UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF PENNSYLVANIA

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

DIRECT PURCHASER PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT BETWEEN DIRECT PURCHASER PLAINTIFFS AND MICHAEL FOODS, INC. AND LEAVE TO FILE MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES FROM THE MICHAEL FOODS, INC. SETTLEMENT FUND

Direct Purchaser Plaintiffs ("Plaintiffs") move this Court for an Order preliminarily approving the Settlement Agreement between Direct Purchaser Plaintiffs and Defendant Michael Foods, Inc. and granting leave to Plaintiffs to file a motion for an award of attorneys' fees and reimbursement of litigation expenses.

In support of this Motion, Plaintiffs rely on their Memorandum in Support of the Motion and the accompanying declaration of Stanley D. Bernstein submitted herewith. The Motion is made on the following grounds:

1. The Settlement falls within the range of reasonableness, *Mehling v. N.Y. Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007), and is sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard—the applicable standards for preliminary approval of a class action settlement, *see In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, at *1-2 (E.D. Pa. May 11, 2004).

2. The Settlement will provide the Class with valuable cash consideration. In addition, it requires Michael Foods to provide cooperation that will assist Plaintiffs' prosecution of this action: Michael Foods must authenticate and establish the admissibility of documents, provide up to four current employees as trial witnesses at Michael Foods'

sole expense; and provide other assistance as described in the Settlement Agreement and accompanying memorandum. Co-Lead Counsel believe that this cooperation will greatly assist them in further prosecuting the claims in this Action. *See, e.g., In re Ikon Office Supplies Inc. Sec. Litig.*, 194 F.R.D. 166, 177 (E.D. Pa. 2000).

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

4. The Settlement is the result of extensive arm's-length negotiations over a period of several months by experienced antitrust and class action lawyers. *In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL 1426, 2003 WL 23316645, at *6 (E.D. Pa. Sept. 5, 2003); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003).

5. The Settlement Agreement was negotiated and executed after fact and expert discovery had closed; *Daubert* motions had been denied; a litigation class had been certified and Defendants' Rule 23(f) appeal of that class certification decision to the Court of Appeals for the Third Circuit had been denied; Michael Foods' individual summary judgment motion on liability (and the individual motions of all other remaining Defendants) had been denied; and Plaintiffs' motion for summary judgment as to Defendants' Capper-Volstead defense in this litigation was granted in part. With the exception of resolution of Defendants' motions to certify for interlocutory appeal the Court's denial of their summary judgment motions on liability and the Non-Settling Defendants' motion to decertify the class, only pre-trial motion practice and trial remains.

6. The expense and uncertainty of continued litigation against Michael Foods and the likelihood of appeal militates strongly in favor of approval. *See In re Linerboard Antitrust Litig*., 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003*); In re Remeron End-Payor Antitrust Litig.*, No. 02-cv-2007, 2005 WL 2230314, at *17 (D.N.J. Sept. 13, 2005).

7. The Class, as defined in the Settlement Agreement, is identical to the certified Shell Egg litigation class, which the Court has already found satisfies the requirements of Federal Rule of Civil Procedure 23(a) and (b)(3).

Dated: January 5, 2017

Respectfully submitted,

/s/ Mindee J. Reuben

Mindee J. Reuben
LITE DEPALMA & GREENBERG LLC
1835 Market Street, Suite 2700
Philadelphia, PA 19103
(267) 314-7980

(973) 623-0858 (fax)
mreuben@litedepalma.com

Interim Co-Lead Counsel and Liaison Counsel for Direct Purchaser Plaintiffs

Michael D. Hausfeld
HAUSFELD LLP
1700 K Street NW
Suite 650
Washington, DC 20006
(202) 540-7200
(202) 540-7201 (fax)
mhausfeld@hausfeldllp.com
Interim Co-Lead Counsel for Direct Purchaser Plaintiffs

Stanley D. Bernstein
BERNSTEIN LIEBHARD LLP
10 East 40th Street
New York, New York 10016
(212) 779-1414
(212) 779-3218 (fax)
bernstein@bernlieb.com

Interim Co-Lead Counsel for Direct Purchaser Plaintiffs

Stephen D. Susman
SUSMAN GODFREY LLP
654 Madison Avenue, 5th Floor
New York, NY 10065-8404
(212) 336-8330
(212) 336-8340 (fax)
ssusman@susmangodfrey.com

Interim Co-Lead Counsel for Direct Purchaser Plaintiffs

On the Brief:

Stephen R. Neuwirth
QUINN EMANUEL URQUHART & SULLIVAN
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000
(212) 849-7165
stephenneuwirth@quinnemanuel.com

Ronald J. Aranoff
WOLLMUTH MAHER & DEUTSCH LLP
500 Fifth Avenue-12th Floor
New York, New York 10110
212 382-3300
212 382-0050
raranoff@wmd-law.com

UNITED STATES DISTRICT COURT
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DIRECT PURCHASER PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT BETWEEN DIRECT PURCHASER PLAINTIFFS AND MICHAEL FOODS, INC. AND LEAVE TO FILE MOTION FOR AWARD OF FEES AND REIMBURSEMENT OF EXPENSES FROM THE MICHAEL FOODS, INC. SETTLEMENT FUND

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Pursuant to Rules 23(e) of the Federal Rules of Civil Procedure, the Direct Purchaser Plaintiff Class ("Class," "Plaintiffs," or "DPPs") respectfully submit this memorandum in support of their motion for: (1) preliminary approval of a settlement between Plaintiffs and Defendant Michael Foods, Inc. ("MFI"), set forth in the "Settlement Agreement between Direct Purchaser Plaintiffs and Defendant Michael Foods, Inc." ("Settlement" or "Settlement Agreement"), attached as Exhibit A to the Declaration of Stanley D. Bernstein ("Bernstein Decl.") accompanying this Motion and Memorandum; [1] and (2) leave to file a motion for an award of attorneys' fees and reimbursement of expenses from the MFI Settlement Fund.[2]

I. INTRODUCTION

After several months of intense arms'-length negotiations in 2016, principally with the assistance of a professional mediator, and preceded by unsuccessful settlement discussions three years prior, Plaintiffs obtained a mutually agreeable settlement with MFI that delivers enormous value to the Class and creates the largest settlement in this litigation to date. In exchange for a release from the claims in this lawsuit through December 31, 2008, MFI has agreed to pay

[1] Pursuant to the Stipulation and Proposed Order to Modify Date of Submission of Proposed Notice Plan submitted to the Court on January 4, 2016 by Class Counsel and Counsel to MFI, Class Counsel intend to file a motion for approval of a plan for and form of Notice of the MFI Settlement Agreement in the coming weeks. For purposes of efficiency, Plaintiffs intend to combine Notice of the MFI Settlement with Notice of the pending Shell Egg litigation class certified by this Court, as those classes share the same class definition. *See infra* n.3 and accompanying text. Additionally, Plaintiffs intend that the Notice will also include a combined claim form for claims from the MFI Settlement and claims from prior settlements with the United States Egg Marketers ("USEM") and United Egg Producers ("UEP"), Hillandale Farms of Pa., Inc. and Hillandale-Gettysburg, LP ("Hillandale"), Midwest Poultry Services LP, National Foods Corporation, and NuCal Foods, Inc., which were finally approved by this Court on June 30, 2016 (ECF Nos. 1418 & 1419). Although class members of these previously approved settlements received Notice of the settlements and their right to opt out or object to them (the deadline for which has passed), they have not yet had the ability to submit claims for distribution from these settlements.

[2] All capitalized terms not otherwise defined herein shall have the same meaning as set forth in the Settlement Agreement.

$75,000,000 into a Fund to provide compensation to the proposed Settlement Class members. The Settlement Amount is nearly three times that of the previous largest settlement amount obtained by DPPs—$28 million from Defendant Cal-Maine Foods, Inc.—and larger than all previous settlements between DPPs and other Settling Defendants combined. In addition to the cash payment, the Settlement Agreement also obligates MFI to assist Plaintiffs in prosecuting this Action by authenticating and establishing the admissibility of documents in this litigation and to provide up to four trial witnesses at MFI's sole expense. Plaintiffs believe these commitments will materially assist them in further prosecuting this Action against the remaining three Defendants: Rose Acre Farms, Inc., Ohio Fresh Eggs, LLC, and R. W. Sauder, Inc. ("Non-Settling Defendants").

Plaintiffs respectfully move the Court for an Order, in substantially the proposed form submitted herewith:

- finding that the proposed settlement with MFI is sufficiently fair, reasonable and adequate to allow dissemination of notice of the settlement to the Settlement Class; and
- granting leave to Plaintiffs to file a motion for an award of attorneys' fees and reimbursement of litigation expenses as set forth in the Proposed Order.

Such an order will allow Plaintiffs to undertake the procedures necessary to obtain final approval of the proposed MFI Settlement as required by Rule 23(e) of the Federal Rules of Civil Procedure and to move for payment of fees and costs from the Settlement Amount with adequate advance notice to the Class prior to final approval. At this time, in considering whether to grant preliminary approval to the MFI Settlement Agreement, the Court need determine only whether the proposed settlement is sufficiently fair, reasonable, and adequate to allow notice of the proposed settlement to be disseminated to the Class. *See In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 WL 1068807, at *1-2 (E.D. Pa. May 11, 2004). A final

determination of the settlement's fairness will be made at or following the Fairness Hearing, after Class Members have received notice of the settlement and of the fee and expense petition, and have been given an opportunity to opt-out of the Settlement or object to it or to the fee and expense motion. As set forth below, Plaintiffs submit that the proposed Settlement more than satisfies the standards for preliminary approval.

II. BACKGROUND

A. The Litigation

This case alleges a nationwide conspiracy among the country's largest egg producers. Plaintiffs allege that Defendants (both Settling and Non-Settling) and other named and unnamed co-conspirators violated the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq*., by engaging in an unlawful conspiracy to reduce egg production and supply and thereby artificially fix, raise, maintain and/or stabilize the prices of shell eggs in the United States. As a result of Defendants' alleged conduct, Plaintiffs and members of the Class paid prices for shell eggs that were higher than they otherwise would have been absent the conspiracy. The lawsuit seeks treble damages, injunctive relief, and attorneys' fees and costs from Defendants. MFI has denied all allegations of wrongdoing in the Action. Filed in late 2008, this litigation has been pending for more than eight years, and, following the Court's denial of Defendants' motions for summary judgment on liability, is nearly ready for trial.

B. Previous Settlement History

The MFI Settlement Agreement is the ninth settlement obtained in this Action by DPPs. On June 8, 2009, Sparboe Farms, Inc. entered into a settlement agreement with Plaintiffs, providing for substantial cooperation in the continued litigation of the case, and on July 16, 2012, this Court granted final approval of that settlement. Order, July 16, 2012 (ECF No. 698). On May 21, 2010, Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. (collectively, "Moark")

entered into a settlement agreement with Plaintiffs providing for both continued cooperation and a cash payment of $25,000,000.00, and on July 16, 2012 this Court granted final approval to that settlement. Order, July 16, 2012 (ECF No. 700). On August 2, 2013, Cal-Maine Foods, Inc. entered into a settlement agreement with Plaintiffs, providing for cooperation and a cash payment of $28,000,000. The Court finally approved the Cal-Maine Settlement Agreement on October 10, 2014. Order, Oct. 10, 2014 (ECF No. 1082).

