UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

IN RE PEANUT FARMERS ANTITRUST LITIGATION	Case No. 2:19-cv-00463 **Honorable Raymond A. Jackson** **Honorable Lawrence R. Leonard**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH DEFENDANT BIRSONG, FOR CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS, AND FOR RELATED RELIEF

I. INTRODUCTION

Plaintiffs have reached a proposed settlement of their claims with Defendant Birdsong Corporation ("Birdsong").[1] Pursuant to the Settlement Agreement, Birdsong will pay the sum of $50 million ($50,000,000.00) in United States dollars into escrow for the benefit of the Settlement Class, and will provide material cooperation to Plaintiffs in this litigation.

Plaintiffs now move the Court to preliminarily approve the Settlement Agreement, certify the proposed Settlement Class, and appoint Interim Co-Lead Counsel as co-lead counsel for the Settlement Class. Plaintiffs also ask the Court to appoint Angeion Group ("Angeion") as the notice and claims administrator for Plaintiffs in this case, and to appoint The Huntington National Bank ("Huntington") as the escrow agent in this litigation. As discussed in this memorandum, at a later date Interim Co-Lead Counsel will move the Court to approve a program to notify members of the Settlement Class of this and any other then-pending settlements, as well as notice to the class if Plaintiffs' motion for class certification is granted (ECF No. 235). At the Final Fairness Hearing, Interim Co-Lead Counsel will request entry of a final order and judgment ("Final Order") consistent with the Settlement Agreement, dismissing with prejudice all claims against Birdsong and retaining jurisdiction for the implementation and enforcement of the Settlement Agreement.

II. BACKGROUND

Plaintiffs are Peanut farmers in the United States who sold raw, harvested Runner Peanuts to Peanut shelling companies. Plaintiffs allege among other things, that Defendants, including Golden Peanut Company LLC ("Golden Peanut"), Olam Peanut Shelling Company, Inc. ("Olam"), and Birdsong entered into a contract, combination, or conspiracy in restraint of trade, the purpose

[1] The Settlement Agreement is attached hereto as Exhibit A to Declaration of Brian D. Clark (hereinafter, "Settlement" or "Settlement Agreement").

and effect of which was to suppress competition and to pay depressed prices to the Settlement Class for runner peanut farmerstock during the Class Period, in violation of Sections 1 of the Sherman Act, 15 U.S.C. § 1.

Plaintiffs filed a complaint on September 5, 2019, (ECF No. 1) against Defendants Birdsong and Golden Peanut, which Defendants Birdsong and Golden Peanut moved to dismiss. (ECF Nos. 47-50). An order denying Defendants' motions to dismiss in their entirety was entered on May 14, 2020 (ECF No. 135). Plaintiffs filed a Second Amended Class Action Complaint on May 27, 2020 (ECF No. 148), naming Olam as a Defendant for the first time, and all Defendants filed answers to this complaint on June 26, 2020. Since filing their initial complaint, Plaintiffs have continued their investigation into the conspiracy they allege, and discovery has been ongoing.

III. SUMMARY OF THE SETTLEMENT AGREEMENT

After extensive arm's length negotiations, Plaintiffs agreed to settle with Birdsong in return for its agreement to pay $50 million ($50,000,000.00) in United States dollars into escrow for the benefit of the Settlement Class. In addition to the payment of money, under the Settlement Agreement, Birdsong will cooperate[2] with Plaintiffs in their continued prosecution of the Action against Defendant Golden Peanut.[3] In consideration, Plaintiffs and the proposed Settlement Class agree, among other things, to release claims against Birdsong and its affiliates, which were or could have been brought in this litigation relating to the conduct alleged in the Complaint. The release does not extend to any other Defendant or co-conspirators.

[2] Provisions regarding cooperation shall be contained in a separately executed side-letter agreement that will be provided to the Court for *in camera* review upon request, but is otherwise strictly confidential. Settlement Agreement § II.A.2.

