identified by Plaintiffs;[6]
- the production of relevant structured compensation data;
- the production of documents responsive to reasonable search terms from three current or former employees identified by Plaintiffs;
- the production of the five following specific categories of documents identified by a reasonable search:
  - i. documents, if any exist, sent to and received from WMS;
  - ii. written agreements or contracts with Agri Stats, Inc. and/or Express Markets, Inc.;
  - iii. Peco's contracts with labor unions executed during the Settlement Class Period;
  - iv. documents that reference compensation that Peco produced to, or received from, the Joint Poultry Industry Human Resources Council, the National Chicken Council, and/or the U.S. Poultry & Egg Association; and
  - v. documents that have been or will be produced to the Department of Justice by Peco regarding any investigation regarding compensation, so long as the agency consents or does not object to the production or, in the event that the agency does object to the production, the Court orders the production.
- use reasonable efforts to authenticate documents produced by Peco; and
- no objection to Plaintiffs' efforts to obtain phone records from third-party carriers.

[6] Plaintiffs may conduct depositions of *former* employees of Peco without limitation, so long as those depositions are conducted in accordance with overall discovery limitations established by the Court. Peco is not obligated to produce its then-current CEO for deposition or trial testimony.

*See* Farah Decl., Ex. B at 8-11 (section II(A)(2)).

**3. The Peco Settlement Class**

The Peco Settlement Agreement defines the Settlement Class as: "All persons employed by Defendant Processors, their subsidiaries, and/or related entities at poultry processing plants, poultry hatcheries, poultry feed mills, and/or poultry complexes in the continental United States from January 1, 2000 until July 20, 2021." Farah Decl., Ex. B at 17-18 (section II(F)(3)). The following persons and entities are excluded from the Settlement Class: "complex managers, plant managers, human resources managers, human resources staff, office clerical staff, guards, watchmen, and salesmen; Defendants, co-conspirators, and any of their subsidiaries, predecessors, officers, or directors; and federal, state or local governmental entities." *Id.* The Settlement Class is co-extensive with the class alleged in the proposed TAC. This expanded class represents Plaintiffs' counsel's informed judgment based in part on their review of WMS's documents and Mr. Meng's declaration, both of which confirm that Peco was not a participant in compensation surveys administered by WMS at any point during the expanded class period.

**4. Peco Release**

In exchange for the monetary and cooperation consideration from Peco, upon entry of a final judgment approving the Settlement Agreement, Plaintiffs and the Settlement Class will release and discharge Peco from any and all claims arising out of or relating to "an alleged or actual conspiracy or agreement between Defendants relating to reducing competition for the hiring and retaining of, or to fixing, depressing, restraining, exchanging information about, or otherwise reducing the Compensation paid or provided to", the Settlement Class. Farah Decl., Ex. B at 11 (section II(B)(2)). This release covers both claims that were asserted and claims that could have been asserted.

As with the WMS Settlement Agreement, the Peco Settlement Agreement does nothing to abrogate the rights of any member of the Settlement Class to recover from any other Defendant. The Peco Settlement Agreement also expressly excludes from its release "any claims wholly unrelated to the allegations or underlying conduct alleged in the Action that are based on breach of contract, negligence, personal injury, bailment, failure to deliver lost goods, damaged or delayed goods, product defect, discrimination, COVID-19 safety protocols, failure to comply with wage and hours laws unrelated to anticompetitive conduct, or securities claims." *Id.*

## III. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT AGREEMENTS

### A. Standard for Granting Preliminary Approval

Federal Rule of Civil Procedure 23(e) provides that "[t]he claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). Before a court may approve a proposed settlement, it must conclude that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). This boils down to "examining [a] proposed … settlement for fairness and adequacy." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991).[7]

At the preliminary approval stage, however, the Court does not make a final determination of the merits of the proposed settlement. *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983). Full evaluation is made at the final approval stage, after notice of the settlement has been provided to the members of the class and those class members have had an opportunity to voice their views of the settlement. *Id.*

[7] The United States Court of Appeals for the Fourth Circuit has "not enumerated factors for assessing a settlement's reasonableness." *In re Lumber Liquidators, Chinese – Manufactured Flooring Prods. Mktg., Sales Pracs. and Prod. Liab. Litig.*, 952 F.3d 471, 484 (4th Cir. 2020).

Rather, "at the preliminary approval stage, the court's role is to determine whether there exists probable cause to submit the proposal to members of the class and to hold a full-scale hearing on its fairness." *Fire & Police Retiree Health Care Fund v. Smith*, No. CCB-18-3670, 2020 U.S. Dist. LEXIS 217892, at *6 (D. Md. Nov. 20, 2020). A court should grant preliminary approval "when the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or of segments of the class or excessive compensation for attorneys and appears to fall within the range of possible approval." *Temp. Servs. v. Am. Int'l Grp., Inc.*, No. 3:08-cv-00271-JFA, 2012 U.S. Dist. LEXIS 86474, at *16-17 (D.S.C. June 22, 2012) (internal citation omitted). "In assessing the fairness and adequacy of a proposed settlement, there is a strong initial presumption that the compromise is fair and reasonable." *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991) (internal quotation marks and citation omitted).

