UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE MUSHROOM DIRECT PURCHASER ANTITRUST LITIGATION	:	**Master File No. 06-0620**
THIS DOCUMENT RELATES TO:	:	
Direct Purchaser Class Action	:	

DIRECT PURCHASER CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENTS AND APPROVAL OF THE FORM AND MANNER OF NOTICE TO THE CLASS AND CLASS PLAINTIFFS' PROPOSED SCHEDULE FOR FINAL APPROVAL

Direct Purchaser Class Plaintiffs Wm. Rosenstein & Sons Co., Associated Grocers, Inc., M. Robert Enterprises, Inc., M.L. Robert, II, LLC, Market Fare, LLC, and Diversified Foods and Seasonings, Inc.[1] ("Class Plaintiffs" or "Plaintiffs") respectfully submit this Memorandum of Law in support of their Motion for Preliminary Approval of Settlements, and Approval of the Form and Manner of Notice to the Class and Class Plaintiffs' Proposed Schedule for Final Approval.

I. INTRODUCTION

Class Plaintiffs have agreed to settle their claims against all remaining defendants: J-M Farms, Inc. ("J-M"); Mushroom Alliance, Inc. ("the Mushroom Alliance"); Franklin Organic Mushroom Farms, Inc., formerly known as Franklin Farms, Inc. ("Franklin"); Mario Cutone Mushroom Co., Inc. ("Cutone"); M.D. Basciani and Sons, Inc. ("Basciani"); and a group of Defendants identified as "Certain Defendants"[2] (collectively "Settling Defendants"). The

[1] The Court previously granted summary judgment on claims brought by Class Representative Diversified on the grounds that it was an indirect purchaser from defendant Kaolin because it purchased mushrooms from one of Kaolin's affiliated distribution centers, South Mill New Orleans, and Kaolin did not control its affiliated distribution centers as a matter of law. ECF No. 780. Class Plaintiffs believe that this ruling was erroneous, and it would have been subject to appeal had Class Plaintiffs not settled. Since the settlements include releases of Diversified and all those in its position, Class Plaintiffs believe that Diversified and any other class members with purchases from Kaolin's affiliated distribution centers (South Mill New Orleans, South Mill Atlanta, South Mill Dallas and South Mill Houston) should be included in the distribution of settlement proceeds. *See* Paragraph 4 of Class Plaintiffs' proposed order attached to the Gerstein Declaration as Exhibit 7; Class Plaintiffs' Proposed forms of notice of the settlements, attached to the Gerstein Declaration as Exhibit 8.

[2] "Certain Defendants" are: Eastern Mushroom Marketing Cooperative, Inc. ("EMMC"); Robert A. Ferranto, Jr. t/a Bella Mushroom Farms; Brownstone Mushroom Farms, Inc.; To-Jo Fresh Mushrooms, Inc.; Country Fresh Mushroom Co.; Gino Gaspari & Sons, Inc.; Gaspari Mushroom Co., Inc.; Kaolin Mushroom Farms, Inc.; South Mill Mushroom Sales, Inc.; Modern Mushroom Farms, Inc.; Sher-Rockee Mushroom Farm, LLC; C&C Carriage Mushroom Co.; Phillips Mushroom Farms, Inc.; Louis M. Marson, Jr., Inc.; Monterey Mushrooms, Inc.; Forest Mushroom, Inc.; Harvest Fresh Farms, Inc.; Leone Pizzini and Son, Inc.; LRP-M Mushrooms LLC; United Farm Cooperative, Inc.; Masha & Toto, Inc., trading as M&T Mushrooms; Oakshire Mushroom Farm, Inc.; W&P Mushroom, Inc.; and John Pia.

settlements have a combined monetary value to the Class of $33,600,000[3] which will be paid into escrow for the benefit of all members of the Class[4] in exchange for dismissal of the litigation between Class Plaintiffs and Settling Defendants with prejudice and a release (the "Settlements"). All terms of the Settlements are set forth in the Settlement Agreements annexed as Exhibits 1, 2, 3, 4, 5, and 6 to the Gerstein Declaration.[5]