[3] On October 23, 2020, Plaintiffs moved for preliminary approval of a settlement with Olam and for certification of a settlement class. Thus, Golden Peanut is the sole remaining Defendant.

IV. STANDARDS APPLICABLE TO PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT

"Even before a court has certified a class, putative class plaintiffs may reach an agreement of settlement with defendants" in which case "plaintiffs may seek to give effect to this settlement through a settlement-only class." *In re NeuStar, Inc. Sec. Litig.*, No. 1:14CV885 JCC/TRJ, 2015 WL 5674798, at *2 (E.D. Va. Sept. 23, 2015). "A settlement class, like a litigation class, must satisfy the requirements of Federal Rule of Civil Procedure 23(a)" and "must also qualify as one of the three Rule 23(b) class types." *Id.* at *3; *see generally Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003).

Class action settlements minimize the litigation expenses of the parties and reduce the strain such litigation imposes upon already scarce judicial resources. *See Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). However, a class action may be settled only with court approval. Before the court may give its final approval, all class members must be given notice of the proposed settlement in the manner the court directs. Fed. R. Civ. P. 23(e). Generally, before directing that notice be given to the class members, the court makes a preliminary evaluation of the proposed class action settlement. The Manual For Complex Litigation (Fourth) § 21.632 (2004) explains:

> Review of a proposed class action settlement generally involves two hearings. First counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation . . . . The Judge must make a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms and must direct the preparation of notice of the . . . proposed settlement, and the date of the [formal Rule 23(e)] fairness hearing.

See also 2 NEWBERG ON CLASS ACTIONS, §11.24 (3d ed. 1992). The standard for final approval of a class action settlement is whether the proposed settlement is fair, reasonable, and adequate.

Fed. R. Civ. P. 23(e)(2). In weighing a grant of preliminary approval, courts must determine whether "giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(i–ii).

V. THE COURT IS LIKELY TO APPROVE THE SETTLEMENT UNDER 23(e)(2)

To determine whether to approve a proposed settlement under Rule 23(e)(2), courts look to the factors in the text of Rule 23(e)(2), which a court must consider when weighing final approval. *See* Fed. R. Civ. P. 23(e)(2) ("If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering" the factors set forth in Rule 23(e)(2).); *see, e.g.*, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig*., 330 F.R.D. 11, 28 (E.D.N.Y. 2019). Rule 23(e)(2) requires courts to consider whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2). Factors (A) and (B) under Rule 23(e)(2) constitute the "procedural" analysis factors and examine "the conduct of the litigation and of the negotiations leading up to the proposed settlement." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment. Factors (C) and (D) under Rule 23(e)(2) constitute the "substantive" analysis factors and examine "[t]he relief that the settlement is expected to provide to class members...." *Id.*

Because the proposed settlement with Birdsong meets all factors under Rule 23(e)(2), the Court will likely grant final approval of the proposed settlement, and thus the proposed settlement should be preliminarily approved.

1. The Class Representatives and Class Counsel Have Adequately Represented the Class

Fed. R. Civ. P. 23(e)(2)(A) requires that "the class representatives and class counsel have adequately represented the class." The adequacy requirement is met when (1) the named plaintiff does not have interests antagonistic to those of the class; and (2) plaintiff's attorneys are "qualified, experienced, and generally able to conduct the litigation." *In re NeuStar, Inc. Securities Litig.*, 2015 WL 5674798, at *4.

Both requirements are satisfied here. Indeed, Defendants did not raise any challenge under the parallel Rule 23(a) adequacy factors in their opposition to Plaintiffs' motion for class certification. (ECF No. 257). The interests of the Settlement Class members are aligned with those of the representative Plaintiffs. Plaintiffs, like all Settlement Class members, share an overriding interest in obtaining the largest possible monetary recovery and as fulsome cooperation as possible. *See, e.g.*, *In re Community Bank of N. Virginia Mortg. Lending Practices Litig.*, 795 F.3d 380, 394 (3d Cir. 2015) (no fundamental intra-class conflict to prevent class certification where all class members pursuing damages under the same statutes and the same theories of

liability); *In re Corrugated Container Antitrust Lit.*, 643 F.2d 195, 222 (5th Cir. 1981), cert. denied, 456 U.S. 998 (1982) (certifying settlement class and holding that "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes"). Representative Plaintiffs are not afforded any special compensation by this proposed Settlement and all Settlement Class members similarly share a common interest in obtaining Birdsong's substantial cooperation to prosecute this case.

