UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-21551-CIV-ALTONAGA/Louis

In re:

FARM-RAISED SALMON
AND SALMON PRODUCTS
ANTITRUST LITIGATION
_____ /

DIRECT PURCHASER PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH ALL DEFENDANTS, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF CLASS NOTICE AND INCORPORATED MEMORANDUM OF LAW

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Direct Purchaser Plaintiffs ("Plaintiffs"), through their counsel Hausfeld LLP and Podhurst Orseck, P.A. ("Class Counsel") respectfully move, under Rule 23 of the Federal Rules of Civil Procedure, for preliminary approval of a proposed settlement (the "Settlement") with all Defendants,[1] preliminary certification of the Settlement Class, and approval of the proposed notice to the Settlement Class.

I. INTRODUCTION

Nearly three years ago, following announcements that the European Commission ("EC") had raided certain Norwegian salmon suppliers in connection with an investigation into potentially anticompetitive practices aimed at increasing the prices for Norwegian salmon, Plaintiff Euclid filed the first civil case against certain of the Defendants on behalf of a proposed class of direct purchasers, seeking damages arising from Defendants' alleged violations of the Sherman Antitrust Act. Plaintiffs' claims, as amended, survived Defendants' motion to dismiss. Following extensive discovery by the Parties—including substantial document productions, numerous sets of interrogatories, and ten 30(b)(6) depositions—the Parties engaged in a Court-ordered mediation before former United States Chief Magistrate Judge Edward Infante in the weeks leading up to the deadline for Plaintiffs to file their class certification motion. As a result of that mediation, the Parties have reached a global settlement.

This Settlement is an outstanding result for the Settlement Class—providing $85,000,000.00 in cash compensation. This sum not only provides the Settlement Class with ample relief but also comes at a relatively early stage in the litigation, which is particularly significant in an antitrust case because such cases often last for years. This resolution thus spares the Settlement Class both litigation risks and substantial litigation costs, preserving more funds for the Settlement Class. The Settlement is fair, reasonable, and adequate, and the Settlement Class satisfies the class

[1] Plaintiffs are: Euclid Fish Company ("Euclid"); Euro USA Inc.; Schneider's Fish and Sea Food Corporation; and The Fishing Line LLC. Defendants are: Mowi ASA (f/k/a Marine Harvest ASA), Mowi USA, LLC (f/k/a Marine Harvest USA, LLC), Mowi Canada West, Inc. (f/k/a Marine Harvest Canada, Inc.), and Mowi Ducktrap, LLC (an assumed name of Ducktrap River of Maine, LLC); Grieg Seafood ASA, Grieg Seafood BC Ltd., Grieg Seafood North America Inc. (f/k/a Ocean Quality North America Inc.), Grieg Seafood USA Inc. (f/k/a Ocean Quality USA Inc.), and Grieg Seafood Premium Brands, Inc. (f/k/a Ocean Quality Premium Brands, Inc.); Sjór AS; SalMar ASA; Lerøy Seafood AS and Lerøy Seafood USA Inc.; and Cermaq Group AS, Cermaq US LLC, Cermaq Canada Ltd., and Cermaq Norway AS. Defendants, collectively with Plaintiffs, are referred to as "Parties". Capitalized terms not defined herein shall have the same definitions ascribed to them in the Settlement Agreement.

certification requirements of Rule 23 for settlement purposes. Moreover, the proposed Notice Program meets all applicable legal requirements under Rule 23 and constitutional due process.

Accordingly, Plaintiffs respectfully request that the Court enter the proposed order granting preliminary approval of the Settlement, certification of the proposed Settlement Class, and approval of the Notice Program. Plaintiffs also ask that the Court vacate all other deadlines and enter the proposed schedule.

II. BACKGROUND AND PROCEDURAL HISTORY

A. The Litigation

On April 23, 2019, Euclid filed the first complaint, *Euclid Fish Co. v. Mowi ASA et al.*, 19-21551-cv, ECF No. 1 (S.D. Fla. Apr. 23, 2019) ("*Euclid*"). *Euclid* was premised upon counsel's review of publicly available material, analysis of market conditions, and research into the EC's investigation targeting numerous Defendants. After it was amended and numerous other similar complaints were filed, the Court consolidated the cases into the above-captioned action. ECF Nos. 53, 56, 57, 94. Following consolidation, the Court appointed Class Counsel as Interim Co-Lead Counsel on behalf of Plaintiffs and the proposed class. ECF No. 97 at 3.

Plaintiffs filed an amended complaint in August 2019 and successfully sought production of over 183,000 documents that Defendants had produced to the DOJ and the EC. *See* ECF Nos. 168, 243. This discovery provided additional details about the Defendants and the antitrust claims. Cermaq was added as a Defendant in Plaintiffs' Second Consolidated Amended Complaint ("SCAC"). Defendants' motion to dismiss the SCAC was denied, and the Court lifted the discovery stay. *See* ECF No. 307, 308.