When evaluating the fairness and adequacy of a proposed settlement, courts keep in mind the following policy consideration: "It has long been clear that the law favors settlement." *United States v. Manning Coal Corp.*, 977 F.2d 117, 120 (4th Cir. 1992). This "strong presumption" is "especially strong in class actions and other complex cases … because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (*en banc*) (affirming certification of two nationwide antitrust settlement classes) (internal citation omitted).

**B. The Settlement Agreements Are Fair**

A court's fairness analysis is intended primarily to ensure that a "settlement [is] reached as a result of good-faith bargaining at arm's length, without collusion." *In re India Globalization Cap., Inc.*, No. DKC 18-3698, 2020 U.S. Dist. LEXIS 77190, at *8 (D. Md. May 1, 2020). The fairness analysis involves examination of "(1) the posture of the case at the time settlement was

proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of [antitrust] class action litigation."[8] *Id.*

The settlement agreements with WMS and Peco are fair. The first factor—*i.e.* the posture of the case—weighs in favor of preliminary approval. The settlement agreements were reached after 27 months of adversarial and informative litigation. The prosecution and defense of the action included the briefing of two rounds of motions to dismiss, each of which yielded a lengthy and detailed ruling by the Court regarding the viability of the alleged claims. The Court's resolution of Defendants' motions to dismiss materially outlined the applicable law and legal hurdles and set the stage for the parties' positions in their settlement negotiations. *See* Farah Decl. ¶ 18.

The second factor—*i.e.* the extent of discovery—also weighs in favor of preliminary approval. The parties are currently engaged in *formal* discovery. *Id.* ¶ 19. The parties have served document requests; exchanged and responded to initial interrogatories; and are in the process of negotiating search terms for document production. Plaintiffs have also reviewed thousands of documents produced by settling Defendant George's, including many demonstrating direct conspiratorial communications between the Defendants. And as a result of the WMS Settlement Agreement, Plaintiffs have reviewed the extensive findings in the 109-page Meng Declaration as

[8] "Federal Rule of Civil Procedure 23(e)(2) has been amended and now sets forth factors for the district court to assess in evaluating fairness, reasonableness, and adequacy." *Herrera v. Charlotte Sch. of Law, LLC*, 818 F. App'x 165, 176 n.4 (4th Cir. 2020). The United States Court of Appeals for the Fourth Circuit, however, has noted that "our factors for assessing class-action settlements almost completely overlap with the new Rule 23(e)(2) factors." *In re Lumber Liquidators*, 952 F.3d at 484 n.8. As the overlap "render[s] the analysis the same," the Fourth Circuit "continues to apply its own standards." *Herrera*, 818 F. App'x at 176 n.4; *see also* Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment ("The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.").

well as thousands of informative documents shared and produced by WMS in this litigation. *Id.* ¶¶ 8-12. This *formal* discovery materially informed Plaintiffs' counsel's assessment of their claims against Peco and WMS. *See Edelen v. Am. Residential Servs., LLC*, No. DKC 11-2744, 2013 U.S. Dist. LEXIS 102373, at *23 (D. Md. July 22, 2013) (granting final approval "[a]lthough the scope of [formal] discovery was somewhat limited" because "all parties had sufficient information about their claims and defenses at the time they began exploring the possibility of settlement").

While extensive *formal* discovery from Defendants has not yet been completed, there has also been "sufficient *informal* discovery and investigation to fairly evaluate the merits of Defendants' positions during settlement negotiations." *Strang v. JHM Mortg. Secs. Ltd. P'ship*, 890 F. Supp. 499, 501-02 (E.D. Va. 1995) (emphasis added). Indeed, "[d]istrict courts within the Fourth Circuit have found that even when cases settle early in the litigation after only informal discovery has been conducted, the settlement may nonetheless be deemed fair." *Temp. Servs.*, 2012 U.S. Dist. LEXIS 86474, at *32. There is "no minimum or definitive amount of discovery that must be undertaken," *In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 244 (S.D. W. Va. 2005), and "[e]ngaging in formal discovery is not essential … or even the critical focal point of the analysis." *In re PNC Fin. Servs. Grp., Inc., Sec. Litig.*, 440 F. Supp. 2d 421, 433 (W.D. Pa. 2006). *See, e.g., In re India*, 2020 U.S. Dist. LEXIS 77190, at *11 (preliminarily approving class action settlement before the filing of motions to dismiss and or commencement of formal discovery).

Here, as the Court is aware, Plaintiffs' capable counsel have engaged in substantial *informal* discovery to analyze the strengths and weaknesses of the Settlement Class's claims. Prior to the filing of the complaint, Plaintiffs expended considerable time and resources to conduct a detailed investigation of Defendants' collaboration in depressing the compensation of their employees. *See* Farah Decl. ¶ 20. Plaintiffs' counsel interviewed multiple confidential witnesses

formerly employed by Defendants and other poultry processors. *Id.* Plaintiffs' counsel also conducted extensive research of both the poultry labor market and the workers that comprise the Settlement Class. *Id.* These unusually extensive investigative and analytical efforts support a finding of fairness. *See In re PNC*, 440 F. Supp. 2d at 430-31; *see also Adesso Homeowners' Ass'n v. Holder Props.*, No. 3:16-cv-710-JFA, 2017 U.S. Dist. LEXIS 224941, at *34 (D.S.C. May 23, 2017) ("[T]he parties have committed substantial resources to the investigation and legal analysis of the claims and defenses of the parties, to obtain sufficient information to weigh the benefits of the proposed settlement against the risks of continued litigation.").