Moreover, Plaintiffs and their counsel will continue to litigate this case vigorously and competently. "The inquiry into the adequacy of legal counsel focuses on whether counsel is competent, dedicated, qualified, and experienced enough to conduct the litigation and whether there is an assurance of vigorous prosecution." *In re NeuStar, Inc. Securities Litig.*, 2015 WL 5674798, at *5. As they demonstrated when they sought appointment, Interim Co-Lead Counsel are qualified, experienced, and thoroughly familiar with antitrust class action litigation.[4] Interim Lead Counsel has an extensive record of representing plaintiffs in antitrust class actions, which indicates counsels' ability to properly leverage the value of this case into a fair settlement. As they respectfully submit has been demonstrated by their conduct to date, Interim Co-Lead Counsel have diligently represented the interests of the class in this litigation and will continue to do so. Accordingly, the Representative Plaintiffs and Interim Co-Lead Counsel have adequately represented the class.

[4] *See* ECF No. 43 (Plaintiffs' Motion for Appointment of Interim Co-Lead Class Counsel and Liaison Counsel); ECF No. 80 (Court's Order of December 20, 2019 appointing same).

2. The Settlement Is Fair and Resulted from Arm's-Length Negotiations

"The relevant factors in assessing a settlement's fairness are: (1) the posture of the case at the time settlement was proposed; (2) the extent of discovery that had been conducted; (3) the circumstances surrounding the negotiations; and (4) the experience of counsel" in class action litigation involving the relevant subject matter. *Jiffy Lube Sec. Litig.*, 927 F.2d 155, 59 (4th Cir. 1991). Fed. R. Civ. P. 23(e)(2)(B) also requires that "the proposal was negotiated at arm's length." There is usually a "strong initial presumption" that a proposed settlement is fair and reasonable when it was the result of arm's-length negotiations. *See In re MicroStrategy, Inc. Sec. Litig.*, 148 F. Supp. 2d 654, 663 (E.D. Va. 2001); *see also* 2 NEWBERG ON CLASS ACTIONS, § 11.40 at 451 (2d ed. 1985).

The proposed Settlement plainly meets the standards for preliminary approval. The Settlement reached here is the product of intensive arm's-length settlement negotiations, which included several rounds of give-and-take between Interim Co-Lead Counsel and Birdsong's counsel. (Clark Decl. ¶ 6.) There has been more than sufficient investigation and discovery to permit counsel and the Court to meaningfully evaluate the merits of the settlement, in light of the facts, risks, and the status of the litigation. *See In re Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 258 (E.D. Va. 2009) ("[I]n cases in which discovery has been substantial and several briefs have been filed and argued, courts should be inclined to favor the legitimacy of a settlement."). Furthermore, based on Plaintiffs' extensive factual investigation to date, the cooperation provisions negotiated as part of the settlement enable Plaintiffs to further prepare for trial against Golden Peanut. (*Id.* ¶¶ 4-6.) The Settlement here is the product of vigorous, extensive, and at times contentious arm's-length negotiations among attorneys who are highly experienced in complex antitrust cases, and who are well informed about the facts and legal issues of this case. Therefore, based on both the

monetary and cooperation elements of the Settlement Agreement, Interim Co-Lead Counsel believe this is a fair settlement for the Settlement Class. (*Id.* ¶ 11.)