Significantly, the Settlement with Certain Defendants is explicitly conditioned on the Court finding one or more exceptions to the "Most Favored Nation" provision ("MFN") of the Class Plaintiffs' settlement agreement with Giorgi Mushroom Co. and Giorgio Foods, Inc. (together, "Giorgi"), which was approved by the Court on December 17, 2018. ECF No. 917. Five of Certain Defendants are subject to that MFN (the "MFN Defendants"). Class Counsel have concurrently filed a separate Petition pursuant to paragraph 22 of the Giorgi settlement agreement asking the Court to find an exception to the MFN because: (1) the MFN Defendants were each unable to pay the MFN amount specified by the Giorgi settlement; and/or (2) a

[3] The settlement with J-M is for $200,000; the settlement with the Mushroom Alliance is for $50,000; the settlement with Franklin is for $975,000; the settlement with Cutone is for $375,000; the settlement with Basciani is for $4,000,000 (to be paid in installments of $1,500,000, $1,500,000, and $1,000,000 over two years); and the settlement with Certain Defendants is for $28,000,000 (to be paid in installments of $18,000,000, $7,000,000, and $3,000,000 over two years).

[4] The Class, as certified by the Court, is defined as "all persons and entities in the non-Western United States who purchased fresh *agaricus* mushrooms directly from an Eastern Mushroom Marketing Cooperative (EMMC) member or one of its co-conspirators or controlled affiliates, agents, or subsidiaries at any time between February 4, 2001 and August 8, 2005 (the 'Class Period'). For group buying organizations and their members, direct purchases are either (1) members who have a significant ownership interest in or functional control over their organizations; or (2) if no member has such interest or control, the organizations themselves. The Class excludes the EMMC, its members and their parents, subsidiaries, and affiliates." ECF No. 780.

[5] The Court appointed Mr. Gerstein's firm, Garwin Gerstein & Fisher LLP, as lead counsel for the class pursuant to Fed. R. Civ. P. 23(g). ECF No. 782.

material adverse change in the legal position of Class Plaintiffs' case occurred that materially altered the negotiating position of Class Plaintiffs' counsel. Since Plaintiffs' settlement with Certain Defendants will be null and void if the Court does not find an exception to the MFN, Plaintiffs respectfully request that the Court rule on their Petition prior to addressing this motion.[6]

Preliminary approval of the Settlements is appropriate. Class Plaintiffs have litigated this case for over thirteen years, successfully obtaining class certification in November 2016.[7] All counsel involved in these Settlements are experienced litigators and are well-positioned to assess the risks and merits of this case. The Settlements assure that the class litigation against the Settling Defendants will be put to rest, while avoiding continued litigation and potential appeals.

Accordingly, Class Plaintiffs respectfully request that the Court enter the proposed Order (Exhibit 7 to the Gerstein Declaration) which provides for:

1. Preliminary approval of the proposed Settlement Agreements and the documents necessary to effectuate the Settlements, including a proposed form of notice to the Class (Exhibit 8 to the Gerstein Declaration);[8]
2. Appointment of Rust Consulting LLC ("Rust") as settlement administrator;

[6] By the terms of this Court's Order of June 24, 2019 (ECF No. 1039), Giorgi has until July 25, 2019, to oppose Plaintiffs' Petition. By the terms of the Giorgi Settlement Agreement, this Court's ruling on the Petition is final and unappealable. Giorgi Settlement Agreement §22(d).

[7] ECF No. 780, Order dated November 22, 2016.

[8] Class Plaintiffs have a pending motion for preliminary approval of a settlement with Defendants Cardile Mushrooms, Inc. and Cardile Brothers Mushroom Packaging, Inc. ("CMI"). ECF No. 983. Class Plaintiffs propose that approval of the five settlements in this motion be put on the same schedule proposed for the CMI settlement. A single, consolidated process for approval and notice of all six settlements will promote judicial economy and avoid the unnecessary expense and confusion of multiple settlement notices. Accordingly, the proposed forms of notice attached as Exhibit 8 to the Gerstein Declaration consolidate notice of the settlements with CMI and the Settling Defendants.