The third factor—*i.e.* the circumstances surrounding the negotiations—heavily favors preliminary approval. Where, as here, "a settlement is the result of genuine arm's-length negotiations, there is a presumption that it is fair." *Gaston v. Lexisnexis Risk Sols., Inc.*, No. 5:16-cv-00009-KDB-DCK, 2021 U.S. Dist. LEXIS 12872, at *18 (W.D.N.C. Jan. 25, 2021); *see also Adesso*, 2017 U.S. Dist. LEXIS 224941, at *33 ("[A] proposed class action settlement is considered presumptively fair where there is no evidence of collusion and the parties, through capable counsel, have engaged in arms' length negotiations."). Before executing the Settlement Agreements, the parties engaged in extensive hard-fought, arm's-length negotiations, which were adversarial throughout and showed no trace of collusion. *See* Farah Decl. ¶¶ 21-22 .

Finally, the fourth factor—*i.e.* the experience of counsel—strongly favors preliminary approval. The lawyers who conducted these negotiations, and who have endorsed the Settlement Agreements as fair and adequate, are highly experienced and nationally recognized antitrust and class action practitioners. *See* Motion to Appoint Counsel, ECF No. 60 (Aug. 30, 2019); *see also* Farah Decl. ¶ 23. This "further minimizes concerns that [Plaintiffs and WMS or Plaintiffs and Peco] colluded to the detriment of the class's interests." *In re MicroStrategy, Inc. Sec. Litig.*, 148

F. Supp. 2d 654, 665 (E.D. Va. 2001). "[T]he opinion of experienced and informed counsel in favor of settlement should be afforded due consideration in determining whether a class settlement is fair and adequate." *Gaston*, 2021 U.S. Dist. LEXIS 12872, at *19 (citing *Jiffy Lube*, 927 F.2d at 159).

In sum, the proposed Settlement Agreements were the product of genuine arm's-length negotiations by experienced counsel, and they were reached only after an extensive investigation of the strengths and weaknesses of the claims.

**C. The Settlement Agreements Are Adequate**

In determining whether a proposed settlement is adequate, courts consider the following factors: "(1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial; (3) the anticipated duration and expense of additional litigation; (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (5) the degree of opposition to the settlement." *In re India*, 2020 U.S. Dist. LEXIS 77190, at *11.

Detailed analyses of the fourth and the fifth factors are unnecessary. This Court has held that it "places little weight upon [the fourth] factor." *In re Mid-Atlantic*, 564 F. Supp. at 1386. And with respect to the fifth factor, "[d]ue to the preliminary nature of this motion," opposition to either of the Settlement Agreements has not yet presented itself. *Temp. Servs.*, 2012 U.S. Dist. LEXIS 86474, at *36.

"The most important factors in this analysis are the relative strength of the plaintiffs' claims on the merits and the existence of any difficulties of proof or strong defenses." *Sharp Farms v. Speaks*, 917 F.3d 276, 299 (4th Cir. 2019). An evaluation of the strength of Plaintiffs' claims in light of the risks and costs of continued litigation supports a finding that the Settlement Agreements are adequate.

Plaintiffs believe that they have pleaded a strong case. The Court held that Plaintiffs' operative complaint withstood Defendants' multiple motions to dismiss. The Court even held that Plaintiffs had alleged the "extremely rare" direct evidence of a *per se* antitrust conspiracy against some defendants.[9]

But this is a complex antitrust action. "[A]n integral part of the strength of a case on the merits is a consideration of the various risks and costs that accompany continuation of the litigation." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985) (citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975)). It is inherently difficult to prove a complex antitrust class action, and there are "significant risks associated with continued litigation." *Temp. Servs.*, 2012 U.S. Dist. LEXIS 86474, at *35. "Regardless of the strength of a claim on the merits, one can never ensure a finding of liability in complex litigation like this. Similarly, all parties to this litigation face significant difficulties and risks in establishing liability and defending against the claims." *US Airline Pilots Ass'n v. Velez*, No. 3:14-cv-00577-RJC-DCK, 2016 U.S. Dist. LEXIS 54239, at *16 (W.D.N.C. Apr. 22, 2016). "Experience proves that, no matter how confident trial counsel may be, they cannot predict with 100% accuracy a jury's favorable verdict, particularly in complex antitrust litigation." *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 523 (E.D. Mich. 2003).

Further, even though the case will continue against the non-settling Defendants, continuing to litigate this case against WMS and Peco would have required significant additional resources and materially increased the complexity of the case. To obtain a jury verdict against WMS and Peco, Plaintiffs would have needed to conduct adversarial discovery of WMS and Peco, litigate discovery disputes with WMS and Peco, brief summary judgment motions concerning WMS and

[9] Mem. Op., ECF No. 378, at 11-16 (Sept. 16, 2020).