Moreover, this Settlement does not affect the potential for full recovery of damages for the Class under the antitrust laws in light of the fact that the remaining Defendant, Golden Peanut, will be jointly and severally liable for all injuries incurred as a result of the conspiracy Plaintiffs allege; Birdsong's sales remain in the case for purposes of assessing injury and damages to the Class. *See* Settlement Agreement, § II.E.11. In addition to not affecting the overall damages, the Settlement should hasten and improve the Class' recovery by providing cooperation from the Settling Defendant. *See In re Ampicillin Antitrust Litig.*, 82 F.R.D. 652, 654 (D.D.C. 1979) (approving settlement where class will "relinquish no part of its potential recovery" due to joint and several liability and where settling defendant's "assistance in the case again [a non-settling defendant] will prove invaluable to plaintiffs").

In addition to a monetary payment, Birdsong will provide cooperation to the Class as provided in the Settlement Agreement. (*See* Clark Decl. ¶ 8.) Courts have recognized the value of such cooperation:

> [F]rom a pragmatic standpoint, the value of . . . [cooperating defendants] in litigation, as opposed to the specter of hundreds of uncooperative opponents, is significant. The [settling defendants] know far better than the plaintiff classes precisely what occurred in the [relevant] period . . . and their willingness to open their files . . . may ease the plaintiffs' discovery burden enormously.

In re IPO Sec. Litig., 226 F.R.D. 186, 198-99 (S.D.N.Y. 2005) (footnote omitted). This cooperation here is even more valuable in light of the applicability of joint and several liability to Plaintiffs' claims—which at the point of the litigation, means that Golden Peanut is jointly and severally liable for the full treble damages that Plaintiff establishes at trial. While Plaintiffs believe

that their case is strong, any complex antitrust litigation is inherently costly and risky, and this Settlement mitigates that risk and protects the Class.

Conversely, Birdsong believes its defenses are strong and that if it continued to litigate, it would succeed on the merits. Birdsong denies that it conspired with Defendants to depress the price of runner peanut farmerstock, and Birdsong maintains that it did nothing wrong. (*See* Settlement Agreement, Recital E, p. 2.) But in the interests of avoiding the risk and uncertainty of trial, Birdsong has agreed to settle; Plaintiffs believe that its contracts and dealings with the other Defendants gives it valuable and unique insight into the alleged conspiracy.

In sum, the Settlement Agreement: (1) provides substantial benefits to the Class; (2) is the result of good faith negotiations between knowledgeable and skilled counsel; (3) was entered into after extensive factual investigation and legal analysis; and (4) in the opinion of experienced Class Counsel, is fair, reasonable, and adequate to the Class. Accordingly, Interim Co-Lead Counsel believe that the Settlement Agreement is in the best interests of the Class Members and should be preliminarily approved by the Court.

3. The Relief Provided For the Class Is Substantial and Tangible

In assessing whether the settlement provides adequate relief for the putative class under Rule 23(e)(2)(C), the Court should consider: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3). Fed. R. Civ. P. 23(e)(2)(C)(i–iv).

"Settlement is favored if settlement results in substantial and tangible present recovery, without the attendant risk and delay of trial." *See, e.g.*, *In re Payment Card Interchange Fee and*

Merchant Discount Antitrust Litig., 330 F.R.D. 11, 36 (E.D.N.Y. 2019) (citations omitted). Here, for the reasons described above in Section V(2), the settlement is fair and resulted from arm's-length negotiations. Counsel thoroughly evaluated the relative strengths and weaknesses of the respective litigation positions, and determined that the settlement brings substantial benefits to the proposed class at a relatively early stage in the litigation, and avoids the delay and uncertainty of continuing protracted litigation with Birdsong. (*See* Clark Decl. ¶¶ 5-11.) In addition, during negotiations there was no discussion, let alone agreement, regarding the amount of attorneys' fees Plaintiffs' counsel ultimately may ask the Court to award in this case, and Plaintiffs' counsel are not seeking fees at this time. (Clark Decl. ¶ 7). The benefits of settlement outweigh the costs and risks associated with continued litigation with Birdsong, and weigh in favor of granting final approval.