In 2014, Plaintiffs entered into a series of settlement agreements with several smaller Defendants: National Food Corporation (on March 28, 2014, for a $1,000,000 cash payment); Midwest Poultry Services (on March 31, 2014, for a $2,500.000 cash payment); UEP and USEM (on May 21, 2014, for a $500,000 cash payment, collectively); NuCal Foods (on August 1, 2014, for a $1,425,000 cash payment); and Hillandale (on October 22, 2014, for a $3,000,000 cash payment).[3] The Court granted final approval to these settlements on June 30, 2016. Orders, June 30, 2016 (ECF Nos. 1418 & 1419).

The total value of all prior settlements between DPPs and Settling Defendants is $61,425,000. Each of these settlement agreements provided for a broad settlement class, which included among its members any individual or entity that purchased shell eggs or egg products directly from any egg producer, including but not limited to any Defendant, or such producers' affiliates, during the period January 1, 2000 through the date on which the settlements were preliminarily approved by the Court.

C. The MFI Settlement Negotiations

Most recently, Co-Lead Counsel for Plaintiffs ("Class Counsel") and MFI's counsel, Weil Gotshal & Manges LLP, engaged in extensive arms' length negotiations over the course of

[3] Plaintiffs also voluntarily dismissed Defendant Daybreak Foods from the Action.

several months, including an all-day mediation and several follow-up discussions, to reach the pending Settlement Agreement. These renewed negotiations followed a failed attempt nearly three years prior to reach a resolution with MFI and various discussions since that time. Throughout prior discussions and the 2016 negotiations, Class Counsel and MFI's counsel, both highly experienced and capable, vigorously advocated their respective clients' positions throughout the settlement negotiations. The Parties were far apart when their discussions and subsequent mediation began in 2016.

The Parties' first serious attempts at settlement began in October 2013 when Plaintiffs and almost all of the then-remaining Defendants (including MFI) participated in a mediation in an attempt to reach a global resolution of the DPPs' claims. Bernstein Decl. ¶ 5. The Parties prepared mediation briefs and submitted them to the mediator, the Honorable Harlan A. Martin (ret.) of JAMS. *Id.*. The mediation took place on October 9, 2013 and lasted nearly a full day, but the gulf between the Parties' positions was too wide and no global resolution was reached. *Id.* And although MFI and Plaintiffs occasionally and informally discussed settlement at various times thereafter, settlement communications did not begin again in earnest for nearly three years. *Id.* ¶ 6.

In July 2016, after the Court had certified the DPP Shell Egg litigation class (but denied certification of an Egg Products class) and limited the class period to September 24, 2004 through December 31, 2008, MFI and Plaintiffs resumed settlement discussions, but the Parties' settlement positions remained far apart. *Id.* ¶ 7. Then, in August 2016, Plaintiffs and MFI agreed to mediate settlement with Jed D. Melnick of JAMS, an experienced and qualified mediator who had previously worked with the Honorable Daniel B. Weinstein, the mediator who assisted with the Cal-Maine settlement discussions. *Id.* ¶ 9. The Parties provided Mr. Melnick with extensive

background materials from their summary judgment briefs and supporting documents. *Id.* On September 8, 2016, when the mediation began, the Parties' settlement postures differed sharply, due in part to several pending motions that had the potential to impact the litigation. Although the mediation ended without resolution that day, numerous mediated negotiations continued via telephone and email over the course of the following months. *Id.* ¶ 12.

The Court then denied MFI's motion for summary judgment as to its individual liability,[4] and granted, in part, Plaintiffs' motion for summary judgment, finding that the UEP and Defendants' conduct under the auspices of UEP were not protected by the Capper-Volstead Act (thus eliminating a key defense at trial). *Id.* ¶ 13. As settlement negotiations were ongoing, the Parties continued to aggressively litigate this action. In September 2016, Michael Foods joined in a motion to decertify the Shell Egg litigation class previously certified by the Court, and filed a motion to certify for appeal the Court's denial of its motion for summary judgment. *Id.* ¶¶ 11, 13. Plaintiffs filed briefs opposing both motions in late November and early December. *Id.* ¶¶ 11, 13.

By early December 2016, the negotiations proceeded rapidly as the Parties' positions converged, and the Parties reached agreement on the principal terms of the Settlement on December 6, 2016. Bernstein Decl. ¶¶ 14-15. The proposed Settlement Agreement was fully executed on December 8, 2016. MFI subsequently deposited the Settlement Amount into an escrow account pursuant to the Parties' Agreement. *Id.* ¶¶ 15-16.

Thus, at the time the Settlement Agreement was reached, Class Counsel had significant and comprehensive knowledge of the strengths and weaknesses of Plaintiffs' claims and of

[4] Order Granting, in Part, and Denying, in Part, Pls.' Mot. for Summ. J. re: Capper-Volstead at 11, Sept. 13, 2016 (ECF No. 1442); Order Denying Defs.' Mot. for Summ. J., Sept. 28, 2016 (ECF No. 1445).

MFI's asserted defenses that enabled Class Counsel to evaluate MFI's settlement positions and to advocate for a fair settlement that served the best interests of the Class. Fact and expert discovery had long since closed, Plaintiffs' motion for certification of a Shell Egg litigation class had been granted,[5] *Daubert* and summary judgment motions had been briefed and decided,[6] and the Parties were preparing for trial. *Id.* ¶ 17. After extensive factual investigation, legal analysis, and case development, it is the opinion of Class Counsel that the Settlement amount of $75 million, combined with MFI's cooperation obligations, is fair, reasonable and adequate to the Class. Plaintiffs respectfully submit that the Settlement is in the best interests of the Class and should be preliminarily approved by the Court.

III. PROVISIONS OF THE SETTLEMENT AGREEMENT

A. The Class

The Class definition in the MFI Settlement Agreement is identical to the Shell Egg Litigation Class previously certified by this Court:[7]

> All individuals and entities that purchased shell eggs from caged birds in the United States directly from Defendants during the Class Period from September 24, 2004 through December 31, 2008.

[5] Am. Mem., Nov. 12, 2015 (ECF No. 1346); Order, Feb. 3, 2016 (ECF No. 1372).

[6] Order Denying Mot. to Exclude Opinions & Testimony of Dr. Jesse David, July 19, 2016 (ECF No. 1423); Order Denying Mot to Exclude Testimony of Dr. Michelle Burtis, Aug. 15, 2016 (ECF No. 1427) Order Denying Mot to Exclude Opinions & Testimony of Dr. Gordon Rausser, Aug. 16, 2016 (ECF No. 1428); Order Denying Mot. to Exclude Opinions & Testimony of Dr. Michael Darre, Aug. 31, 2016 (ECF No. 1430); Mem. Granting, in Part, Mot. for Summ. J. Against IPPs and DAPs, Aug. 9, 2016 (ECF No. 1438); Order Granting, in Part, and Denying, in Part, Mot. for Summ. J. re: Damages, Sept. 12, 2016 (ECF No. 1440); Order Granting, in Part, and Denying, in Part, Pls. Mot. for Summ. J. re: Capper-Volstead, Sept. 13, 2016 (ECF No. 1442); Order Denying Defs. Mot. for Summ. J., Sept. 28, 2016 (ECF No. 1445).

[7] *Compare* MFI Settlement Agreement ¶ 18 *with* Order Certifying Shell Egg Litigation Class ¶ 1, Feb. 3, 2016 (ECF No. 1372) *and* Am. Mem. at 4 & 61, Nov. 12. 2015 (ECF No. 1346).

> Excluded from the Class are the Defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities. Also excluded from the Class are purchasers of "specialty" shell eggs (such as "organic," "certified organic," "free range," "cage free," "nutritionally enhanced," or "vegetarian fed") and purchasers of hatching eggs, which are used by poultry breeders to produce breeder stock or growing stock for laying hens or meat.

Settlement Agreement ¶ 18 (Bernstein Decl., Ex. A).

B. Cash Consideration to the Class & Rescission Provisions

The proposed Settlement Agreement provides that within 20 days of its execution, MFI will pay $75,000,000 in cash (the "Settlement Amount") into an escrow account (which funds have since been deposited). *See* Settlement Agreement ¶ 32. This money shall remain in that account, controlled by MFI and Class Counsel, pending approval of the settlement by the Court. MFI also has the right and option to rescind the Agreement should the purchases of class members choosing to opt-out of the Settlement equal or exceed a percentage of sales set forth in a Confidential Supplemental Agreement between the Parties, which will be disclosed to the Court for *in camera* inspection prior to entry of the Preliminary Approval Order. *Id.* ¶ 29. Additionally, the Settlement Agreement provides that Class Counsel may seek an award of attorneys' fees and reimbursement of litigation expenses from the Settlement Fund, subject to Court approval, and that MFI shall have no other obligation to pay any fees or expenses to Class Counsel.

C. The Cooperation Provisions

In addition to the Settlement Amount, the Settlement Agreement also requires that MFI establish the authenticity and status of certain documents as business records. *Id.* ¶ 38. MFI also agrees to comply with trial subpoenas, served via email by Plaintiffs, to produce up to four trial witnesses and that it will not seek to quash any such subpoenas served by Plaintiffs. MFI also

agrees that any such witnesses that are current MFI employees will be deemed to reside within 100 miles of this district and will travel to this District for trial at MFI's expense. *Id.* ¶ 39. Additionally, MFI agrees to cooperate to help Plaintiffs locate and serve subpoenas on MFI's former employees. *Id.*

D. Release Provisions

In exchange for the consideration provided by MFI, Plaintiffs have agreed to release MFI from any and all claims arising out of or resulting from: (i) an agreement or understanding between or among two or more Defendants; (ii) Defendants' reduction or restraint of supply and reduction of or restrictions on production capacity, or (iii) Defendants' pricing, selling, discounting, marketing, or distributing of Shell Eggs in the United States or elsewhere up to December 31, 2008. *Id.* ¶¶ 24-27. The full text of the proposed release, including the limitations thereof, is set forth in the Settlement Agreement at paragraphs 24 through 27.

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

A. Standard for Preliminary Approval of the Settlement

The approval of class action settlements involves a two-step process: (1) preliminary approval; and (2) a fairness hearing, after notice to the class, to determine final approval of the proposed settlement. *See Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 438-39 (E.D. Pa. 2008); *In re Auto. Refinishing*, 2004 WL 1068807, at *1-2; *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 562 (D.N.J. 1997); 4 NEWBERG ON CLASS ACTIONS § 11:25, at 38-39 (4th ed. 2002).