3. Appointment of First State Trust Company as escrow agent for the settlements with Basciani and Certain Defendants;

4. A schedule for approval of the Settlements that includes a Fairness Hearing for the Court to consider: (a) Class Plaintiffs' request for final approval of the Settlements and entry of a proposed order and final judgment; (b) whether the Court should approve Class Counsel's application for an award of attorneys' fees, reimbursement of expenses, and incentive awards for Class Representatives; and (c) Class Plaintiffs' request for dismissal of this action against the Settling Defendants with prejudice; and

5. Proceedings in the Direct Purchaser Class Action against the Settling Defendants to be stayed until such time as the Court renders a final decision regarding the approval of the Settlements.

II. BACKGROUND

A. Class Plaintiffs' Claims and Procedural Background

In February 2006, Class Plaintiffs filed the first antitrust lawsuit on behalf of all direct purchasers challenging Defendants' conduct regarding the sale of fresh *agaricus* mushrooms.[9] Class Plaintiffs alleged that Defendants had unlawfully conspired to fix the price of fresh *agaricus* mushrooms and had conspired to restrict the supply of fresh *agaricus* mushrooms to artificially inflate their prices. The Settling Defendants denied these claims. The Settling Defendants moved to dismiss Class Plaintiffs' complaint, and Class Plaintiffs prevailed after extensive briefing and oral argument. The case then proceeded through intensive discovery involving the Settling Defendants and the other defendants in the case, including production and review of nearly one million pages of documents, multiple expert reports and supplements thereto, and dozens of depositions (fact and expert). The parties briefed and argued multiple summary judgment motions, multiple *Daubert* motions, and Class Plaintiffs' motion for class certification. Defendants appealed this Court's grant of summary judgment on Defendants' Capper-Volstead immunity to the Third Circuit, which found the interlocutory appeal to have

[9] *See* ECF No. 1.

been improperly taken, and sought leave to appeal various other issues throughout the long history of the case. After the Court's decision on class certification, Defendants petitioned for review of that ruling by the Third Circuit pursuant to Fed. R. Civ. P. 23(f). Those petitions were denied on January 24, 2017.

B. Settlement Negotiations and the Proposed Settlements

The settlement negotiations between Class Counsel and attorneys for the Settling Defendants were at arm's-length and were vigorously contested. Class Counsel assessed the value of this case based on its history in this Court and their extensive experience litigating antitrust class actions.

Class Plaintiffs have proposed a form and manner of providing notice of the proposed Settlements to the Class, and the procedures by which: (a) Class members who wish to appear may do so; (b) Class members may object to the proposed Settlement Agreements; and (c) Class Counsel shall apply for an award of attorneys' fees, reimbursement of expenses incurred in prosecuting this action, and incentive awards for the Class Representatives. Final approval of the proposed Settlement Agreements will result in the dismissal with prejudice of Class Plaintiffs' claims in their entirety against the Settling Defendants.

IV. THE PROPOSED SETTLEMENTS MEET THE STANDARD FOR PRELIMINARY APPROVAL.

Preliminary approval of a proposed class settlement is warranted if the court determines that it has no grounds to doubt the settlement's fairness, the settlement has no obvious deficiencies, and the settlement appears to fall within the range of possible approval.[10] "The

[10] *See Mehling v. New York Life Ins. Co.*, 246 F.R.D. 467, 472 (E.D. Pa. 2007); *Thomas v. NCO Fin. Sys., Inc.*, 2002 U.S. Dist. LEXIS 14157, at *5, *14 (E.D. Pa. July 31, 2002); *Greer v. Shapiro & Kreisman*, 2001 U.S. Dist. LEXIS 21114, at *7 (E.D. Pa. Dec. 18, 2001).