Discovery then began in earnest. In response to Plaintiffs' discovery requests, Defendants produced more than 872,000 documents, amounting to more than 62 million pages, and responded to multiple interrogatories. Plaintiffs also responded to Defendants' interrogatories and document discovery, producing more than 95,000 documents, amounting to more than 163,000 pages.

In October 2021, Plaintiffs filed their Third Consolidated Amended Complaint ("TCAC"). The TCAC explicitly alleged a claim under the "Rule of Reason" doctrine against all Defendants, alleging that they engaged in information exchanges that violated Sections 1 and 3 of the Sherman Act. ECF No. 447. In the TCAC, Plaintiffs allege that Defendants unlawfully coordinated to fix the prices charged to direct purchasers of farm-raised Atlantic salmon and products derived therefrom. Defendants were alleged to have done so by both (1) applying a coordinated strategy

to fix, raise, or stabilize spot prices of farmed Norwegian salmon through inter-competitor transactions reported to the NASDAQ Salmon Index and (2) coordinating sales prices and exchanging commercially sensitive information to reduce competition among Defendants for salmon, thereby facilitating supra-competitive spot pricing reported by NASDAQ.

Over the last two years, Plaintiffs have vigorously prosecuted their claims, including successfully opposing a motion to dismiss, reviewing hundreds of thousands of documents and dozens of interrogatory responses, and participating in nearly 30 discovery hearings. Plaintiffs also acquired Defendants' transaction data and worked with Dr. Tasneem Chipty of AlixPartners to analyze the class-wide impact and damages resulting from Defendants' alleged actions, and to conduct other significant analyses of Defendants' transaction data and related NASDAQ materials.

B. The Settlement

On March 8-9, 2022, pursuant to the Court's order, ECF No. 381, the Parties engaged in a mediation conducted by retired Chief Magistrate Judge Edward Infante (N.D. Cal.). Following extensive negotiations over two days, the Parties arrived at the rough terms of a potential global settlement. The Parties spent the next several weeks negotiating and documenting their agreement, ultimately executing the Settlement on May 25, 2022. *See* Prieto Decl., Ex. A ("Settlement Agreement" or "SA"). Plaintiffs now move the Court for preliminary approval of the Settlement and related Notice Plan.

The Settlement provides significant relief for the Settlement Class and was negotiated at arm's length between the Parties. In exchange for releasing claims against Defendants in this litigation, Defendants have agreed to pay $85,000,000.00 into a Settlement Fund upon which Settlement Class Members can make claims. SA ¶¶ 1.v & 2. The Settlement Class is:

> All persons and entities in the United States, their territories, and the District of Columbia who purchased farm-raised Atlantic salmon or products derived therefrom directly from one or more Defendants from April 10, 2013 until the date of Preliminary Approval. Excluded from the Settlement Class are the Court and its personnel and any Defendants and their parent, subsidiary, or affiliated companies.

SA ¶ 5. The Released Claims provision is set forth in Paragraph 1.r of the Settlement Agreement. The Released Claims provision excludes unrelated claims and explicitly notes that "the Released Claims" do not include the following Claims: "(a) Claims based on negligence, personal injury, bailment, failure to deliver lost goods, damaged or delayed goods, product defects, breach of

product warranty, or breach of contract; (b) Claims based upon a Releasing Party's purchase(s) of farm-raised Atlantic salmon from the Released Parties (or any one of them) occurring outside the United States or its territories for use or consumption outside of the United States or its territories; or (c) Claims brought under any state law for indirect purchases of farm-raised Atlantic Salmon, including, but not limited to, the Claims brought by the indirect purchasers in *Wood Mountain Fish LLC., et. al. v. Mowi ASA, et. al.*, 19-cv-22128 (S.D. Fla.), and any related indirect purchaser cases consolidated thereunder." SA ¶ 1.r.

Defendants have also agreed to deposit the Settlement Amount into the Escrow Account within 10 calendar days after Preliminary Approval of the Settlement by the Court. After Preliminary Approval, Class Counsel may pay from the Settlement Fund, without further approval from Defendants or the Court, the costs and expenses reasonably and actually incurred up to the sum of USD $150,000 in connection with providing notice and the administration of the settlement. Funds expended from this amount will not be reimbursed in the event that final approval is not granted.

The Settlement Agreement permits Class Counsel to apply to the Court for attorneys' fees and reimbursement of advanced costs. SA ¶ 2. Class Counsel have diligently litigated this case for approximately three years on a contingency basis, and they intend to seek a reasonable fee award not to exceed 30% of the Settlement Fund. Class Counsel will likewise seek to recover the expenses they have incurred in the litigation in an amount no greater than $2,250,000. This amount includes costs of expert fees, foreign language review attorneys and translators, document review vendors, and deposition-related costs. Class Counsel may also request service awards for the named Plaintiffs to be paid from the Settlement Fund, if Eleventh Circuit law permits. The Settlement Agreement is neither dependent nor conditioned upon the Court approving the aforementioned fee, expense, and service payments.