When deciding preliminary approval, a court does not conduct a "definitive proceeding on the fairness of the proposed settlement." *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983). That definitive determination must await the final hearing, at

which the fairness, reasonableness, and adequacy of the settlement are more fully assessed. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 638 (E.D. Pa. 2003).[8]

In determining whether to preliminarily approve a class settlement, courts look to whether "the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval." *Mehling v. N.Y. Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007). To make that determination, courts consider whether "'(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.'"[9] *Gates*, 248 F.R.D. at 444 (*quoting In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 638); *In re Processed Egg Prods. Antitrust Litig*., No. 08-md-2002, 2014 WL 828083, at *2 (E.D. Pa. Feb. 28, 2014); *Kopchak v. United Res. Sys*., No. 13-cv-5884, 2016 WL 4138633, at *6 (E.D. Pa. Aug. 4, 2016) (applying these factors to determine whether there are obvious deficiencies). A settlement falls within the

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

[9] The last factor, the percentage of objections, is premature at this stage as the members of the class have not had an opportunity to object. *Smoot v. Wieser Bros. Gen. Contractors, Inc.*, No. 15-cv-424, 2016 WL 1736498, at *5 (W.D. Wis. Apr. 29, 2016).

range of possible approval when a court finds these factors are satisfied. *Kopchak*, 2016 WL 4138633, at *6.

After making such findings, a settlement agreement is entitled to a presumption of fairness and should be preliminarily approved. *See Gates*, 248 F.R.D. at 439; *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (holding that the "preliminary determination establishes an initial presumption of fairness"); *In re Am. Inv. Life Ins. Co. Annuity Mktg. and Sales Practices Litig.*, 263 F.R.D. 226, 238 (E.D. Pa. 2009) (same). Where, as here, a litigation class has already been certified prior to settlement negotiations, courts have required a less probing fairness inquiry than in the absence of such certification. *See In re Gen. Motors Corp*., 55 F.3d at 805; *see also id.* at 814 ("In ordinary class action settlements (i.e., where the court certifies the class before settlement negotiations commence) courts can presume that the negotiations occurred at arm's length because they have already determined that the counsel negotiating on behalf of the class adequately represents the class's interests."). Additionally, in reviewing a proposed settlement, courts may also consider the amount of relief provided, s*ee, e.g.*, *In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 344 (E.D. Pa. 2007), and commitments of settling defendants to provide information or cooperation that assists the class in prosecuting the action against non-settling defendants, *see e.g., In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 643.

Finally, the Court should consider that "settlement of litigation is especially favored by courts in the class action setting." *In re Ins. Brokerage Antitrust Litig*., 297 F.R.D. 136, 144 (D.N.J. 2013) (citing *In re Gen. Motors Corp.*, 55 F.3d at 784 (holding that "the law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation")); *Austin v. Pa. Dep't 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") (internal quotations omitted).

As discussed below, the MFI Settlement is entitled to a presumption of fairness because: the negotiations occurred at arm's length over a period of several months and at a time when the litigation was well-advanced; Class Counsel and MFI's counsel are experienced in this type of complex litigation; the settlement does not provide for any preferential treatment of class representatives or any segment of the class nor for compensation of attorneys beyond what this Court may award; and the Agreement provides significant monetary relief to the Class and requires that MFI provide cooperation that will assist with the prosecution of this case.

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

As noted, the $75,000,000 Settlement Amount exceeds the combined value of all prior settlement approved by this Court, and exceeds the highest settlement amount obtained to date from Cal-Maine Foods ($28 million) by nearly three-fold. *See* Mem. Approving Cal-Maine Settlement at 38, Oct. 10, 2014 (ECF No. 1081) (finally approving Cal-Maine Settlement finding $28 million in monetary relief and cooperation to be reasonable). This amount reflects Plaintiffs' success in defeating summary judgment motions on liability and in securing certification of the Shell Egg litigation class, as well as the Court's rulings that the putative egg products class (which had been included in all prior settlements) could not be certified for trial purposes and that the Shell Egg class is limited to a four-year period. The $75 million in monetary relief is all the more significant because the Class is expected to be smaller than those of prior settlements, providing even greater relief to its members than the Settlement Amount may suggest: it includes a class period of just over four years, in contrast to prior settlement periods that ran for up to 14

years; it includes only purchases from Defendants, unlike prior settlements that included purchases from any egg producer; and it applies only to purchases of shell eggs, unlike prior settlements that included purchases of both shell eggs and egg products.[10] Thus, considering the value of the Settlement Amount and the more narrow Class definition, the MFI Settlement Amount of $75 million actually understates the value of the Settlement to Class members. It provides substantially more monetary relief to fewer claimants for fewer purchases from fewer producers than all prior settlements found by this Court to be fair, reasonable, and adequate.

Moreover, the damages Plaintiffs suffered due to MFI's alleged conduct remain in the case, and, under joint and several liability, are recoverable from the three remaining Defendants. *See In re Auto. Refinishing*, 2004 WL 1068807, at *2 (preliminarily approving settlement agreement where, *inter alia*, "this settlement does not affect the joint and several liability of the remaining Defendants in this alleged conspiracy"). Again, the settlement here is an excellent result for the Class, with a recovery far in excess of prior settlements approved previously by the Court (in fact, larger than all the prior settlements combined).

And, as discussed above, the proposed Settlement Agreement also provides that MFI not only authenticate and establish as business records documents Plaintiffs may seek to introduce at trial, it also requires MFI's cooperation in presenting up to four current MFI employees as trial

[10] *Compare* MFI Settlement Agreement ¶ 18 *with* Decl. of Michael D. Hausfeld, Ex. A (Settlement Agreement with Moark) ¶ 19 (ECF No. 349-1); Decl. of Michael D. Hausfeld, Ex. A (Settlement Agreement with Cal-Maine Foods) ¶ 20 (ECF No. 848-2); Decl. of James J. Pizzirusso, Ex. A (Settlement Agreement with National Foods Corp.) ¶ 22 (ECF No. 952-2); Decl. of James J. Pizzirusso, Ex. B (Settlement Agreement with Midwest Poultry Services) ¶ 23 (ECF No. 952-3); Decl. of James J. Pizzirusso, Ex. A (Settlement Agreement with UEP/USEM) ¶ 25 (ECF No. 997-2); Decl. of James J. Pizzirusso, Ex. A (Settlement Agreement with NuCal Foods) ¶ 22 (ECF No. 1041-2); Decl. of Ronald J. Aranoff, Ex. A (Settlement Agreement with Hillandale) ¶ 23 (ECF No. 1093-2).

The Class, in contrast to prior settlement agreements, also includes egg producers in the class definition if they purchased shell eggs directly from any Defendant or their affiliates.

witnesses, at MFI's expense, and in assisting Class Counsel in locating MFI's former employees who Plaintiffs may seek to call at trial and in securing their cooperation and attendance.

In the opinion of Class Counsel, who have substantial experience litigating antitrust class actions, the significant Settlement Amount is appropriate cash consideration for the discharge of the Class claims against MFI and a highly favorable result for the Class. The Settlement Amount was agreed to after review of MFI's shell egg sales and market share during the damages period, and after consideration of the likely expense of and risks associated with litigating claims against MFI at trial. Class Counsel also believe the cooperation required under the Agreement, which will preserve Plaintiffs' ability to present to a jury evidence adduced from FMI over years of discovery, will provide substantial assistance to Plaintiffs in further prosecuting their claims. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 643 (noting settlement provisions for cooperation provide substantial benefit to the classes and support settlement approval); *In re Ikon Office Solutions Inc. Sec. Litig.*, 194 F.R.D. 166, 177 (E.D. Pa. 2000) (noting that cooperation agreements are valuable in settling a complex case); *In re Auto. Refinishing*, 2004 WL 1068807, at *2 (acknowledging the settlement provisions' requirements for assistance by settling defendants in prosecuting claims).

Courts have accorded significant weight to the opinion of Class Counsel based on a thorough analysis of the facts. *See, e.g., In re Gen. Instruments Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001); *Stewart v. Rubin*, 948 F. Supp. 1077, 1099 (D.D.C. 1996) ("A court should defer to the judgment of experienced counsel who have competently evaluated the strength of the proof."), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997); *Petruzzi's Inc. v. Darling-Delaware Co.*, 880 F. Supp. 292, 301 (M.D. Pa. 1995) ("[T]he opinions and recommendations of such experienced counsel are indeed entitled to considerable weight"); *In re Coordinated Pretrial Proceedings in*

Antibiotic Antitrust Actions, 410 F. Supp. 659, 667 (D. Minn. 1974) ("The recommendation of experienced antitrust counsel is entitled to great weight.").

Finally, the Settlement Agreement is fair to the class as a whole. It provides no preferential treatment to Class Representatives. Class Counsel anticipate the allocation of settlement funds will, as in the Moark and Cal-Maine settlements, be distributed pro-rata based on each class member's (including Class Representative's) purchases of shell eggs.[11] Class representatives will benefit from the Settlement Agreement in the same way as any other Class member. *See* Allocation Order, May 11, 2016 (ECF No. 1401) (finding pro rata allocation of Cal-Maine settlement funds to be fair, reasonable, and adequate). Moreover, the Agreement requires that any award for payment of attorneys' fees and costs is subject to proper motion to, and approval by, the Court. Settlement Agreement ¶ 34.

C. The Negotiation Process with MFI Supports Preliminary Approval.

Settlements that result from arm's-length negotiations between experienced counsel are generally entitled to deference from the court. *In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL 1426, 2003 WL 23316645, at *6 (E.D. Pa. Sept. 5, 2003); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 640 (holding that "[a] presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel"); *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"); *McGuiness v. Parnes*, No. 87-2728, 1989 WL 29814, at *1 (D.D.C. Mar. 22, 1989) ("While the evaluation of the fairness and adequacy of a settlement . . . is anything but a scientific process, there is nothing about this Settlement suggesting that the Court

[11] Because egg products are not included in the Class, however, unlike in prior settlements, class members' purchases of egg products will not be compensated.

should second-guess the product of the negotiations between the skilled and conscientious lawyers who represented parties on both sides of this litigation."); 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 an understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness considerations of Rule 23(e). *See In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 184 (E.D. Pa. 1997) (concluding that the settlement was the product of "good faith, arms' length negotiations[,]" which eliminated "the risk that a collusive settlement agreement may [have been] reached").

As discussed above and in the accompanying Bernstein Declaration, the Settlement with MFI is the result of hard-fought, arm's-length negotiations between Class Counsel and MFI's counsel, all experienced and capable lawyers in complex class actions and antitrust matters.[12] Class Counsel and MFI's counsel vigorously advocated their respective clients' positions in the settlement negotiations and were prepared to proceed against MFI to trial if no settlement was reached. Bernstein Decl. ¶¶ 5-9, 12, 17. And the Parties twice engaged the services of experienced, neutral mediators to facilitate the settlement negotiations; after the second mediation, the mediator continued assisting the negotiations in the months following the initial in-person mediation session. *Id.* ¶¶ 5, 9, 12. As part of those processes, the Parties exchanged,

[12] In finally approving the Cal-Maine Settlement, the Court previously found that Class Counsel were experienced in similar class action and antitrust litigation. Mem. at 27, Oct. 10, 2014 (ECF No. 1081).

The experience and qualifications of Interim Co-Lead Class Counsel are described in Interim Co-Lead Counsel's Submission in Support of Permanent Appointment of Interim Leadership Structure. *See* Submission in Supp. of Permanent Appt. of Interim Leadership Structure, *T.K. Ribbing's Family Rest. v. United Egg Producers, Inc.*, No. 08-cv-4653 (E.D. Pa. Nov. 13, 2008) (ECF No. 26), and accompanying exhibits.

and provided to the mediator, comprehensive confidential mediation briefs and other materials laying out the strengths and weaknesses of the claims and defenses. *Id.* ¶¶ 5, 9.