4. The Proposal Treats Class Members Equitably Relative to Each Other

Consideration under this Rule 23(e)(2) factor "could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." Fed. R. Civ. P. 23 advisory committee's note to 2018 amendment.

Here, representative Plaintiffs are treated the same as all other Class members in this proposed Settlement, and all Class members similarly share a common interest in obtaining Birdsong's cooperation to prosecute this case. The release applies uniformly to putative class members and does not affect the apportionment of the relief to class members. Accordingly, this factor will likely weigh in favor of granting final approval. *See, e.g.*, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 330 F.R.D. 11, 47 (E.D.N.Y. 2019).

VI. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS

In order to preliminarily approve the proposed settlement, the Court must also find that it will likely be able to certify the class for purposes of judgment on the proposal. Fed. R. Civ. P. 23(e)(1)(B)(i–ii).

Under Rule 23, class actions may be certified for settlement purposes only. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Certification of a settlement class must satisfy each requirement set forth in Rule 23(a), as well as at least one of the separate provisions of Rule 23(b). *Id.* at 613-14; *see also In re NeuStar, Inc. Sec. Litig.*, 2015 WL 5674798, at *2 ("A settlement class, like a litigation class, must satisfy the requirements of Federal Rule of Civil Procedure 23(a)" and "must also qualify as one of the three Rule 23(b) class types."); *see generally Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003).

Plaintiffs seek certification of a Settlement Class consisting of:

> All persons or entities in the United States who sold raw, harvested runner peanuts to any of the Defendants, their subsidiaries or joint-ventures, from January 1, 2014 through December 31, 2019 (the "Class Period"). Specifically excluded from this Class are the Defendants; the officers, directors or employees of any Defendant; any entity in which any Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any Defendant. Also excluded from this Class are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, any juror assigned to this action, and any co-conspirator identified in this action.

(Settlement Agreement, § I.A) As detailed below, this proposed Settlement Class meets the requirements of Rule 23(a) as well as the requirements of Rule 23(b)(3).

A. <u>The Requirements of Rule 23(a) Are Satisfied</u>

1. Numerosity

Fed. R. Civ. P. 23(a)(1) requires that the class be so numerous as to make joinder of its members "impracticable." The proposed Settlement Class consists of persons or entities in the

United States who sold raw, harvested runner peanuts to any of the Defendants, their subsidiaries or joint-ventures, from January 1, 2014 through December 31, 2019. Based on their investigation, Interim Co-Lead Counsel believe there are thousands of persons or entities that fall within the Settlement Class definition. As it would be "impracticable to join such a large and geographically diverse group, the numerosity requirement is easily satisfied. *See In re BearingPoint, Inc. Securities Litig*., 232 F.R.D. 534, 538 (E.D. Va. 2006).

2. Common Questions of Law and Fact

Fed. R. Civ. P. 23(a)(2) requires that there be "questions of law or fact common to the class." Plaintiffs must show that resolution of an issue of fact or law "is central to the validity of each" class member's claim and "[e]ven a single [common] question will" satisfy the commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011).

A central allegation in the Complaint is that Defendants entered into a contract, combination or conspiracy in restraint of trade, the purpose and effect of which was to suppress competition and to pay depressed prices for runner peanut farmerstock, thereby harming Plaintiffs and the Settlement Class. Proof of this conspiracy will be common to all Class members. In addition to that overarching question, this case is replete with other questions of law and fact common to the Settlement Class including: (a) The identity of the participants of the alleged conspiracy; (b) The duration of the conspiracy alleged herein and the acts performed by Defendants and their co-conspirators in furtherance of the conspiracy; (c) Whether the alleged conspiracy violated the federal antitrust laws; (d) Whether the conduct of Defendants and their co-conspirators, as alleged in this Complaint, caused injury to the business or property of the Plaintiffs and other members of the Class; (e) The effect of Defendants' alleged conspiracy on the prices of Runners sold in the United States during the Class Period; (f) Whether Plaintiffs and other

members of the Class are entitled to, among other things, injunctive relief and if so, the nature and extent of such injunctive relief; and (g) The appropriate class-wide measure of damages. Accordingly, the Settlement Class satisfies Rule 23(a)(2).