Peco, and prepare a liability case against WMS and Peco for trial. Courts in the Fourth Circuit have found that such circumstances (involving partial settlements in complex actions) support approval: "From the court's perspective, it is clear that pursuing the claims and potential claims against the settling defendants would add complexity, expense and delay which could postpone actual recovery for years." *In re PNC*, 440 F. Supp. 2d at 432. Another found: "Although plaintiffs have expressed their intention to continue to pursue their claims against the non-settling defendants, many additional hours would have been required to prepare and respond to anticipated summary judgment motions, and to try the case against the settling defendants. Settlement under these circumstances clearly is appropriate." *Stone*, 139 F.R.D. at 340.

In light of the above risk assessment, the terms of the proposed Settlement Agreements provide the Settlement Class with more than adequate relief. The Peco Settlement Agreement obligates Peco to pay $3,000,000 into a settlement fund that will provide tangible financial benefits to the Settlement Class. Meanwhile, the remaining Defendants continue to be jointly and severally liable for *all* the damages caused by the alleged conspiracy. The financial recovery from Peco alone would render its Settlement Agreement adequate, but Plaintiffs also secured extensive cooperation obligations (summarized above) that will materially strengthen their claims against the remaining Defendants. Those cooperation obligations include depositions and trial testimony from Peco executives as well as document productions from Peco custodians.

The terms of the Peco Settlement Agreement are particularly adequate considering that the case against Peco is materially weaker than the case against the other Defendants. Peco did not attend the Defendant Processors' annual roundtable meetings or participate in compensation

surveys administered by WMS. Indeed, the Court has already found that Plaintiffs do not have sufficient direct or circumstantial evidence to support a *per se* antitrust claim against Peco.[10]

WMS, meanwhile, is a small consulting company with only three current employees and none of the financial resources of the Defendant Processors. However, the WMS Settlement Agreement obligates WMS to provide invaluable cooperation. As part of the Settlement Agreement, WMS has *already* produced a 109-page declaration from its President, Jonathan Meng, and more than 400,000 documents that are responsive to search terms. This already-produced evidence provided the basis for most of the new allegations that are part of the TAC. Additionally, all three of WMS's current employees are obligated to sit for depositions and provide trial testimony, as needed.

Accordingly, the Peco and WMS Settlement Agreements allow Plaintiffs to secure key evidence—in the form of the Meng declaration, documents, deposition testimony, and trial testimony—from both Peco, WMS, and their employees. *See In re Ampicillin Antitrust Litig.*, 82 F.R.D. 652, 654 (D.D.C. 1979) (approving settlement in light of settling defendant's "assistance in the case against [a non-settling defendant]"); *see generally In re IPO Sec. Litig.*, 226 F.R.D. 186, 198-99 (S.D.N.Y. 2005) (recognizing the value of cooperating defendants in complex class action litigation).

In antitrust cases against a stable of non-settling defendants, one court recognized that early cooperation from one defendant can benefit the class more than a monetary settlement. *In re Processed Egg Prod. Antitrust Litig.*, 284 F.R.D. 278, 303 (E.D. Pa. 2012) ("There is greater efficiency in the Plaintiffs [sic] proceeding with their case with [settling defendant's] cooperation then with monetary consideration from an early settlement."). Such cooperation at this stage:

[10] Mem. Op., ECF No. 378 at 19.

- Lays out for Plaintiffs, "with greater clarity and the force of having witnesses and documents," what the case is about so that Plaintiffs can move it forward "more expeditiously." *Id.*

- Guides Plaintiffs through the poultry processing industry, the relevant labor market, the genesis of the compensation surveys, and the conduct of Defendants at the annual poultry meetings. *See id.*

- Identifies companies and individuals with testimony that will benefit the class, and which Plaintiffs otherwise may not identify until discovery is much further along. *See id.*

- Permits the review of documents and communications that might otherwise not be disclosed in an adversarial discovery posture. *See id.*

In sum, the proposed Settlement Agreements are both adequate in light of the strength of Plaintiffs' claims and the risks and expense of continued litigation. Accordingly, the proposed Settlement Agreements are fair and should be preliminarily approved.

## IV. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS

Plaintiffs request that the Court certify the proposed Settlement Class to receive the benefits of the Settlement Agreement. Specifically, Plaintiffs seek certification of a Settlement Class consisting of "All persons employed by Defendant Processors, their subsidiaries, and/or related entities at poultry processing plants, poultry hatcheries, poultry feed mills, and/or poultry complexes in the continental United States from January 1, 2000 until July 20, 2021."[11] Farah Decl., Ex. A at 12 (section II(E)(3)) (WMS Settlement Agreement); Ex. B at 17-18 (section II(F)(3)) (Peco Settlement Agreement). Should the Court reject the Plaintiffs' proposed expansion of the putative litigation class, then Plaintiffs propose that for WMS only, Settlement Class definition will revert to the definition from Plaintiffs' current operative complaint (SAC, ECF No.

[11] The Settlement Class excludes complex managers, plant managers, human resources managers, human resources staff, office clerical staff, guards, watchmen, and salesmen; Defendants, co-conspirators, and any of their subsidiaries, predecessors, officers, or directors; and federal, state or local governmental entities." Ex. B at 17-18 (section II(F)(3)) (Peco Settlement Agreement); Ex. A at 12 (section II(E)(3)) (WMS Settlement Agreement).