Importantly, as settlement negotiations with Michael Foods were ongoing, the Parties continued to aggressively advocate their litigation positions. As discussed more fully *infra* Section VI.D, after the mediation had already been planned or was continuing, Michael Foods joined in a motion to decertify the DPP Shell Egg litigation class (ECF No. 1433), and also moved the Court to certify for interlocutory appeal its order denying MFI's summary judgment motion (ECF No. 1449). Plaintiffs filed strong and vigorous opposition briefs to both motions, along with a supplemental expert report accompanying the opposition to the motion for decertification. ECF Nos. 1454 & 1456.

Moreover, the Settlement Agreement provides for now specified amount of attorneys' fees or cost reimbursement, and provides only for Plaintiffs' ability to apply to the Court for a fee and costs award. *See In re Cmty. Bank of N. Va.*, 418 F.3d 277, 308 (3d Cir. 2005) (noting danger of collusion where fees are negotiated simultaneously with the settlement). Thus, nothing in the course of the negotiations or in the substance of the proposed Settlement presents any reason to doubt its fairness. Indeed, the time gap between the global mediation with all Defendants in 2013 and the final agreement between Plaintiffs and MFI, entered into more than three years later, demonstrates that Settlement Agreement was the product of informed and vigorous negotiation.

D. The Procedural Posture at the Time the Settlement Agreement was Negotiated Supports Preliminary Approval.

Before the Parties began their second mediation in September 2016, this Action was well advanced and the Parties were preparing for trial. Discovery had long since concluded (involving dozens of depositions and production of more than one million documents by Defendants, the

review of which Plaintiffs determined established that MFI and the others engaged in a massive conspiracy). Bernstein Decl. ¶ 7. Further, the Court had granted Plaintiffs' motion for class certification of a Shell Egg litigation class and subsequently limited that class period to September 24, 2004 through December 31, 2008.[13] *Id.* Defendants' motion for interlocutory review of the class certification order was denied,[14] and summary judgment had been fully briefed and argued. *Id.*

Directly after the September 8, 2016 mediation and while the negotiations with MFI continued, this Court: granted, in part, Plaintiffs' motion for summary judgment, finding that the UEP was not protected by the Capper-Volstead Act and eliminating a key defense in this litigation and denied Plaintiffs' summary judgment motion with respect to the Capper-Volstead Act's applicability to USEM;[15] denied MFI's dispositive motion for summary judgment, while finding that certain arguments and evidence favorable to MFI's defenses could be introduced at trial;[16] and granted, in part, certain Defendants' summary judgment motion as to Direct Action Plaintiffs and Indirect Purchaser Plaintiffs, finding claims regarding the UEP Certified Program by the DAPs and IPPs would be evaluated under a "rule of reason" standard.[17] Thus, as these negotiations were proceeding, the Action against MFI was heading toward trial and all parties to

[13] Amended Mem. Granting, in Part, DPPs' Mot for Class Certification, Nov. 12, 2015 (ECF No. 1346); Order Granting Certification of Shell Egg Litigation Class, Feb. 3, 2016 (ECF No. 1372).

[14] Order Denying Petition for Leave to Appeal, Dec. 3, 2015 (ECF No. 1357).

[15] Order Granting, in Part, and Denying, in Part, Pls.' Mot. for Summ. J. re: Capper-Volstead, Sept. 12, 2016 (ECF No. 1442).

[16] *See* Mem. at 6-8, 24, 31-32, Sept. 28, 2016 (ECF No. 1444); Order Denying Defs. Mot. for Summ. J., Sept. 28, 2016 (ECF No. 1445).

[17] Order Granting, in Part, Defs. Mot. for Summ J. as to DAPs and IPPs on Liability, Sept. 9, 2016 (ECF No. 1438). It remains unclear how this ruling will apply to the DPP Action.

the Agreement understood the scope of the remaining claims and the attendant risks of proceeding.

Accordingly, the advanced procedural posture of this litigation at the time the Settlement Agreement was reached supports a finding that the Settlement is within the range of reasonableness. *See Bradburn Parent Teacher Store, Inc. v. 3M* (*Minnesota Mining & Mfg. Co.)*, 513 F. Supp. 2d 322, 331 (E.D. Pa. 2007) (finding fact that case was near the eve of trial following substantial discovery when agreement was reached supported fairness of the settlement); *Rowe v. E.I. DuPont de Nemours & Co.*, No. 06-cv-1810, 2011 WL 3837106, at *13 (D.N.J. Aug. 26, 2011) (noting that counsel were well-positioned to assess the merits of the litigation during settlement negotiations where the settlement agreement was reached after discovery had concluded and summary judgment was fully briefed and pending, and finding that this weighed in favor of approval). *Seidman v. Am. Mobile Sys.*, 965 F. Supp. 612, 617, 619 (E.D. Pa. 1997) (approving settlement where, *inter alia*, settlement was achieved on the eve of trial after extensive discovery had occurred and a litigation class had been certified).

E. The Expense and Uncertainty of Continued Litigation against MFI Supports Preliminary Approval.

The Settlement is particularly reasonable given the risks inherent in moving forward against MFI. Courts have noted that "[a]n antitrust class action is arguably the most complex action to prosecute." *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 639 (citation omitted); *see also Weseley v. Spear*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (noting that antitrust class actions are "notoriously complex, protracted, and bitterly fought").

Continuing this litigation against MFI poses risks for both Plaintiffs and MFI. First, as noted, *supra*, MFI and other Defendants moved the Court to certify for interlocutory appeal of the Court's denial of their summary judgment motions (which motion MFI has since withdrawn

as to the DPPs). ECF Nos. 1449-52. Although Plaintiffs' opposition to those motions (ECF No. 1454) compellingly demonstrates why the motions are without merit, Plaintiffs face the risk that the Court may grant the motions, subjecting class members to a protracted appeal and further delaying ultimate relief to the Class. Second, the Court's memorandum in support of its Order denying MFI's motion for summary judgment, although finding that MFI's participation in the UEP Certified Program alone may be sufficient for a jury to find MFI's concerted action with other Defendants to reduce supply, also identified a number of MFI's arguments that it may present at trial, namely that certain of MFI's customers demanded its participation in the UEP certified program, that MFI pursued production expansion even after joining that program, and that concerted action by MFI was economically irrational.[18] Third, the Court's Order applying the rule of reason to the DAPs' and IPPs' claims regarding the Certified Program,[19] if applied to DPPs, suggests that trial may be more complex than if only the *per se* standard applied. Finally, all Defendants moved the Court to decertify the Shell Egg litigation class. ECF No. 1433. Although Plaintiffs' opposition to that motion demonstrates that decertification is inappropriate and the motion is meritless, and Plaintiffs are confident this case will proceed to trial, the decertification motion also adds to the uncertainty in this litigation.

Accordingly, although Plaintiffs are confident in the strength of their case against MFI and the likelihood of success in defeating the motion for decertification and in prevailing at trial, the outcome is nonetheless uncertain. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 639; *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475-76 (S.D.N.Y. 1998) ("Antitrust litigation in general, and class action litigation in particular, is unpredictable. . . .

[18] Mem. at 6-8, 24, 31-32, Sept. 28, 2016 (ECF No. 1444).

[19] Order Granting, in Part, Defs. Mot. for Summ J. as to DAPs and IPPs on Liability, Sept. 9, 2016 (ECF No. 1438).

[T]he history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal."). Moreover, even after trial is concluded, there would very likely be one or more lengthy appeals. *In re Remeron End-Payor Antitrust Litig.*, No. 02-cv-2007, 2005 WL 2230314, at *17 (D.N.J. Sept. 13, 2005). The degree of uncertainty supports preliminary approval of the proposed Settlement Agreement. *See In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995).

Class counsel have considered the complexities of this litigation, the risks and expense of continuing to trial against MFI, and the likely appeal if Plaintiffs do prevail at trial. After weighing these against the guaranteed recovery to the Class and what Class Counsel believe to be the significant benefits of the Settlement Amount and MFI's cooperation obligations, Class Counsel firmly believe the Settlement represents a desirable resolution of this litigation as to MFI.

All of the relevant factors—the terms of the settlement, the nature of the negotiations, the well-advanced state of the litigation at the time of settlement, the experience of Class Counsel and the risks of proceeding against MFI—support the conclusion that the Settlement falls within the range of possible final approval and is entitled to the presumption of fairness, permitting notice to issue to the Class.

V. THE CLASS DEFINED IN THE SETTLEMENT AGREEMENT IS COTERMINOUS WITH THE LITIGATION CLASS PREVIOUSLY CERTIFIED.

Rule 23 governs the issue of class certification for both litigation and settlement classes. A class should be certified where the four requirements of Rule 23(a) are satisfied, and when one of the three subsections of Rule 23(b) is also met. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d at 527-30. 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). In addition to satisfying Rule 23(a), a class much also satisfy the requirements of Rule 23(b)(3), which authorizes class certification if "the court finds that the questions of law or fact common 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).

As noted *supra*, the MFI Settlement Agreement defines the Class as follows:

> All individuals and entities that purchased shell eggs from caged birds in the United States directly from Defendants during the Class Period from September 24, 2004 through December 31, 2008.
>
> Excluded from the Class are the Defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities. Also excluded from the Class are purchasers of "specialty" shell eggs (such as "organic," "certified organic," "free range," "cage free," "nutritionally enhanced," or "vegetarian fed") and purchasers of hatching eggs, which are used by poultry breeders to produce breeder stock or growing stock for laying hens or meat.

Settlement Agreement ¶ 18. This Class definition is identical to the definition of the Shell Egg litigation class previously certified by this Court. Order Certifying Shell Egg Litigation Class ¶ 1, Feb. 3, 2016 (ECF No. 1372).

The Court may therefore rely on its prior findings that the Class, so defined, satisfies Rule 23. *See, e.g.*, *In re Polyurethane Foam Antitrust Litig*., 135 F. Supp. 3d 679, 684 (N.D. Ohio 2015) (noting that the court previously certified a litigation class using the same class definition as the settlement class with the exception of the settlement class's reference to opt-outs

and concluding, therefore, that the settlement class satisfies Rule 23), *recons. denied*, No. 10-md-2196, 2015 WL 12748013 (N.D. Ohio Dec. 21, 2015); *Diaz v. Hillsborough Cty. Hosp. Auth.*, No. 90-cv-120, 2000 WL 1682918, at *1 (M.D. Fla. Aug. 7, 2000) (approving the class for settlement purposes where the class was substantially similar to the litigation class previously certified as satisfying Rule 23(a) and (b)). *Cf. In re Processed Egg Prods. Antitrust Litig*., 284 F.R.D. 249, 259 (E.D. Pa. 2012) (noting that a court must determine whether the settlement class satisfies Rule 23 when a litigation class has not yet been certified).