preliminary approval decision is not a commitment to approve the final settlement; rather, it is a determination that there are no obvious deficiencies and the settlement falls within the range of reason."[11] Accordingly, preliminary approval does not require a court to reach any ultimate conclusions on the merits of the litigation.[12] Instead, "[t]his analysis often focuses on whether the settlement is the product of arm's-length negotiations."[13]

In a court's evaluation of a proposed settlement, the "professional judgment of counsel involved in the litigation is entitled to great weight."[14] Here, Class Counsel have been litigating antitrust class actions for decades, and are recommending settlements that will provide substantial consideration to the Class.

A hearing is not necessary or required under Rule 23(e) at the preliminary approval stage. As explained in the Manual for Complex Litigation (the "Manual"), "[i]n some cases, this initial evaluation can be made on the basis of information already known, supplemented as necessary by briefs, motions, or informal presentations by parties."[15] Obviously, the named Class Plaintiffs and Class Counsel are available at the Court's convenience if it wishes to hold a hearing.

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[11] *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 438 (E.D. Pa. 2008) (internal quotations and citation omitted).

[12] *See Thomas*, 2002 U.S. Dist. LEXIS 14157, at *14 (quoting *Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974)).

[13] *Curiale v. Lenox Grp. Inc.*, 2008 U.S. Dist. LEXIS 92851, at *11 (E.D. Pa. Nov. 14, 2008). *See also In re Auto Refinishing Paint Antitrust Litig.*, 2004 U.S. Dist. LEXIS 29163, at *6 (E.D. Pa. May 10, 2004) (approving settlement reached "after extensive arms-length negotiation between very experienced and competent counsel").

[14] *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 452 (E.D. Pa. 1985). *See also Varacallo v. Mass Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005) ("Class Counsel's approval of the Settlement also weighs in favor of the Settlement's fairness.").

[15] MANUAL FOR COMPLEX LITIGATION, § 21.632 at 382 (4th ed. 2005). *See also Curiale*, 2008 U.S. Dist. LEXIS 92851 (court granting preliminary approval without hearing).

A. The Proposed Settlements Are the Product of Serious, Informed, Arm's-Length Negotiations.

If a court finds that a settlement is the result of good-faith, serious, arm's-length negotiations, the settlement is entitled to a presumption of fairness because such negotiations guard against any obvious deficiencies in a settlement.[16]

Counsel have been litigating this case for over thirteen years. Its voluminous record permitted Class Plaintiffs and the Settling Defendants to identify the strengths and weaknesses of their respective claims and defenses. The parties engaged in intensive settlement discussions. The negotiations were detailed, time-consuming, and hard-fought.

B. The Advanced Stage of This Case Supports Preliminary Approval.

Class Plaintiffs reached each of these settlements at a point in the case when they were deep into trial preparations. Class Counsel has made a fully-informed assessment of the value of its claims against the Settling Defendants.

C. Class Counsel Are Highly Experienced in Class Action Antitrust Litigation.

Class Counsel believe that the Settlements are fair and in the best interests of the Class. In negotiating the Settlements, Class Counsel considered the volume of mushrooms sold by each of the Settling Defendants during the class period and the evidence of the Settling Defendants' involvement in the conduct at issue. In approving class action settlements, courts often defer to

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[16] *Hughes v. In Motion Entm't*, 2008 U.S. Dist. LEXIS 63369, at *13-16 (W.D. Pa. Aug. 18, 2008). *See also Mehling*, 246 F.R.D. at 472 ("A common inquiry is whether the proposed settlement is the result of 'arm's-length negotiations.'"); *Curiale*, 2008 U.S. Dist. LEXIS 92851, at *11 (the preliminary approval analysis "often focuses on whether the settlement is the product of arm's-length negotiations"); *Gates*, 248 F.R.D. at 444 (granting preliminary approval where there was "nothing to indicate that the proposed settlement . . . [was] not the result of good faith, arm's-length negotiations between adversaries").

the judgment of experienced counsel who have engaged in arm's-length negotiations,[17] understanding that vigorous, skilled negotiation protects against collusion and advances the fairness interests of Rule 23(e).