386) and will be defined as: "All persons employed by Defendant Processors, their subsidiaries and/or related entities at poultry processing plants in the continental United States from January 1, 2009 until July 20, 2021." The reason for this alternative class is the cost-prohibitive nature of notice to a broader class in a cooperation-only settlement.

"A settlement class, like a litigation class, must satisfy the requirements" of Federal Rule of Civil Procedure 23(a) and one of the categories of Rule 23(b). *Brown v. Transurban USA, Inc.*, 318 F.R.D. 560, 566 (E.D. Va. 2016). The Fourth Circuit practice is to "give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application [that] will in the particular case 'best serve the ends of justice for the affected parties and promote judicial efficiency.'" *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (quoting *In re A.H. Robins Co.*, 880 F.2d 709, 740 (4th Cir. 1989)). This proposed Settlement Class meets the prerequisites of Rule 23(a) as well as the prerequisites of Rule 23(b)(3).

## A. The Settlement Class Satisfies Rule 23(a)

### 1. Numerosity

Rule 23(a)(1) requires that the class be so numerous as to make joinder of its members "impracticable." Generally, classes consisting of forty or more members are considered sufficiently large to satisfy the numerosity requirement. *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 337 (D. Md. 2012). *See, e.g., Cypress v. Newport News Gen. & Non-Sectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (holding that a class of only eighteen members satisfied the numerosity requirement). Here, the precise number of Settlement Class members is presently known only to Defendants. But based on extensive investigation, Plaintiffs' counsel believes that hundreds of thousands of people fall within the Settlement Class definition. Rule 23(a)(1) is satisfied.

**2. Commonality**

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Plaintiffs must show that resolution of an issue of fact or law "is central to the validity of each" class member's claim; "[e]ven a single [common] question will" satisfy the commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 359 (2011). "In the antitrust context, courts have generally held that an alleged conspiracy or monopoly is a common issue that will satisfy Rule 23(a)(2) as the singular question of whether defendants conspired to harm plaintiffs will likely prevail." *D&M Farms v. Birdsong Corp.*, No. 2:19-cv-463, 2020 U.S. Dist. LEXIS 226047, at *10 (E.D. Va. Dec. 1, 2020).

Here, a central allegation in the Complaint is that Defendants, including WMS and Peco, illegally conspired to depress Defendant Processors' compensation to poultry processing workers. Proof of this conspiracy will be common to all Settlement Class members. In addition to that overarching question, this case is replete with other questions of law and fact common to the Settlement Class, including, *inter alia*, the identity of the participants in the alleged conspiracy, the duration of the alleged conspiracy, and the measure of damages caused by the alleged conspiracy. *See* TAC ¶ 522. Rule 23(a)(2) is satisfied.

**3. Typicality**

Rule 23(a)(3) requires that the class representatives' claims be "typical" of class members' claims. "As a general matter, the 'typicality' prerequisite is satisfied in instances where plaintiffs' claims arise out of the common course of conduct of one or more defendant." *Adesso*, 2017 U.S. Dist. LEXIS 224941, at *23. Typicality is "established by plaintiffs and all class members alleging the same antitrust violations by defendants." *D&M Farms*, 2020 U.S. Dist. LEXIS 226047, at *10 (quoting *Am. Sales Co. v. Pfizer, Inc.*, No. 2:14cv361, 2017 U.S. Dist. LEXIS 137222, at *35 (E.D. Va. July 28, 2017)). Here, both Plaintiffs' claims and Settlement Class members' claims arise out

of a common course of misconduct by Defendants; each received compensation that was depressed by Defendants' conduct. As such, Rule 23(a)(3) is satisfied.

**4. Adequacy**

Rule 23(a)(4) requires that, for a case to proceed as a class action, the court must find that "the named parties will fairly and adequately protect the interests of the class." This inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 625 (1997) (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982)). For a conflict to defeat class certification, the conflict "must be more than merely speculative or hypothetical," but rather "go to the heart of the litigation." *Gunnells*, 348 F.3d at 430-31 (internal citations omitted).

There is no conflict here, as the interests of Plaintiffs are aligned with those of Settlement Class members. Plaintiffs, like all Settlement Class members, share an overriding interest in obtaining both the largest possible monetary recovery and most helpful cooperation. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981) ("[S]o long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes."). Moreover, Plaintiffs are not afforded any special or unique compensation by the proposed Settlement Agreement. As such, Rule 23(a)(4) is satisfied.

**B. The Requirements of Rule 23(b)(3) Are Satisfied**

Once Rule 23(a)'s four prerequisites are met, Plaintiffs must demonstrate that the proposed Settlement Class satisfies Rule 23(b)(3). Specifically, Plaintiffs must show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Plaintiffs have done so.

**1. Predominance of Common Issues**

"Courts focus on the issue of liability to determine whether a proposed class meets the predominance prong: '[i]f the liability issue is common to the class, common questions are held to predominate over individual ones.'" *City of Cape Coral Mun. Firefighters' Ret. Plan v. Emergent Biosolutions, Inc.*, 322 F. Supp. 3d 676, 685 (D. Md. 2018) (internal citation omitted). "[A] claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *In re Cardizem CD Antitrust Litig*., 200 F.R.D. 297, 307 (E.D. Mich. 2001) (internal citation omitted). Therefore, "when one or more of the central issues in the action are common to the class and can be said to predominate, the [class] will be considered proper." 7AA Charles Alan Wright, Arthur R. Miller & Mary K. Kane, Federal Practice & Procedure: Civil 3d § 1778 at 121-23.