In its Memorandum certifying the Shell Egg litigation class,[20] this Court previously found that the same class defined under the MFI Settlement Agreement satisfies Rule 23's requirements of: (1) *numerosity*, because the class includes potentially more than 13,000 members (Mem. at 7, Nov. 12, 2015 (ECF No. 1346)); (2) *commonality*, because the allegation that Defendants conspired to restrict egg supply are common to each class member and can be proven on a class-wide basis (*id.*); (3) *typicality and adequacy*, because the prices paid by all class members for shell eggs were affected by the conspiracy and differences in methods for purchasing and pricing did not create intra-class conflicts (*id.* at 7-12); (4) *ascertainability*, because the class is defined by objective criteria and is ascertainable using Defendants' transaction data and Plaintiffs' purchase records (*id.* at 12-13); (5) *predominance*, because Defendants' antitrust violations and any defenses may be proven by evidence common to the class, antitrust injury was likewise susceptible to common proof, including expert economic and statistical evidence of antitrust impact, that all or virtually all of the class members would have been affected by the conspiracy, and that individual issues did not predominate (*id.* at 13-59); and (6) *superiority and manageability*, because interests of efficiency and economy favored

[20] Am. Mem., Nov. 12, 2015 (ECF No. 1346).

litigating the class antitrust claims (*id.* at 59-60). Accordingly, because the Class defined in the MFI Settlement Agreement is identical to the certified Shell Egg class it satisfies Rule 23.

VI. PLAINTIFFS' MOTION FOR LEAVE TO FILE MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

Plaintiffs also seek leave to file a motion for an award of attorneys' fees and for reimbursement of litigation expenses from the MFI Settlement Fund.[21] Class Counsel propose that their motion for attorneys' fees and for reimbursement of expenses be filed 45 days before the Settlement objection and opt-out deadline, and shall be posted on the www.eggproductssettlement.com website. In their forthcoming proposed form of Notice, Class Counsel will propose that that the Notice of the MFI Settlement will inform Class members of: (1) the maximum amount of fees that Class Counsel will seek from the Settlement Amount; (2) the date on which Plaintiffs' fee and expense motion will be filed and that the motion will be available on the settlement website for Class members' review; and (3) their right to object to the motion in whole or in part, and the means by which they may do so. This will afford Class members both sufficient notice of the motion and a reasonable opportunity to review it prior to determining whether to object to the motion or the Settlement Agreement or to opt-out of the class.[22]

VII. CONCLUSION

For the reasons set forth above, Plaintiffs request that the Court preliminarily approve the Settlement Agreement between Plaintiffs and MFI and grant Plaintiffs leave to file a motion for attorneys' fees and reimbursement of litigation expenses as provided in the Proposed Order.

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

[22] *See* Order at 1 n.2, Aug. 15, 2013 (ECF No. 727) (concluding that the class must have sufficient notice of, and adequate opportunity to object to, a motion for fees and expenses prior to the objection deadline).

Dated: January 5, 2017

Respectfully submitted,

/s/ Mindee J. Reuben

Mindee J. Reuben
LITE DEPALMA & GREENBERG LLC
1835 Market Street, Suite 2700
Philadelphia, PA 19103
mreuben@litedepalma.com
(267) 314-7980
(973) 623-0858 (fax)
mreuben@litedepalma.com

Co-Lead Counsel and Liaison Counsel for Direct Purchaser Plaintiffs

Michael D. Hausfeld
HAUSFELD LLP
1700 K Street NW
Suite 650
Washington, DC 20006
(202) 540-7200
(202) 540-7201 (fax)
mhausfeld@hausfeldllp.com

Co-Lead Counsel for Direct Purchaser Plaintiffs

Stanley D. Bernstein
BERNSTEIN LIEBHARD LLP
10 East 40th Street
New York, New York 10016
(212) 779-1414
(212) 779-3218 (fax)
bernstein@bernlieb.com

Co-Lead Counsel for Direct Purchaser Plaintiffs

Stephen D. Susman
SUSMAN GODFREY LLP
654 Madison Avenue, 5th Floor
New York, NY 10065-8404
(212) 336-8330
(212) 336-8340 (fax)

ssusman@susmangodfrey.com

Co-Lead Counsel for Direct Purchaser Plaintiffs

On the Brief:

Stephen R. Neuwirth
QUINN EMANUEL URQUHART & SULLIVAN
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000
(212) 849-7165
stephenneuwirth@quinnemanuel.com

Ronald J. Aranoff
WOLLMUTH MAHER & DEUTSCH LLP
500 Fifth Avenue-12th Floor
New York, New York 10110
212 382-3300
212 382-0050
raranoff@wmd-law.com

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF PENNSYLVANIA

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

[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT WITH MICHAEL FOODS, INC. AND GRANTING LEAVE TO FILE MOTION FOR FEES AND REIMBURSEMENT OF EXPENSES

It is hereby ORDERED AND DECREED as follows:

1. The motion of Direct Purchaser Plaintiffs for preliminary approval of the proposed settlement, which Defendant Michael Foods, Inc. ("Michael Foods") does not oppose, is hereby GRANTED.

2. The Court finds that the proposed settlement with Michael Foods, as set forth in the Settlement Agreement, subject to final determination following an approved form of and plan for notice and a fairness hearing, falls within the range of reasonableness and is sufficiently fair, reasonable and adequate to the following class defined in the Settlement Agreement:

> All individuals and entities that purchased shell eggs from caged birds in the United States directly from Defendants during the Class Period from September 24, 2004 through December 31, 2008.
>
> Excluded from the Class are the Defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities. Also excluded from the Class are purchasers of "specialty" shell eggs (such as "organic," "certified organic," "free range," "cage free," "nutritionally enhanced," or "vegetarian fed") and purchasers of hatching eggs, which are used by poultry breeders to produce breeder stock or growing stock for laying hens or meat.

3. As the Court previously certified a Shell Egg litigation class, finding it fully complied with the requirements of Federal Rule of Civil Procedure 23, and the class defined in the proposed MFI Settlement Agreement is identical to that litigation class (ECF No. 1372), the Court need not make additional Rule 23 findings regarding the class defined in the MFI Settlement Agreement.

4. Direct Purchaser Plaintiffs' request for leave to file a motion for attorneys' fees and reimbursement of litigation expenses is hereby APPROVED and shall be filed in accord with the deadline set forth in this Order.

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

SIGNIFICANT DATES

6. Direct Purchaser Plaintiffs' Motion for Fees and Expenses: Must be filed 90 days prior to the Fairness Hearing (exact date to be inserted in Direct Mail Notice and Publication Notice).

7. Objections to the Michael Foods Settlement: Must be postmarked 45 days prior to the Fairness Hearing (exact date to be inserted in Direct Mail Notice and Publication Notice).

8. Requests for Exclusion from the Michael Foods Settlement: Must be postmarked or hand delivered 45 days prior to the Fairness Hearing (exact date to be inserted in Direct Mail Notice and Publication Notice).

9. Motion for Final Approval: Must be filed at least 30 days prior to the Fairness Hearing.

10. Fairness Hearing: _____, at __:__ _.m. [approximately 6 months from preliminary approval], United States District Court, Eastern District of Pennsylvania, 601 Market Street, Courtroom ___, Philadelphia, PA 19106-1797 (exact date to be inserted in Direct Mail Notice and Publication Notice). The date, time, and location of this hearing are subject to change, and Class members are advised to check www.eggsproductssettlement.com for any updates.

BY THE COURT:

_____
Gene E.K. Pratter
United States District Judge

Date:_____

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF PENNSYLVANIA

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

DECLARATION OF STANLEY D. BERNSTEIN IN SUPPORT OF DIRECT PURCHASER PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT BETWEEN DIRECT PURCHASER PLAINTIFFS AND DEFENDANT MICHAEL FOODS, INC.

I, Stanley D. Bernstein, declare as follows:

1. I am one of the founding partners of the law firm Bernstein Liebhard LLP. I am one of the Court-appointed Co-Lead Counsel for Direct Purchaser Class Plaintiffs in the above captioned action, along with counsel from Hausfeld LLP, Lite DePalma Greenberg, LLC, and Susman Godfrey LLP.

2. I submit this declaration in support of the accompanying motion for preliminary approval of the proposed settlement agreement between Michael Foods, Inc. and Direct Purchaser Class Plaintiffs.

3. I was among the principal negotiators of the proposed Settlement Agreement with Michael Foods, along with other Co-Lead Counsel for Direct Purchasers, and Stephen Neuwirth of Quinn Emanuel Urquhart & Sullivan LLP.

4. The most recent settlement negotiations with Michael Foods were conducted by experienced counsel on both sides through arm's length negotiations during the latter part of

2016. Michael Foods and Class Counsel were prepared to continue litigating this action and to proceed to trial against Michael Foods if no appropriate settlement could be reached.

5. Initial discussions between Michael Foods and Co-Lead Counsel began in October 2013, when Direct Purchaser Plaintiffs and almost all of the then-remaining Defendants, including Michael Foods, undertook global settlement discussions in an effort to fully resolve this action as to Direct Purchaser Plaintiffs. The Parties engaged the mediation services of the Honorable Harlan A. Martin (ret.) of JAMS. In advance of the global mediation, the Parties prepared extensive confidential mediation briefs that were submitted to Judge Martin. The mediation took place on October 9, 2013, but no resolution was achieved as the Parties' positions were far apart.

6. In the years following the October 2013 global mediation, Class Counsel and MFI spoke at various times to explore settlement informally, but were unable to make progress to resolve the claims against MFI. Negotiations did not begin again in earnest until nearly three years later.

7. Settlement discussions between Class Counsel and Michael Foods resumed in or around early July 2016. At that time, discovery (which involved dozens of depositions and the production of more than one million documents by Defendants, the review of which documented the massive conspiracy in which MFI and other Defendants and co-conspirators engaged) had long since closed. The parties has also fully briefed and argued summary judgment motions, which were pending before the Court. At the time of these subsequent discussion, the Court had already issued its Order certifying a Shell Egg litigation class for the period September 24, 2004 through December 31, 2008 and denying certification of an Egg Products subclass. Defendants'

petition to the Court of Appeals for the Third Circuit seeking review of the Court's class certification decision had also been denied.

8. At the outset of the discussions during summer of 2016, there was a wide gulf between the Parties' settlement positions, and the prospects for settlement with Michael Foods appeared dim.

9. By mid-August 2016, Class Counsel and Michael Foods agreed to undertake an in-person settlement mediation, scheduled to take place on September 8, 2016, and retained the services of Jed D. Melnick of JAMS, an experienced, qualified mediator. In advance of the mediation, the Parties submitted materials supporting their positions, including the briefing and select exhibits submitted in support of the Parties' respective motions for summary judgment.

10. In July and August 2016, prior to the mediation, the Court issued orders denying all motion to exclude expert testimony on liability and damages.

11. On September 2, 2016, less than one week before the mediation was scheduled to take place, all remaining Defendants, including Michael Foods, moved the Court to decertify the Shell Egg litigation class. Class Counsel filed their opposition to that motion on December 1, 2016, which included a supplemental expert report.

12. The mediation took place on September 8, 2016 and lasted almost all day. During the mediation, it became clear that the Parties' settlement positions diverged significantly, and the Parties ended that mediation session without resolution. In the weeks and months following the mediation, Mr. Melnick continued to mediate settlement negotiations between the Parties via telephone and email.