Class Counsel have very substantial experience in similar antitrust class action cases, having been involved in many such cases for over 30 years.[18] The record in this case shows the vigor with which Class Counsel have prosecuted this case for over thirteen years.

[17] *See Collier v. Montgomery Cty. Housing Auth.*, 192 F.R.D. 176, 186 (E.D. Pa. 2000) ("the court will give due regard to the advice of the experienced counsel in this case who recommend the settlement . . . who have negotiated this settlement at arm's-length and in good faith"); *Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1472 (E.D. Pa. 1995) (stating that significant weight should be attributed "to the belief of experienced counsel that settlement is in the best interest of the class").

[18] Some or all of the attorneys here also were counsel in the following class action antitrust settlements: *In re Cardizem CD Antitrust Litig.*, No. 99-md-1278 (E.D. Mich. Edmunds, J.) (final settlement approval on November 25, 2002); *In re Buspirone Antitrust Litig.*, MDL Docket No. 1413 (S.D.N.Y. Koeltl, J.) (final settlement approval on April 7, 2003); *In re Relafen Antitrust Litig.*, No. 01-12239 (D. Mass. Young, J.) (April 9, 2004); *North Shore Hematology-Oncology Assoc., P.C. v. Bristol-Myers Squibb Co.*, No. 1:04-cv-248 (D.D.C. Sullivan, J.) (Nov. 30, 2004); *In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-mdl-1317 (S.D. Fla. Seitz, J.) (April 19, 2005); *In re Remeron Antitrust Litig.*, No. 03-cv-0085 (D.N.J. Hochberg, J.) (Nov. 9, 2005); *In re Children's Ibuprofen Oral Suspension Antitrust Litig.*, No. 1:2004-cv-01620 (D.D.C. Huvelle, J.) (April 24, 2006); *Meijer, Inc. v. Warner Chilcott*, No. 05-2195 (D.D.C. Kollar-Kotelly J.) (April 20, 2009); *In re Tricor Antitrust Litig.*, No. 05-340 (D. Del. Robinson, J.) (April 24, 2009); *In re Nifedipine Antitrust Litig.*, No. 03-md-223 (D.D.C. Leon, J.) (Jan. 31, 2011); *In re OxyContin Antitrust Litig.*, No. 04-md-1603 (S.D.N.Y. Stein, J.) (Jan. 25, 2011); *Meijer, Inc. v. Abbot Labs.*, No. 07-5985 (N.D. Cal. Wilken, J.) (August 11, 2011); *In re Wellbutrin SR Antitrust Litig.*, No. 04-5525 (E.D. Pa. Stengel, J.) (Nov. 21, 2011); *In re D.D.A.V.P. Antitrust Litig.*, No. 05-cv-2237 (S.D.N.Y. Seibel, J.) (Nov. 28, 2011); *Rochester Drug Co-Operative v. Braintree Labs. Inc.*, No. 07-142 (D. Del. Robinson, J.) (May 31, 2012); *In re Neurontin Antitrust Litig.*, No. 02-1830 (D.N.J. Hochberg, J.) (Aug. 6, 2014); *Mylan Pharma., Inc. v. Warner Chilcott, Ltd.*, No. 12-cv-3824 (E.D. Pa. Diamond, J.) (Sept. 15, 2014); *In re Prandin Direct Purchaser Antitrust Litig.*, No. 2:10-cv-12141 (E.D. Mich. Cohn, J.) (Jan. 20, 2015).

D. The Proposed Settlements Confer Valuable Consideration and Are Within the Range of Possible Approval.

The proposed Settlements are in the best interest of the Class. The Settlements confer valuable consideration to the Class. In reaching each of these Settlements, Class Counsel considered the relative size of each of the Settling Defendants, the strength of the evidence against each of the Settling Defendants, Class Plaintiffs' trial strategy, and other settlements with similarly situated defendants in this case that the Court previously approved.