The Supreme Court has stated that "[p]redominance is a test readily met in certain cases alleging … violations of the antitrust laws." *Amchem*, 521 U.S. at 625. As this is an antitrust conspiracy case, common issues regarding the existence, scope, and effect of the conspiracy, *inter alia*, predominate over individual issues. *See, e.g., Hughes v. Baird & Warner, Inc.*, No. 76 C 3929, 1980 U.S. Dist. LEXIS 13885, at *7 (N.D. Ill. Aug. 20, 1980) ("Clearly, the existence of a conspiracy is the common issue in this ca[s]e. That issue predominates over issues affecting only individual sellers.").

Plaintiffs "are not required to prove that each element of their claims is susceptible to classwide proof, but only that 'common questions predominate over any questions affecting only individual [class] members.'" *In re Zetia Ezetimihe Antitrust Litig.*, No. 2:18-md-2836, 2020 U.S. Dist. LEXIS 112331, at *86 (E.D. Va. June 18, 2020) (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013)). Nevertheless, Plaintiffs could use common evidence to

prove each of the elements of their antitrust claims on behalf of the Settlement Class. To prevail in an antitrust case, Plaintiffs must prove three elements: (1) a violation of the antitrust laws; (2) the impact of the unlawful activity; and (3) measurable damages. *In re Zetia*, 2020 U.S. Dist. LEXIS 112331, at *86.

**a. Violation of the Antitrust Laws**

Courts have found that the existence and scope of an antitrust conspiracy are common issues. *See, e.g., In re Zetia*, 2020 U.S. Dist. LEXIS 112331, at *88 ("As many courts—including this one—have recognized, such evidence is common to the class, for if each member pursued its claims individually, it would rely on the same evidence to prove the alleged antitrust violations."). *See also* Alba Conte & Herbert Newberg, Newberg on Class Actions § 18.26, at 18-83 to 18-86 (4th ed. 2002) ("in antitrust [cases], the issues of conspiracy … have been viewed as central issues which satisfy the predominance requirement").

Proof of Defendants' antitrust violations would involve evidence common to all Settlement Class members. Critically, Plaintiffs' allegations of compensation-fixing focus on the actions of the Defendants, rather than the actions of individual class members, so that common issues regarding Defendants' liability predominate. Proof, common to the Settlement Class, establishes the creation, scope, terms, participants, and enforcement of the conspiracy, as well as acts in furtherance of the conspiracy. As shown by WMS's production in connection with its Settlement Agreement, such evidence comes from Defendants' own files, statements, records, and employees. In short, proof of Defendants' antitrust violations is a common issue of sufficient importance that it alone causes common issues to predominate in this case. *See Am. Sales Co. v. Pfizer, Inc.*, No. 2:14cv361, 2017 U.S. Dist. LEXIS 137222, at *43 (E.D. Va. July 28, 2017) ("Based on this common evidence, the legal issues surrounding the antitrust violation will also be resolved uniformly across the class — whether [defendant] violated antitrust laws does not depend on any

legal issue unique to a particular class member. Accordingly, Plaintiffs have proven by a preponderance of the evidence that common issues regarding the antitrust violation predominate over any individualized inquiry.").

**b. Impact of the Unlawful Activity**

"To show antitrust impact, there must be sufficient evidence to show that the class members suffered some damage as a result of [Defendants'] alleged antitrust violation." *In re Zetia*, 2020 U.S. Dist. LEXIS 112331, at *89-91 (quoting *Am. Sales Co.*, 2017 U.S. Dist. LEXIS 137222, at *14). "But at the class certification stage," Plaintiffs need not prove actual class-wide impact; rather, Plaintiffs "need only '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.* (quoting *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008)).

At trial, Plaintiffs will prove common impact on a class-wide basis using evidence common to the Settlement Class. First, Defendant Processors and co-conspirators collectively possess market power in the market for employment at poultry processing plants, poultry complexes, hatcheries, and poultry feed mills. TAC ¶ 471. Defendant Processors and co-conspirators together control more than 90 percent of that relevant labor market, which affords them "the power to jointly set compensation for workers at poultry processing plants, poultry complexes, hatcheries, and poultry feed mills." *Id.* Second, individual poultry processing facilities did *not* set compensation for Settlement Class members. Rather, "the compensation of workers at poultry processing complexes, plants, hatcheries, and feed mills owned by Defendant Processors, their subsidiaries, and related entities were made exclusively by and at each Defendant Processor's corporate headquarters during the Class Period." *Id.* ¶ 190. Third, the alleged conspiracy "commonly impacted all workers at poultry processing plants, poultry complexes, hatcheries, and poultry feed mills owned by Defendant Processors, their subsidiaries, and related entities in the