13. After the in-person mediation, as negotiations were on-going, in mid-September 2016, the Court issued several orders resolving the Parties' summary judgment motions. The

Court granted, in part, Plaintiffs' motion regarding Defendants' Capper-Volstead Act defenses and denied Michael Foods dispositive summary judgment motion. Michael Foods subsequently filed a motion with the Court seeking certification, under 28 U.S.C. § 1292(b), for interlocutory appeal of the Court's September 2016 Order denying Michael Food's motion. Direct Purchasers filed their brief in opposition on November 21. 2016.

14. Throughout this period, negotiations continued in earnest, and by early December 2016, the Parties' positions began to converge.

15. On December 6, 2016, after working through the weekend with the mediator, Class Counsel and Michael Foods reach agreement on the principle terms of the Settlement Agreement. The Parties executed a final settlement agreement on December 8, 2016. The Settlement provides that Michael Foods shall pay $75,000,000 in cash and cooperate with Direct Purchaser Plaintiffs prior to and at the time of trial of the claims against Non-Settling Defendants. A true, correct and complete copy of this Settlement Agreement is attached as Exhibit A.

16. On December 12, 2016, Michael Foods deposited the full Settlement Amount into the Parties' agreed upon Settlement Fund escrow account.

17. At the time of the mediation and execution of the Settlement Agreement, after completion of fact and expert discovery, briefing and resolution of both class certification and summary judgment motions, and as the case was approaching the eve of trial, Direct Purchaser Plaintiffs had significant and comprehensive knowledge of Defendants' antitrust conspiracy and the strengths and weaknesses of their claims and Defendants' asserted defenses.

18. It is my opinion, which I understand is shared by all Class Counsel, that the Settlement Agreement with Michael Foods is fair and reasonable and in the best interests of the Class.

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

Dated: January 5, 2017

/s/ Stanley D. Bernstein
Stanley D. Bernstein

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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

SETTLEMENT AGREEMENT BETWEEN DIRECT PURCHASER PLAINTIFFS AND DEFENDANT MICHAEL FOODS, INC.

This Settlement Agreement ("Agreement") is made and entered into this 8th day of December 2016 (the "Execution Date") by and between Michael Foods, Inc., together with its past and present parents, subsidiaries and affiliates ("Michael Foods"), and Direct Purchaser Plaintiffs' Class representatives ("Plaintiffs") (as defined herein at Paragraph 11), both individually and on behalf of a Class (as defined herein at Paragraph 5) of direct purchasers of Shell Eggs (as defined herein at Paragraph 16).

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

WHEREAS, Plaintiffs allege that Michael Foods participated in an unlawful conspiracy to raise, fix, maintain, and/or stabilize the price of certain Shell Eggs in the United States at artificially high levels in violation of Section 1 of the Sherman Act;

WHEREAS, Plaintiffs have conducted an investigation into the facts and the law regarding the Action and have concluded that a settlement with Michael Foods according to the terms set forth below is fair, reasonable, and adequate, and beneficial to and in the best interests of Plaintiffs and the Class;

WHEREAS, Michael Foods denies all allegations of wrongdoing in the Action. However, despite its belief that it is not liable for, and has good defenses to, the claims alleged in the Action, Michael Foods desires to settle the Action, and thus avoid the expense, risk, exposure, inconvenience, and distraction of continued litigation of the Action, or any action or proceeding relating to the matters being fully settled and finally put to rest in this Agreement;

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

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

A. Definitions

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

1. "Class Counsel" shall refer to the law firms of Lite DePalma Greenberg, LLC, 1835 Market Street, Suite 2700, Philadelphia, PA 19103; Hausfeld LLP, 1700 K

Street NW, Suite 650, Washington, DC 20006; Bernstein Liebhard LLP, 10 East 40th Street, New York, NY 10016; and Susman Godfrey, 654 Madison Avenue, 5th Floor, New York, NY 10065-8404. "Plaintiffs' Counsel" shall refer to the law firms identified on pages 147-151 of the Third Consolidated Amended Class Action Complaint filed in the Action on January 4, 2013, provided however that Lite DePalma Greenberg, LLC has been substituted for Weinstein Kitchenoff & Asher LLC as Plaintiffs' Counsel (ECF No. 1185).

2. "Michael Foods' Counsel" shall refer to the law firms of Weil, Gotshal & Manges LLP, 1300 Eye Street NW, Washington, DC 20005 and Stinson Leonard Street, 150 South First Street, Suite 2300, Minneapolis, MN 55402.

3. "Counsel" means both Class Counsel and Michael Foods' Counsel, as defined in Paragraphs 1 and 2 above.

4. "Claims Administrator" shall mean Garden City Group, LLC.

5. "Class Member" or "Class" shall mean each member of the settlement class, as defined in Paragraph 18 of this Agreement, who does not timely elect to be excluded from the Class, and includes, but is not limited to, Plaintiffs.

6. "Class Period" shall mean the period from and including September 24, 2004, up to and including December 31, 2008.

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

8. "Final Approval" shall mean the definition given to that phrase in Paragraph 23 hereof.

9. "Non-Settling Defendants" shall refer to remaining Defendants other than Michael Foods.

10. "Other Settling Defendants" shall refer to Cal-Maine Foods, Moark LLC, Norco Ranch, Inc., Land O'Lakes, Inc., Sparboe Farms, Inc., United Egg Producers, United States Egg Marketers, Hillandale Farms of Pa., Inc. and Hillandale Gettysburg, L.P., National Food Corporation, NuCal Foods, Inc., and Midwest Poultry Services, LP.

11. "Plaintiffs" shall mean each of the following named Class representatives: T.K. Ribbing's Family Restaurant, LLC; Eby-Brown Company LLC; John A. Lisciandro d/b/a/ Lisciandro's Restaurant; and Karetas Foods, Inc.

12. "Releasees" shall refer, jointly and severally, and individually and collectively, to Michael Foods, its parents (including Post Holdings, Inc.), subsidiaries, and affiliated companies, and its past and present officers, directors, employees, agents, insurers, attorneys, shareholders, joint venturers that are neither Non-Settling Defendants nor Other Settling Defendants, partners and representatives, as well as the predecessors, successors, heirs, executors, administrators, and assigns of each of the foregoing.

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

14. "Settlement Amount" shall refer to $75,000,000 (seventy-five million) U.S. dollars.

15. "Settlement Fund" shall refer to the funds accrued in the escrow account established in accordance with Paragraph 32 below.

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

17. " Total Sales" shall mean the sum of the annual U.S. sales by Michael Foods, Non-Settling Defendants, and Other Settling Defendants of Shell Eggs, for the years during the Class Period, to be mutually agreed upon by Counsel.

B. Class Certification

18. The class definition for purposes of this settlement between Direct Purchaser Class Plaintiffs and Michael Foods shall be the same as the class certified by the Court in its February 2, 2016 Order (Docket 1372) and is defined as follows:

> All individuals and entities that purchased shell eggs from caged birds in the United States directly from Defendants during the Class Period from September 24, 2004 through December 31, 2008.
>
> Excluded from the Class are the Defendants, their co-conspirators, and their respective parents, subsidiaries and affiliates, as well as any government entities. Also excluded from the Class are purchasers of "specialty" shell eggs (such as "organic," "certified organic," "free range." "cage free", "nutritionally enhanced," or "vegetarian fed") and purchasers of hatching eggs, which are used by poultry breeders to produce breeder stock or growing stock for laying hens or meat.

C. Approval of this Agreement and Dismissal of Claims

19. Plaintiffs and Michael Foods shall use their best efforts to effectuate this Agreement, including cooperating in promptly seeking Court approval of this Agreement and securing both the Court's certification of the Class and the Court's approval of

procedures, including the giving of Class notice under Federal Rules of Civil Procedure 23(c) and (e), to secure the prompt, complete, and final dismissal with prejudice of the Action as to Michael Foods.

20. Within two (2) business days after the execution of this Agreement by Michael Foods, Counsel shall jointly file with the Court a stipulation for suspension of all proceedings against Michael Foods in the Action pending approval of this Agreement. Within twenty (20) business days after execution of the Agreement by Michael Foods, Plaintiffs shall submit to the Court a motion (the "Motion"): for preliminary approval of the Agreement and certification of a Class for settlement purposes ("Preliminary Approval"), and authorization to disseminate notice of Class certification and the settlement. The Motion shall include: (a) the proposed definition of the Class for settlement purposes as set forth in Paragraph 18 of this Agreement; (b) a proposed form of, method for, and date of dissemination of notice; and (c) a proposed schedule for the filing of Plaintiffs' Motion for Fees and Expenses, the filing of a Motion to approve finally the Settlement Agreement, and a final fairness hearing; and (d) a proposed form of order preliminarily approving the Settlement and certifying the class for settlement purposes. The text of the items referred to in clauses (a) through (d) above shall be proposed by Plaintiffs subject to the agreement of Michael Foods, which agreement shall not be unreasonably withheld. After Preliminary Approval, and subject to approval by the Court of the means for dissemination of notice, individual notice of the Agreement ("Class Notice") shall be mailed to persons and entities who are located in the United States and who purchased Shell Eggs directly from Michael Foods, any Non-Settling Defendant(s) in the Action, or Other Settling Defendants during the Class Period that: are

identified by or were previously identified by Michael Foods; were previously identified by Other Settling Defendants; are identified by or were previously identified by Non-Settling Defendants; and are identified by Plaintiffs and Plaintiffs' Counsel in the Action. In addition, after Preliminary Approval, and subject to Court approval of the means for dissemination of notice, Class Notice shall also be published once in the *Wall Street Journal* and in such other trade journals targeted towards direct purchasers of Shell Eggs, if any, proposed by Class Counsel. Within twenty (20) days after the Execution Date, Michael Foods shall supply to Class Counsel at Michael Foods' expense and in such form as kept in the regular course of business (electronic format if available) such names and addresses of potential Class Members as it has or confirm that it has provided that information previously. If practicable and approved by the Court, Plaintiffs may combine dissemination of notice of the certification of the Class for settlement purposes and the Agreement with the dissemination of notice of other settlement agreements that have been or may be reached with other Defendants in the Action, and may use a common Claim Form that combines claims by Settlement Class members from the Settlement with Michael Foods with claims by Settlement Class members from settlements reached with Other Settling Defendants for which Settlement Class members have not yet submitted claims.

21. Within twenty (20) days of the date on which the Court preliminarily approves the Agreement and certifies a Class for settlement purposes, Michael Foods shall provide to Plaintiffs (to the extent that such data have not already been produced by Michael Foods in discovery in the Action) in a text delimited format, Michael Foods' sales data over the Class Period sufficient to show the dollar volume of annual sales of

Shell Eggs to each of Michael Foods' customers during the Class Period. Within twenty (20) days after expiration of the deadline established by the Court and set forth in the notice by which potential Class Members must request exclusion from the Settlement Class ("Opt-Out Deadline"), Plaintiffs shall provide Michael Foods, through Michael Foods' Counsel, a written list of all potential Class Members that have exercised their right to request exclusion from the Class, the dollar volume of purchases of Shell Eggs during the Class Period for each such potential Class Member and the percentage that each such potential Class Member's purchases represents of the Total Sales as reflected in the data produced in this litigation.