In counsel's professional judgment, the Settlements fall "within the range of" settlements that could "possibl[y]" be worthy of final approval as fair, reasonable, and adequate.[19] Whether a settlement is granted *final* approval is determined at the final fairness stage in accordance with *Girsh v. Jepson*, 521 F.2d 153 (3d Cir. 1975), which enumerates nine factors to be considered by courts assessing the fairness of a settlement under Rule 23(e).[20] At the *preliminary* approval stage, by contrast, courts simply determine if the settlement could possibly be approved using the *Girsh* factors.[21]

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[19] *See, e.g.*, *Samuel v. Equicredit Corp.*, 2002 WL 970396, *1 n.1 (E.D. Pa. May 6, 2002) (quoting Newberg on Class Actions § 11.25 (1992)).

[20] These factors are: "(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 the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *Girsh*, 521 F.2d at 157 (internal quotations and citation omitted). *See Kaplan v. Chertoff*, 2008 U.S. Dist. LEXIS 5082, at *33-34 (E.D. Pa. Jan. 24, 2008).

[21] *See Curiale*, 2008 U.S. Dist. LEXIS 92851, at *27 n.4 ("[a]t the preliminary approval stage, however, we need not address all of these factors, as 'the standard for preliminary approval is far less demanding'") (quoting *Gates*, 248 F.R.D. at 444 n.7).

E. The Plan of Distribution Is Fair, Reasonable, and Adequate.

Approval of a plan of distribution for a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole, *i.e.*, the distribution plan must be fair, reasonable, and adequate.[22] Generally, an allocation plan is reasonable if it reimburses Class members based on the type and extent of their injuries.[23]

The proposed plan of distribution meets this standard. As described in the proposed notice to Class members, in connection with their motion for final approval of these Settlements, Class Counsel will present an allocation plan to the Court providing that the proceeds of all proposed class settlements in this case, net of any Court-approved award of attorneys' fees and expenses and/or incentive awards to Class members[24] (the "Net Settlement Fund"), will be paid to Class members who submit claims based on each Class member's *pro rata* share of the total damages for Class members submitting claims. For purposes of this allocation, the damages of members of the approved Class who submit claims will be determined by multiplying their purchases during the class period (February 4, 2001 to August 8, 2005) by the overcharge percentage of 7.178427% determined by Plaintiffs' expert. The damages of members of the Giorgi settlement class[25] who submit claims and do not have damages during the approved class

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[22] *In re Ikon Office Sols., Inc., Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000).

[23] *Id*.

[24] If the Court grants Class Plaintiffs' motion for Preliminary Approval of these Settlements, in connection with Class Plaintiffs' motion for Final Approval, Class counsel intends to submit an application to the Court for: (a) attorneys' fees totaling no more than 40% of the Class' recovery; (b) reimbursement of Class Counsel's litigation expenses, which are currently estimated at approximately $4,500,000; and (c) incentive awards for Class Representatives who aided Class Counsel in the prosecution of the case and in achieving these Settlements.

[25] In approving the Giorgi settlement (ECF No. 877), the Court adopted the following definition of the Giorgi settlement class from the Giorgi settlement agreement:

period will be determined by multiplying their purchases during the additional time periods in the Giorgi settlement class (January 1, 2001 through February 3, 2001 and/or August 9, 2005 through December 31, 2008) by 1%. Because the terms of the settlement agreements with Basciani and Certain Defendants provide for a portion of the settlement amounts to be paid to the Class in installments, the allocation plan will provide for the proceeds from those settlements to be distributed to Class members in two installments – the first following the Court's grant of final approval and a second installment two years later distributing the funds from the second and third installment payments from each of the Settlements with Basciani and Certain Defendants. The funds would be held in escrow until they are distributed. By the terms of the

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> All persons or entities who purchased Agaricus mushrooms directly from an EMMC member or one of its co-conspirators or its owned or controlled affiliates, agents or subsidiaries at any times during the period January 1, 2001 through December 31, 2008. The term "Agaricus mushrooms" shall mean all varieties and strains of the species Agaricus bisporus, including, among others, both brown and white varieties. The Direct Purchaser Class excludes the EMMC, its members and their parents, subsidiaries and affiliates. The Class also excludes Giant Eagle and Publix Super Markets, Inc. and their parents, subsidiaries and affiliates.