continental United States because Defendant Processors valued internal equity, *i.e.* the idea that similarly situated employees should be compensated similarly." *Id.* ¶ 481. Defendant Processors "determined the hourly wages, annual salaries, bonuses, and employment benefits for Class Members across the country in a formulaic way, establishing schedules that compensated employees according to their specific positions in poultry processing complexes, plants, hatcheries, and feed mills." *Id.* ¶ 192. As a consequence, when Defendant Processors aligned their compensation schedules, the alignment systematically impacted the compensation of each Settlement Class member, as each occupied a position within those schedules. Fourth, in the absence of the conspiracy, Defendant Processors would have vigorously "competed with each other for labor during the Class Period by offering higher wages, higher salaries and superior benefits to Class Members." *Id.* ¶ 212. This is particularly true given that each Defendant Processor or one of its subsidiaries owns and operates a poultry processing plant that is within 47 miles of a poultry processing plant owned by another Defendant Processor, another Defendant Processor's subsidiary, or a co-conspirator, "meaning that many workers could easily switch to rival poultry processing plants offering better compensation in an unrestrained competitive market." *Id.* Instead, through their coordinated effort, Defendants restrained competition resulting in injury to the entire Settlement Class.

Another antitrust case within the Fourth Circuit that alleged a conspiracy to depress compensation—*Seaman v. Duke University,* No. 1:15-CV-462, 2018 U.S. Dist. LEXIS 16136 (M.D.N.C. Feb. 1, 2018)—is instructive. In that case, plaintiffs alleged that the University of North Carolina ("UNC") and Duke University conspired not to hire each other's faculty, which had the effect of reducing compensation. In certifying a class, the court found two of the plaintiffs' arguments persuasive for purposes of demonstrating common impact: (1) "that because of the no-

hire agreement the UNC and Duke defendants did not have to provide preemptive compensation increases for faculty that otherwise would have been needed to ensure employee retention" and (2) "that the defendants' internal equity structures—policies and practices that are alleged to have ensured relatively constant compensation relationships between employees—spread the individual harm of decreased lateral offers and corresponding lack of retention offers to all faculty, thus suppressing compensation faculty-wide." *Id.* at *10. The court concluded that those "theories of anti-trust impact to faculty present common questions for which common proof will be proffered." *Id.* at *11. Here, Plaintiffs offer those same theories (and more) and thus have sufficiently demonstrated that class-wide impact is capable of common proof at trial.

**c. Measurable Damages**

No precise damages formula is required at the class certification stage. Rather, the Court's inquiry is merely limited to assessing whether methods are "available to prove damages on a class-wide basis." *In re Zetia*, 2020 U.S. Dist. LEXIS 112331, at *96-97. "Assuming an appropriate model is put forth, 'the need for some individualized determinations' is not fatal to class certification." *Id.* (quoting *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015)).

Multiple methodologies are available to prove damages in this case on a class-wide basis. For example, class-wide damages can be calculated using an industry benchmark model, which is an approach commonly employed in antitrust cases of this type. The compensation paid to workers in another industry (or industries) can be used as a yardstick to estimate the compensation that Settlement Class members would have received in the absence of the conspiracy. This can be done using standard regression techniques that control for non-conspiratorial differences between the two industries that would be likely to influence compensation. *See also Seaman*, 2018 U.S. Dist. LEXIS 16136, at *16-18 (holding that a regression analysis is a viable method for calculating damages using common evidence in a case alleging the depression of compensation).

**2. Superiority of a Class Action**

In addition to the predominance of common questions, Rule 23(b)(3) requires a finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Factors relevant to the superiority of a class action under Rule 23(b)(3) include: (A) the interest of the members of the class in individually controlling the prosecution of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of the class action. Fed R. Civ. P. 23(b)(3).

In this case, a class action is certainly superior. The interests of Settlement Class members in individually controlling the prosecution of separate claims are outweighed by the efficiency of the class mechanism. There are no other pending actions raising the same allegations. Thus, the first three factors listed above are easily addressed: no class member has demonstrated any interest in litigating individually; the claims in this case are not being litigated anywhere else; and it would be enormously inefficient—for both the Court and the parties—to engage in multiple trials of the same claims asserted in multiple individual actions. "Requiring individual Class Members to file their own suits would cause unnecessary, duplicative litigation and expense, with parties, witnesses and courts required to litigate time and again the same issues, possibly in different forums." *In re Serzone*, 231 F.R.D. 221at 240.

Moreover, "the expense of individual actions, weighed against the potential individual recovery of the vast majority of class members here, would be prohibitive." *Temp. Servs.*, 2012 U.S. Dist. LEXIS 86474, at *13. *See also City of Ann Arbor Employees' Ret. Sys. v. Sonoco Prods. Co.*, 270 F.R.D. 247, 257 (D.S.C. 2010) (holding that the superiority requirement has been satisfied because "the costs associated with bringing individual actions would be prohibitive when weighed

against the potential individual recoveries"). Because it would be economically unreasonable for Settlement Class members to adjudicate their separate claims individually, the superiority of a class action is evident. Proceeding as a class action, rather than a host of separate individual trials, would provide significant economies in time, effort and expense and permit Settlement Class members to seek damages that would otherwise be too costly to pursue.