3. Typicality

Fed. R. Civ. P. 23(a)(3) requires that the class representatives' claims be "typical" of class members' claims. This typicality prerequisite requires that the class representative "be part of the class and possess the same interest and suffer the same injury as the class members." *In re NeuStar, Inc. Sec. Litig.*, 2015 WL 5674798, at *4; (quoting *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001)). Typicality ensures that "the class representative's interests will be sufficiently aligned with those of the other class members." *Id.* (quoting *In re Computer Sci. Corp. Sec. Litig.*, 288 F.R.D. 112, 117 (E.D. Va. 2012)). Here, the class representatives' interests are so aligned.

Plaintiffs here allege that Defendants entered into a contract, combination or conspiracy in restraint of trade, the purpose and effect of which was to suppress competition and to pay depressed prices for runner peanut farmerstock, thereby harming Plaintiffs and the Proposed Class. The named class representative Plaintiffs will have to prove the same elements that absent Settlement Class members would have to prove, *i.e.*, the existence and impact of such conspiracy. Because the representative Plaintiffs' claims arise out of the same alleged illegal anticompetitive conduct and are based on the same alleged theories and will require the same types of evidence to prove those theories, the typicality requirement of Rule 23(a)(3) is satisfied.

4. Adequacy

For the reasons mentioned above in Section V(1), the class representatives and class counsel have adequately represented the class.

B. <u>The Proposed Settlement Class Satisfies Rule 23(b)(3)</u>

Once Rule 23(a)'s four prerequisites are met, Plaintiffs must show the proposed Settlement Class satisfies one of the provisions of Rule 23(b). The proposed Settlement satisfies Rule 23(b)(3) by showing that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Considerable overlap exists between the court's determination of commonality and a finding of predominance. *See, e.g.*, *In re NeuStar, Inc. Securities Litig*., 2015 WL 5674798, at *3; *In re Mills Corp. Sec. Litig.*, No. 1:06–cv–077, 257 F.R.D. 101, 109 (E.D. Va. 2009).

In antitrust conspiracy cases such as this one, courts consistently find that common issues of the existence and scope of the conspiracy predominate over individual issues, which follows from the central nature of a conspiracy in such cases. *Hughes v. Baird & Warner, Inc.*, No. 76 C 3929, 1980 WL 1894, at *3 (N.D. Ill. Aug. 20, 1980) ("Clearly, the existence of a conspiracy is the common issue in this case. That issue predominates over issues affecting only individual sellers."); *see also Amchem*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.").

Plaintiffs must also show that a class action is superior to individual actions, which is evaluated by four considerations:

> (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members

> of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of the class action.

Fed. R. Civ. P. 23(b)(3).

Here, any Class member's interest in individually controlling the prosecution of separate claims is outweighed by the efficiency of the class mechanism. Thousands of persons or entities were under-paid for runner peanut farmerstock during the class period; settling these claims in the context of a class action conserves both judicial and private resources and hastens Class members' recovery. Finally, while Plaintiffs see no management difficulties in this case, Plaintiffs do not believe that this final consideration is pertinent to approving the proposed settlement class. *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

Accordingly, the proposed class action is superior to other available methods (if any) for the fair and efficient adjudication of the controversy relating to Birdsong.