This definition differs from the Class definition adopted for all other purposes in that it begins on January 1, 2001 (as opposed to February 4, 2001) and ends on December 31, 2008 (as opposed to August 8, 2005). The difference in these class definitions resulted from developments following execution of the Giorgi settlement on April 27, 2011, including counsel's continued development and evaluation of the discovery record, legal rulings issued by the Court, and opinions of Class Plaintiffs' economic expert. Class Plaintiffs' economic expert only provided a damage analysis for purchasers within the later class definition.

To address the difference between the Giorgi settlement class and the later approved class, Class Plaintiffs propose to calculate damages for class members submitting claims for purchases during the time periods January 1, 2001 through February 3, 2001 and/or August 9, 2005 through December 31, 2008 **but who have no purchases during the time period February 4, 2001 to August 8, 2005** (the time period of the later approved class definition) by multiplying the purchases in the Giorgi-only time periods by an overcharge percentage of 1%.

settlement agreements, these installment payments will be secured in a manner that cannot be superseded by creditors. The settlement agreements are conditioned on the Court finding the security to be sufficient and satisfactory as part of its final approval of the settlements. The proposed plan is similar to plans previously approved by courts in class action antitrust cases and implemented with a high degree of success and efficiency,[26] and should be approved here as well.

F. The Proposed Form and Manner of Notice Are Appropriate.

1. Form of Notice.

Under Rule 23(e), Class members are entitled to reasonable notice of a proposed settlement before it is finally approved by the Court, and notice of the final Fairness Hearing.[27] "[T]o satisfy due process, notice to Class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[28] There are two components of notice: (1) the form of the notice, and (2) the manner in which notice is sent to Class members.

The proposed form of notice is appropriate. It contains the same relevant information concerning the settlement as the forms of notice that the Court approved for prior settlements in this case (and to notify Class members that a class had been certified).[29] It is designed to alert Class members of the proposed Settlements by using a bold headline, and the plain language text

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[26] *See, e.g., Mylan Pharma., Inc. v. Warner Chilcott, Ltd.*, No. 12-cv-3824 (E.D. Pa Sept. 15, 2014) (ECF No. 665) (granting final approval to Plan of Distribution); *In re Flonase Antitrust Litig.*, No. 08-cv-3149 (E.D. Pa. June 14, 2013) (ECF No. 496) (same); *Meijer, Inc. v. Biovail Corp.*, No. 2:08-cv-02431 (E.D. Pa. Nov. 7, 2012) (ECF No. 485) (same).

[27] *See* Manual §§ 21.312, 21.633.

[28] *Karcich*, 194 F.R.D. at 174.

[29] *See* ECF No. 877.

provides important information regarding the terms of the proposed Settlements including fair, clear, and concise descriptions in plain, easily understood language of: (1) the nature of the action; (2) the definition of the certified Class; (3) the identity of Settling Defendants; (4) the significant terms of the proposed Settlements including the consideration that Settling Defendants have each agreed to pay to the Class; (5) that a Class member may object to all or any part of the proposed Settlements and the process for doing so, including entering an appearance through an attorney if the Class member desires; (6) the process for obtaining a portion of the settlement proceeds; (7) the final approval process for the proposed Settlements and Class Counsel's request for attorneys' fees, reimbursement of all litigation expenses, and incentive awards for Class Representatives; (8) the schedule for completing the settlement approval process, including deadlines for Class members to submit objections to the Settlements and the submission of the motion for final approval of the Settlements and/or Class Counsel's request for attorneys' fees, reimbursement of all litigation expenses, and incentive awards for Class Representatives; (9) and the binding effect of a final judgment on members of the Class. *See generally* Exhibit 8 to the Gerstein Declaration. In addition, the proposed notice prominently features Class Counsel's contact information and directions to the firm website for Class Counsel where the Settlement documents and supplemental information will be provided, as well as contact information for the settlement administrator.