22. Plaintiffs shall, in accordance with the schedule set forth in the Preliminary Approval Order, seek entry of an order and final judgment, the text of which shall be proposed by Plaintiffs subject to the agreement of Michael Foods, which agreement shall not be unreasonably withheld:

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

b. Directing that, as to Michael Foods, the Action be dismissed with prejudice and, except as explicitly provided for in this Agreement, without costs;

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

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

e. Requiring Class Counsel to file with the Clerk of the Court a record of potential Class Members that timely excluded themselves from

the Class, and to provide a copy of the record to counsel for Michael Foods.

23. This Agreement shall become final only when (a) the Court has entered an order finally approving this Agreement under Rule 23(e) of the Federal Rules of Civil Procedure; (b) the Court has entered final judgment dismissing the Action against Michael Foods on the merits with prejudice as to all Class Members and without costs, and (c) the time for appeal or to seek permission to appeal from the Court's approval of this Agreement and entry of a final judgment as described in clause (b) above has expired or, if appealed, approval of this Agreement and the final judgment have been affirmed in their entirety by the Court of last resort to which such appeal has been taken and such affirmance has become no longer subject to further appeal or review ("Final Approval"). It is agreed that neither the provisions of Rule 60 of the Federal Rules of Civil Procedure nor the All Writs Act, 28 U.S.C. § 1651, shall be taken into account in determining the above-stated times. On the Execution Date, Plaintiffs and Michael Foods shall be bound by the terms of this Agreement, and the Agreement shall not be rescinded except in accordance with Paragraphs 28 and 29 of this Agreement.

D. Release and Discharge

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

damages, and the consequences thereof, arising out of or resulting from: (i) any agreement or understanding between or among two or more Defendants, (ii) Defendants' reduction or restraint of supply, Defendants' reduction of or restrictions on production capacity, or (iii) Defendants' pricing, selling, discounting, marketing, or distributing of Shell Eggs in the United States or elsewhere. The claims released hereunder include but are not limited to any conduct alleged, and causes of action asserted, or that could have been alleged or asserted, whether or not concealed or hidden, in the Complaints filed in the Action (the "Complaints"), which in whole or in part arise from or are related to the facts and/or actions described in the Complaints, including under any federal or state antitrust, unfair competition, unfair practices, price discrimination, unitary pricing, trade practice, consumer protection, fraud, RICO, civil conspiracy law, or similar laws, including, without limitation, the Sherman Antitrust Act, 15 U.S.C. § 1 et seq., from the beginning of time to December 31, 2008, (the "Released Claims"). Releasors shall not, after the date of this Agreement, seek to recover against any of the Releasees for any of the Released Claims. Notwithstanding anything in this Paragraph, Released Claims shall not include, and this Agreement shall not and does not release, acquit or discharge, claims based solely on purchases of Shell Eggs outside of the United States on behalf of persons or entities located outside of the United States at the time of such purchases. This Release is made without regard to the possibility of subsequent discovery or existence of different or additional facts.

25. Each Releasor waives California Civil Code Section 1542 and similar or comparable present or future law or principle of law of any jurisdiction. Each Releasor hereby certifies that he, she, or it is aware of and has read and reviewed the following

provision of California Civil Code Section 1542 ("Section 1542"): "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." The provisions of the release set forth above shall apply according to their terms, regardless of the provisions of Section 1542 or any equivalent, similar, or comparable present or future law or principle of law of any jurisdiction. Each Releasor may hereafter discover facts other than or different from those which he, she, or it knows or believes to be true with respect to the claims that are the subject matter of this Settlement Agreement, but each Releasor hereby expressly and fully, finally and forever waives and relinquishes, and forever settles and releases any known or unknown, suspected or unsuspected, contingent or non-contingent, claim whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts, as well as any and all rights and benefits existing under (i) Section 1542 or any equivalent, similar or comparable present or future law or principle of law of any jurisdiction and (ii) any law or principle of law of any jurisdiction that would limit or restrict the effect or scope of the provisions of the release set forth above, without regard to the subsequent discovery or existence of such other or different facts.

26. In addition to the provisions of Paragraphs 24 and 25, each Releasor hereby expressly and irrevocably waives and releases, upon this Agreement becoming finally approved by the Court, any and all defenses, rights, and benefits that each Releasor may have or that may be derived from the provisions of applicable law which, absent such waiver, may limit the extent or effect of the release contained in Paragraphs

24 and 25. Each Releasor also expressly and irrevocably waives any and all defenses, rights, and benefits that the Releasor may have under any similar statute in effect in any other jurisdiction that, absent such waiver, might limit the extent or effect of the release.

27. The release and discharge set forth in Paragraphs 24 through 26 herein do not include claims relating to payment disputes, physical harm, defective product, or bodily injury (the "Excepted Claims") and do not include any Non-Settling Defendant or Other Settling Defendant.

E. Rescission

28. If the Court refuses to approve this Agreement or any part hereof, or if such approval is modified or set aside on appeal, or if the Court does not enter the final judgment provided for in Paragraph 23 of this Agreement, or if the Court enters the final judgment and appellate review is sought, and on such review, such final judgment is not affirmed, then Michael Foods and Plaintiffs shall each, in their sole discretion, have the option to rescind this Agreement in its entirety within ten (10) days of the action giving rise to such option. If this Agreement is rescinded, within ten (10) days of both the notice of rescission to Class Counsel and the Escrow Agent and Michael Foods' written instructions to the Escrow Agent, all amounts in the escrow account created pursuant to Paragraph 32 hereof, less any expenses authorized pursuant to this Agreement, shall be wire transferred to Michael Foods, pursuant to its instructions; provided, however, that simultaneous with its written instructions to the Escrow Agent, Michael Foods shall provide to Class Counsel notice of such instructions, and Class Counsel shall, within five (5) business days of receipt of such notice, notify the Escrow Agent of any objections to Michael Foods' instructions and funds shall not be wired until expiration of that objection

deadline. If Class Counsel object, the provisions of Article First, subsection h of the Escrow Agreement shall govern.

29. If Class Counsel notify Michael Foods, pursuant to Paragraph 21, that Class Members whose combined annual purchases of Shell Eggs from Michael Foods, Non-Settling Defendants, and Other Settling Defendants over the Class Period equal or exceed a percentage set forth in a Supplemental Agreement signed by the parties ("Opt-Out Threshold") have requested exclusion from this Agreement ("Excluded Class Members"), Michael Foods shall have the right and option, within fifteen (15) days after receipt of such notice, to rescind the Agreement.

30. The parties intend that the Supplemental Agreement shall be specifically disclosed to the Court and offered for in camera inspection by the Court at or prior to entry of the Preliminary Approval Order, but, subject to the Court's approval, it shall not be filed with the Court before the expiration of the Opt-Out Deadline unless ordered otherwise by the Court. The parties shall seek to keep the Opt-Out Threshold confidential before the Opt-Out Deadline. In the event that the Court directs that the Supplemental Agreement be filed prior to the Opt-Out Deadline, no party shall have any right to any relief by reason of such disclosure. Michael Foods shall give written notice to Class Counsel to invoke rights under this Paragraph to rescind the Agreement. If this Agreement is rescinded, subject to the terms of the Supplemental Agreement, all amounts in the escrow created pursuant to Paragraph 32 hereof, less any expenses, fees, or taxes authorized pursuant to this Agreement, shall be wire transferred to Michael Foods, pursuant to its instructions to the Escrow Agent; provided, however, that simultaneous with its written instructions to the Escrow Agent, Michael Foods shall provide to Class

Counsel notice of such instructions, and Class Counsel shall, within five (5) business days of receipt of such notice, notify the Escrow Agent of any objections to Michael Foods' instructions and funds shall not be wired until expiration of that objection deadline. If Class Counsel object, the provisions of Article First, subsection h of the Escrow Agreement shall govern.

31. In the event of rescission, if Final Approval of this Agreement is not obtained, or if the Court does not enter the final judgment provided for in Paragraph 23 of this Agreement, Class Counsel and Michael Foods agree that this Agreement, including its exhibits, and any and all negotiations, documents, information, and discussions associated with it shall be without prejudice to the rights of Michael Foods or Plaintiffs, shall not be deemed or construed to be an admission or denial, or evidence or lack of evidence of any violation of any statute or law or of any liability or wrongdoing, or of the truth or falsity of any of the claims or allegations made in this Action in any pleading, and shall not be used directly or indirectly, in any way, whether in this Action or in any other proceeding, unless such documents and/or information is otherwise obtainable by separate and independent discovery permissible under the Federal Rules of Civil Procedure.

F. Payment

32. Michael Foods shall pay or cause to be paid the Settlement Amount in settlement of the Action. The Settlement Amount shall be wire transferred by Michael Foods or its designee within twenty (20) days of the Execution Date into the Settlement Fund, which shall be established as an escrow account at a bank agreed to by Class Counsel and Michael Foods' Counsel, which agreement shall not be unreasonably

withheld, and administered in accordance with the Escrow Agreement attached hereto as Exhibit A.

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

34. Class Counsel may seek an award of attorneys' fees and reasonable litigation expenses approved by the Court, to be paid out of the Settlement Amount after the Final Approval of the Agreement. Michael Foods agrees not to object to Class Counsel's petition to the Court for payment of attorneys' fees, costs, and expenses from the Settlement Amount. Except to the extent that the Court may award attorneys' fees and litigation expenses to be paid out of the Settlement Amount, Michael Foods shall have no obligation to pay any fees or expenses for Class Counsel.

35. Upon entry of an order by the Court approving the request for an award of attorneys' fees and expenses and incentive awards for class representatives ("Attorneys' Fees Order") made pursuant to Paragraph 34 above, attorneys' fees may be distributed from the Settlement Fund pursuant to the terms of the fee order, provided however that any Class Counsel seeking to draw down their share of the attorneys' fees prior to Final Approval and the Attorneys' Fees Order becoming final shall secure the repayment of the amount drawn down by a letter of credit or letters of credit on terms, amounts, and by banks acceptable to Michael Foods, which acceptance shall not be unreasonably withheld. The Attorneys' Fees Order becomes final when the time for appeal or to seek permission to appeal from the Attorneys' Fees Order has expired or, if appealed, has been

affirmed by the Court of last resort to which such appeal has been taken and such affirmance has become no longer subject to further appeal or review.

36. In order to receive distribution of funds pursuant to Paragraph 34 prior to Final Approval and the Attorneys' Fees Order becoming final above, each Class Counsel shall be required to provide the Claims Administrator the approved letter(s) of credit in the amount of Class Counsel's draw-down, and shall be required to reimburse the Settlement Fund within thirty (30) days all or the pertinent portion of the draw-down with interest, calculated as the rate of interest published in the *Wall Street Journal* for 3-month U.S. Treasury Bills as of the close on the date that the draw-down was distributed, if Final Approval is not granted or if the award of attorneys' fees is reduced or overturned on appeal. The Claims Administrator may present the letter(s) of credit in the event the Class Counsel fails to honor the obligation to repay the amount withdrawn.