Finally, the Supreme Court has found that when certifying a settlement class "a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. R. Civ. P. 23(b)(3)(D), for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620. Such is the case here. If approved, the Settlement Agreement would obviate the need for a trial against Peco or WMS, and thus questions concerning that trial's manageability are irrelevant. Accordingly, the Court should certify the Settlement Class.

## V. DEFERRING CLASS NOTICE IS APPROPRIATE IN THIS CASE

Rule 23(e) requires that, prior to final approval of a settlement, notice of that settlement must be distributed to all class members who would be bound by it. Rule 23(c)(2)(B) requires that notice of a settlement be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

Plaintiffs request that the Court agree to defer formal notice of the Settlement Agreement to the Settlement Class until a later date.[12] In Plaintiffs' Motions for Preliminary Approval of Settlements with Pilgrim's Pride Corporation and with George's Inc., Plaintiffs made the same

[12] Plaintiffs, WMS, and Peco have agreed that the timing of a motion to provide notice to the Settlement Class of the Settlement Agreement is at the discretion of Interim Co-Lead Counsel and may be combined with notice of other settlements in this action. *See* Farah Decl., Ex. A at 14 (section II(E)(5)) (WMS Settlement Agreement); Ex. B at 14 (section II(D)(2)) (Peco Settlement Agreement).

request. This Court granted Plaintiffs' requests on July 20, 2021 (Pilgrim's Pride) and October 5, 2021 (George's).[13]

Deferring formal notice of the Settlement Agreement is appropriate here, too, for the same reasons. First, Plaintiffs do not yet have the names and/or contact information of Settlement Class members. Plaintiffs believe that the Settlement Class consists of hundreds of thousands of individuals who were employed by Defendant Processors and their related entities over a period exceeding a decade. Via written formal discovery, Plaintiffs have requested identifiers and contact information for each of those Settlement Class members from Defendants, but it will take time for Defendants to produce all such data. Defendants have until January 14, 2022 to substantially complete the production of documents. *See* Scheduling Order, ECF No. 456 (May 3, 2021). *See, e.g., McKinney v. U.S. Postal Serv.*, 292 F.R.D. 62, 68 (D.D.C. 2013) (court deferred the issuance of class notice "pending the completion of [an] additional six-month search period" that would "allow [party's] counsel to locate more accurate information" regarding class members).

Second, each provision of notice to a class of this size costs hundreds of thousands of dollars. Accordingly, providing separate notice to the Settlement Class each time that Plaintiffs enter into a settlement with any of the non-settling Defendants might lead to inefficiencies and reduce the amount of funds available for distribution to the Settlement Class. If possible, it is in the best interests of the Settlement Class to combine the notice of the Peco and WMS settlement with notice of the prior Pilgrim's and George's settlements, and any future notice(s) of future settlement(s) with other Defendants, should additional settlements be reached in the near future. Proceeding in this way creates attendant efficiencies and cost savings for the Settlement Class,

[13] *See* Order Granting Prelim. Approval of Settlement between Plaintiffs and Pilgrim's Pride, ECF No. 490 (July 20, 2021); Order Granting Prelim. Approval of Settlement between Plaintiffs and George's Inc. and George's Foods, LLC, ECF No. 529 (Oct. 5, 2021).

resulting in more money from the settlements making it into the pockets of Settlement Class members. Indeed, courts often defer notice of partial settlements in complex antitrust cases until enough settlements have been reached to make the transmittal of notice cost-effective. *See, e.g., In re Auto. Wire Harnesses*, No. 12-md-02311, 2020 U.S. Dist. LEXIS 183483, at *267 (E.D. Mich. Sept. 30, 2020) (approving plaintiffs' plan "to defer notice and the corresponding claims process until Class Counsel determined that an appropriate number of settlements occurred," which "kept expenses lower"); *In re: Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637, Order (ECF No. 462) ¶¶ 3-4 (N.D. Ill. Aug. 18, 2017) (allowing plaintiffs to defer class notice of a preliminarily approved settlement until a later time); *In re Aftermarket Filters Antitrust Litig.*, No. 1:08-cv-04883, Order (ECF No. 885), at 5, 11 (N.D. Ill. Feb. 16, 2012) (same).

If the Court approves Plaintiffs' request to defer notice, Plaintiffs will propose a detailed notice plan in a subsequent motion that will be filed after Defendants have produced data regarding each of the identifiable Settlement Class members. The proposed notice plan will, pursuant to Rule 23(c)(2)(B), provide the "best notice practicable" to all potential Settlement Class members who will be bound by the proposed Settlement Agreement.

## VI. CONCLUSION

For the above reasons, Plaintiffs respectfully request that, once the Court has ruled on the Plaintiffs' Motion for Leave to File Third Amended Consolidated Complaint and resolved any resulting pleadings motions, the Court enter an order: (1) preliminarily approving Plaintiffs' settlement with WMS and Peco, (2) certifying the Settlement Class that is co-extensive with Plaintiffs proposed Third Amended Consolidated Complaint, (3) appointing Interim Co-Lead Counsel as Settlement Class Counsel, (4) appointing Plaintiffs as Settlement Class Representatives, (5) deferring notice to Settlement Class members until a later date, and

(6) ordering a stay of all proceedings against WMS and Peco except those proceedings provided for or required by the Settlement Agreement.

Dated: December 17, 2021

Respectfully submitted,

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