2. Manner of Notice.

As they did for the initial settlements approved by the Court, Class Plaintiffs propose to provide notice by first-class United States mail as well as by publication in an appropriate trade journal. Notice will be sent by first-class mail to every purchaser whose address appears in Defendants' electronic transactional sales data. In addition to notice by first-class mail, Class Plaintiffs will publish the notice in *Progressive Grocer*, an industry journal that the Class

representatives have advised is the most likely publication to provide actual notice to the members of the Class.

G. The Court Should Appoint Rust as Settlement Administrator.

Class Plaintiffs also ask that the Court appoint Rust as the settlement administrator. The Court has already approved Rust to administer notice of class certification and the settlements with Giorgi, Kitchen Pride Mushroom Farms, Inc., and Creekside Mushrooms, Ltd.[30] It has the requisite skill and experience to serve in this function.[31] Rust will oversee the administration of the Settlements, including disseminating notice to the Class, calculating each Class member's *pro rata* share of the Settlement fund, and distributing settlement proceeds.

H. The Court Should Appoint First State Trust Company as Escrow Agent for the Settlements With Basciani and Certain Defendants.

Class Plaintiffs propose First State Trust Company to serve as escrow agent to hold the installment settlement payments of Basciani and Certain Defendants until they are distributed. First State Trust Company has extensive experience performing this function. Basciani and Certain Defendants have approved this selection.[32]

I. The Proposed Schedule Is Fair and Should Be Approved.

As set forth in the proposed order, Class Plaintiffs propose the following schedule for completing the Settlement approval process:

- Within 10 days of the date of filing for preliminary approval, the Settling Defendants shall serve notice pursuant to the Class Action Fairness Act of 2005;

[30] ECF No. 877.

[31] Rust is well-reputed within the legal, accounting, and financial service fields, and frequently handles claims administration in settlement of large, complex antitrust cases. Rust's resume is attached as Exhibit 9 to the Gerstein Declaration.

[32] *See* Exhibit A to the Basciani and Certain Defendants Settlement Agreements (Escrow Agreements).

- Within 30 days from the date of preliminary approval, notice will be mailed to each member of the Class in Defendants' electronic sales data, and Class Counsel shall arrange for publication notice in the earliest available issue of *Progressive Grocer*;

- Within 60 days from the date of preliminary approval, Class members may object to the Settlements;

- Within 7 days from the expiration of the deadline for Class members to object to the Settlements, Class Counsel will file a motion and memorandum in support of final approval of the Settlements;

- On a date to be set by the Court no less than 115 days following preliminary approval, the Court will hold a final Fairness Hearing; and

- No later than 30 days prior to the date of the Fairness Hearing set by the Court, Class members may submit any Notices of Intention to Appear and Summary Statements of Objections to the Settlements.

This schedule is fair to Class members. It gives Class members ample time for consideration of the Settlements and to object to the Settlements. And, as noted herein, the notice will, *inter alia*, explain the Settlements and direct Class members as to how they can get more information or answers to any questions they may have. In addition, the schedule allows the full statutory period for the Settling Defendants to serve their respective Class Action Fairness Act notices pursuant to 28 U.S.C. § 1715 and for regulators to review the proposed Settlements and, if they choose, advise the Court of their view.

V. CONCLUSION

For the foregoing reasons, Class Plaintiffs respectfully request that the Court enter the proposed Order.

Dated: July 11, 2019

s/ Barry L. Refsin

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