37. Disbursements for any payments and expenses incurred in connection with taxation matters relating to this Settlement Agreement shall be made from the Settlement Amount pursuant to section I of this Agreement upon written notice to the Escrow Agent by Class Counsel of such payments and expenses, and such amounts shall not be refundable to Michael Foods in the event that this Settlement Agreement is disapproved, rescinded, or otherwise fails to become effective.

G. Discovery Obligations

38. Prior to trial in this Action, Michael Foods shall, at the request of Class Counsel and through reasonable means (including, but not limited to, affidavits and declarations by persons qualified to testify as to authenticity) establish the authenticity and status as business records of documents produced by Michael Foods, and, to the

extent possible, any documents produced by Non-Settling Defendants, Settling Defendants, or the alleged co-conspirators in this Action authored or created by Michael Foods or sent to or received by Michael Foods. Class Counsel agree to use reasonable efforts to minimize the burden to Michael Foods of any such authentication or business records testimony.

39. Should a trial occur in this Action where the Direct Purchaser Plaintiff Class is a party, Michael Foods agrees that it will fully comply with a trial subpoena to produce up to four witnesses at the trial. Michael Foods' counsel agrees to accept service of the aforementioned subpoenas on Michael Foods behalf via email. Michael Foods agrees that it will not attempt to quash up to four trial subpoenas served by counsel for the Direct Purchaser Plaintiff Class for any reason. In addition, Michael Foods agrees that for purposes of this provision all Michael Foods' witnesses, limited to current employees, are deemed to "reside" within 100 miles of the Eastern District of Pennsylvania and will travel to the trial at the sole expense of Michael Foods. With respect to former employees, Michael Foods agrees it will cooperate in assisting Direct Purchaser Plaintiffs to locate and serve subpoenas, and if these witnesses elect to appear at trial, such appearance will be at the sole expense of Michael Foods.

H. Notice of Settlement to Class Members

40. Class Counsel shall take all necessary and appropriate steps to ensure that notice of this Settlement Agreement ("Notice") and the date of the hearing scheduled by the Court to consider the fairness, adequacy, and reasonableness of this Agreement is provided in accordance with the Federal Rules of Civil Procedure and any Court orders. Class Counsel will undertake all reasonable efforts to obtain from Non-Settling

Defendants the names and addresses of those persons that purchased Shell Eggs directly from any Non-Settling Defendant during the Class Period. Class Notice will be issued after Preliminary Approval by the Court and subject to any Court orders regarding the means of dissemination of notice.

41. Subject to court approval, disbursements for any payments and expenses incurred in connection with the costs of Notice and administration of the Settlement Agreement by the Claims Administrator shall be made from the Settlement Amount upon written notice to the Escrow Agent by Class Counsel of such payments and expenses, and such amounts, up to a maximum of $350,000, shall not be refundable to Michael Foods in the event that this Settlement Agreement is disapproved, rescinded, or otherwise fails to become effective.

I. Taxes

42. Class Counsel shall be solely responsible for directing the Claims Administrator to file all informational and other tax returns necessary to report any taxable and/or net taxable income earned by the Settlement Amount. Further, Class Counsel shall be solely responsible for directing the Escrow Agent to make any tax payments, including interest and penalties due, on income earned by the Escrow Funds ("Tax Expenses"). Class Counsel shall be entitled to direct the Escrow Agent in writing to pay customary and reasonable Tax Expenses, including reasonable professional fees and expenses incurred in connection with carrying out their responsibilities as set forth in this Paragraph, from the applicable Escrow Fund by notifying the Escrow Agent in writing and as provided in paragraph 37 herein. Michael Foods shall have no responsibility to make any tax filings relating to this Settlement Agreement.

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

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

J. Miscellaneous

45. This Agreement does not settle or compromise any claim by Plaintiffs or any Class Member asserted in the Action against any Non-Settling Defendant or any potential defendant other than the Releasees. All rights of any Class Member against

Non-Settling Defendants or any other person or entity other than the Releasees are specifically reserved by Plaintiffs and the Class Members. The sales of Shell Eggs by Michael Foods to Class Members shall remain in the case against the Non-Settling Defendants in the Action as a basis for damage claims and shall be part of any joint and several liability claims against Non-Settling Defendants in the Action or other persons or entities other than the Releasees.

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

47. This Agreement, together with the Supplemental Agreement provided under paragraph 30 and incorporated by reference herein, constitutes the entire agreement among Plaintiffs (and the other Releasors) and Michael Foods (and the other Releasees) pertaining to the settlement of the Action against Michael Foods only and supersedes any and all prior and contemporaneous undertakings of Plaintiffs and Michael Foods in

connection therewith. In entering into this Agreement, Plaintiffs and Michael Foods have not relied upon any representation or promise made by Plaintiffs or Michael Foods not contained in this Agreement. This Agreement may be modified or amended only by a writing executed by Plaintiffs and Michael Foods and approved by the Court.

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

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

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

51. In the event this Agreement is not approved or is terminated, or in the event that the order and final judgment approving the settlement is entered but is substantially reversed, modified, or vacated, the pre-settlement status of the litigation (including, without limitation, any applicable tolling of all statutes of limitations) shall be restored, and the Agreement shall have no effect on the rights of Michael Foods or Plaintiffs to prosecute or defend the pending Action in any respect, including the right to litigate fully the issues related to Class certification, raise personal jurisdictional

defenses, or any other defenses, which rights are specifically and expressly retained by Michael Foods.

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

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

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

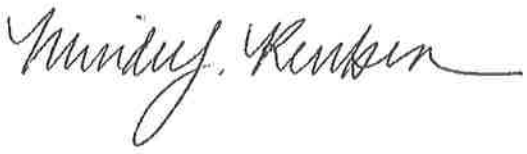
55. Where this Agreement requires any party to provide notice or any other communication or document to any other party, such notice, communication, or document shall be provided by electronic mail or overnight delivery to:

For the Class:
Mindee J. Reuben
LITE DEPALMA & GREENBERG, LLC
1835 Market Street, Suite 2700
Philadelphia, PA 19103
mreuben@litedepalma.com

For Michael Foods:
Carrie C. Mahan
Weil, Gotshal & Manges LLP
1300 Eye Street NW
Washington, DC 20005
carrie.mahan@weil.com

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

Dated: December 8, 2016



Mindee J. Reuben
LITE DEPALMA & GREENBERG LLC
1835 Market Street, Suite 2700
Philadelphia, PA 19103
mreuben@litedepalma.com
(267) 314-7980
(973) 623-0858 (fax)
mreuben@litedepalma.com

Michael D. Hausfeld
HAUSFELD LLP
1700 K Street, Suite 650
Washington, DC 20006
(202) 540-7200
(202) 540-7201 (fax)
mhausfeld@hausfeld.com

Stanley D. Bernstein
BERNSTEIN LIEBHARD LLP
10 East 40th Street
New York, NY 10016
(212) 779-1414
(212) 779-3218 (fax)
bernstein@bemlieb.com

Stephen D. Susman
SUSMAN GODFREY LLP
654 Madison Avenue, 5th Floor
New York, NY 10065-8404
(212) 336-8330
(212) 336-8340 (fax)
ssusman@susrnangodfrey.com

(Co-Lead Counsel for the Class)

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

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Mindee J. Reuben
LITE DEPALMA & GREENBERG LLC
1835 Market Street, Suite 2700
Philadelphia, PA 19103
mreuben@litedepalma.com
(267) 314-7980
(973) 623-0858 (fax)
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Michael D. Hausfeld
HAUSFELD LLP
1700 K Street, Suite 650
Washington, DC 20006
(202) 540-7200
(202) 540-7201 (fax)
mhausfeld@hausfeld.com

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Stephen D. Susman
SUSMAN GODFREY LLP
654 Madison Avenue, 5th Floor
New York, NY 10065-8404
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(212) 336-8340 (fax)
ssusman@susrnangodfrey.com

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Mindee J. Reuben
LITE DEPALMA & GREENBERG LLC
1835 Market Street, Suite 2700
Philadelphia, PA 19103
mreuben@litedepalma.com
(267) 314-7980
(973) 623-0858 (fax)
mreuben@litedepalma.com

Michael D. Hausfeld
HAUSFELD LLP
1700 K Street, Suite 650
Washington, DC 20006
(202) 540-7200
(202) 540-7201 (fax)
mhausfeld@hausfeld.com

Stanley D. Bernstein
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New York, NY 10016
(212) 779-1414
(212) 779-3218 (fax)
bernstein@bemlieb.com

Stephen D. Susman
SUSMAN GODFREY LLP
654 Madison Avenue, 5th Floor
New York, NY 10065-8404
(212) 336-8330
(212) 336-8340 (fax)
ssusman@susrnangodfrey.com

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Dated: December 8, 2016

Mindee J. Reuben
LITE DEPALMA & GREENBERG LLC
1835 Market Street, Suite 2700
Philadelphia, PA 19103
mreuben@litedepalma.com
(267) 314-7980
(973) 623-0858 (fax)
mreuben@litedepalma.com

Michael D. Hausfeld
HAUSFELD LLP
1700 K Street, Suite 650
Washington, DC 20006
(202) 540-7200
(202) 540-7201 (fax)
mhausfeld@hausfeld.com

Stanley D. Bernstein
BERNSTEIN LIEBHARD LLP
10 East 40th Street
New York, NY 10016
(212) 779-1414
(212) 779-3218 (fax)
bernstein@bernlieb.com

Stephen D. Susman
Terrell W. Oxford
SUSMAN GODFREY LLP
654 Madison Avenue, 5th Floor
New York, NY 10065-8404
(212) 336-8330
(212) 336-8340 (fax)
ssusman@susmangodfrey.com
toxford@susmangodfrey.com

(Co-Lead Counsel for the Class)

Carrie C. Mahan
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street NW,
Washington, DC 20005
(202) 682-7231
(202) 857-0940 (fax)
carrie.mahan@weil.com

(On Behalf of Michael Foods, Inc.)

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 Actions	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **DIRECT PURCHASER PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT BETWEEN DIRECT PURCHASER PLAINTIFFS AND MICHAEL FOODS, INC. AND LEAVE TO FILE MOTION FOR AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES FROM THE MICHAEL FOODS, INC. SETTLEMENT FUND** via electronic mail and this Court's ECF service.

Liaison Counsel

Jan P. Levine, Esquire
PEPPER HAMILTON LLP
3000 Two Logan Square
18th & Arch Streets
Philadelphia, PA 19103
levinej@pepperlaw.com

Defendants' Liaison Counsel

Krisnha B. Narine, Esquire
Lauletta Birnbaum
100 S. Broad St.
Suite 905
Philadelphia, PA 19110
knarine@lauletta.com

Indirect Purchaser Plaintiffs' Liaison Counsel

William J. Blechman, Esquire
KENNY NACHWALTER, P.A.
1100 Miami Center
201 South Biscayne Boulevard
Miami, FL 33131
wblechman@kennynachwalter.com

Direct Action Plaintiffs' Liaison Counsel

Date: January 5, 2017

BY: /s/ Mindee J. Reuben
Mindee J. Reuben