VII. NOTICE TO THE CLASS

Rule 23(e) requires that prior to final approval, notice of a proposed settlement be given in a reasonable manner to all class members who would be bound by such a settlement. For a class proposed under Rule 23(b)(3), whether litigated or by virtue of a settlement, Rule 23(c)(2)(B) enumerates specific requirements. At an appropriate time prior to moving for final approval of this proposed Settlement, Interim Co-Lead Counsel will present the Court with a notice plan, which, pursuant to Rule 23(c)(2)(B), will provide due process and reasonable notice to all farmers who sold runner peanuts to Defendants—Settling and Non-Settling Defendants alike—who can be identified through lists that have been provided by the Defendants. However, for the reasons

identified herein, Interim Co-Lead Counsel requests that the Court agree to defer formal notice to the Class for the time being.[5]

There is a large cost to the Class, likely to exceed $100,000, each time notice is provided to a class of this size. (Clark Decl., ¶ 10.) Therefore, Interim Co-Lead Counsel requests that the Court agree to defer formal notice to the Class of this settlement for efficiency and cost effectiveness. In large antitrust cases, courts have deferred notice until enough settlements have been reached to make it cost effective. *See, e.g.*, *In re Aftermarket Filters Antitrust Litig.*, No. 1:08-cv-04883, Preliminary Approval Order (ECF No. 885) at p. 5 (granting preliminary approval of settlement agreements, certifying settlement class, and ordering that class notice be deferred until a later time); *In re New Jersey Tax Sales Antitrust Litig.*, No. 3:12-cv-01893, Order (ECF No. 276) at ¶ 7 (granting preliminary approval of settlement and finding that cost of class notice warranted deferral). If more settlements are reached, or Plaintiffs' class certification motion is approved, then the costs of notice can be spread across those settlements. In addition, multiple notices can be potentially confusing for class members. This Court has the discretion to decide the timing of the notice. *Id.* In the experience of Interim Co-Lead Counsel, it is better for notice of more than one proposed settlement to be combined into one notice, with the attendant and obvious efficiencies and savings to the class.

[5] Interim Co-Lead Counsel and Birdsong have agreed that the timing of a motion to approve notice to the Class of this Settlement Agreement is in the discretion of Co-Lead Counsel, and may be combined with notice of other settlements in this Action. (*See* Settlement Agreement, §§ II.C.2. and II.E.3.)

VIII. APPOINTMENT OF THE NOTICE ADMINISTRATOR AND AN ESCROW AGENT TO MAINTAIN SETTLEMENT FUNDS

Plaintiffs propose that Angeion Group ("Angeion") be appointed by the Court to serve as the Settlement Administrator in this case. Angeion was selected by Co-Lead Counsel after a competitive bidding process. A comprehensive summary of judicial recognition Angeion has received is attached to the Declaration of Steven Weisbrot submitted in support of this motion, as Exhibit A, and Angeion's diversity and inclusion statement is attached to the Declaration as Exhibit B.

Finally, Plaintiffs propose that The Huntington National Bank ("Huntington") be appointed by the Court to serve as the escrow agent, maintain the Qualified Settlement Fund as called for by the parties' Settlement Agreement (*see* Settlement Agreement, § II.C), and provide escrow services in this litigation. Huntington was selected by Co-Lead Counsel based on extensive experience with this vendor and its repeated ability to provide services at the lowest cost and at the highest level of quality in numerous prior cases. Huntington's qualifications are attached to the Declaration of Robyn Griffin submitted in support of this motion, as Exhibit A, and Huntington's diversity and inclusion statement is attached to the Declaration as Exhibit B.

IX. CONCLUSION

For these reasons, Interim Co-Lead Counsel respectfully request that the Court:

(1) Preliminarily approve the Settlement Agreement;

(2) Certify the proposed Settlement Class;

(3) Appoint Interim Co-Lead Counsel as co-lead counsel for the Settlement Class;

(4) Appoint Angeion as the notice and claims administrator;

(5) Appoint Huntington National Bank as the escrow agent to provide escrow services in this case.

Dated: November 2, 2020

Respectfully submitted,

By *__/s/ Kevin J. Funk__*

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically e-mail notification of such filing to all counsel of record.

To the best of my knowledge, there are no other attorneys or parties who require service by U.S. Mail.

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