With one exception, the Settlement Agreement represents the complete agreement between the Parties. The Parties have separately agreed to terms permitting the Defendants to terminate the Settlement Agreement should the total volume of commerce represented by Settlement Class Members opting for exclusion from the Settlement Class exceed a certain number. Those terms, and the specific number, will remain confidential and only be disclosed to the Court, which will be provided a copy of the separate agreement for *in camera* review upon request.

C. The Settlement Notice and Claims Process

Plaintiffs have retained third-party administrator, JND Legal Administration ("JND") to conduct the notice and claims administration of the Settlement. As set forth in the supporting Declaration of Gina M. Intrepido-Bowden, the proposed notice plan includes direct notice of the Settlement to be provided via direct mail to the Settlement Class Members at the addresses collected from Defendants' transactional data. Declaration of Gina Intrepido-Bowden ¶ 12. Publication notice will also be given via a press release, and given the industry-wide interest in this case, it is likely to be picked up by relevant media outlets, including those known to report on this case. *Id*. The proposed notice ("Notice") will clearly communicate Settlement Class Members' rights and options under the Settlement in plain, easily understood language, and is attached as Exhibit B to the Declaration of Gina Intrepido-Bowden.

Under Plaintiffs' proposed plan of allocation, Settlement Class Members can make claims for their *pro rata* share of the Settlement Amount. As explained in the Notice, Plaintiffs will use the transactional data produced by Defendants to determine each Settlement Class Member's individual volume of commerce. JND plans to establish a secure online portal whereby Settlement Class Members can check and verify their volume of commerce. Settlement Class Members who dispute their volume of commerce can submit documentation to JND and request reconsideration of the calculation. This plan reduces the burden of claim submission on Settlement Class Members. The proceeds of the Settlement will be distributed on a *pro rata* basis, and Settlement Class Members' payment amounts could vary depending on the number of claims submitted. This process will be clearly and fully explained both in the Settlement Class Notice and on a dedicated website available to Settlement Class Members.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 23(e) requires judicial approval for the compromise of claims brought on a class basis. "[S]uch approval is committed to the sound discretion of the district court." *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992).[2] In exercising that discretion, courts are mindful of the "strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) ("*Bennett*"). The policy favoring settlement is especially relevant in class

[2] Unless otherwise noted, citations are omitted and emphasis is added.

actions, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See, e.g.*, *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) ("There is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex.").

In December of 2018, the Rules Committee revised Federal Rule of Civil Procedure 23 to formalize the preliminary approval process for district courts when first evaluating a proposed class action settlement. *See* Fed. R. Civ. P. 23(e)(1). Under the "new" rule, "[t]he court must direct notice [of the proposed settlement] in a reasonable manner to all class members who would be bound by the proposal if 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). Under the Rule, courts may approve a settlement proposal on a finding that it is fair, reasonable, and adequate after considering 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); *Fruitstone v. Spartan Race Inc.*, No. 1:20-CV-20836, 2021 WL 354189, at *4–5 (S.D. Fla. Feb. 2, 2021) ("*Fruitstone*").

The Eleventh Circuit also continues to instruct district courts to consider the "*Bennett* factors" in assessing whether a proposal is "fair, reasonable, and adequate." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1273 (11th Cir.), *cert. denied sub nom. Huang v. Spector*, 142 S. Ct. 431 (2021), and *cert. denied sub nom. Watkins v. Spector*, 142 S. Ct. 765 (2022). Those factors include (1) "the likelihood of success at trial"; (2) "the range of possible recovery"; (3) "the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable"; (4) "the complexity, expense and duration of litigation"; (5) "the substance and amount of opposition to the settlement"; and (6) "the stage of proceedings at which the settlement was achieved." *Id.*

The Court's Preliminary Approval will allow all Settlement Class Members to receive notice of the Settlement's terms and the date and time of the Fairness Hearing at which Settlement Class Members may be heard and at which further evidence and argument concerning the fairness, adequacy, and reasonableness of the Settlement may be presented by the Parties. *See* MANUAL FOR COMPLEX LITIG., §§ 13.14, 21.632. A hearing is not required at the preliminary approval stage; the Court may grant such relief upon an informal application by the Parties. *Id.* § 13.14.

IV. ARGUMENT

A. The Settlement is Likely to Be Approved.

1. The Settlement Class Has Been Adequately Represented – Rule 23(e)(2)(A).

Class Counsel and the Plaintiffs have more than adequately represented the Settlement Class in this matter. The named Plaintiffs have diligently represented the Settlement Class's interests throughout the litigation by aggressively advocating for the interests shared among all Settlement Class Members. Plaintiffs have also represented the Settlement Class by participating in and responding to discovery, including producing nearly 100,000 documents and their purchase data, responding to written discovery, and assisting Class Counsel and their experts in understanding the salmon industry. These named Plaintiffs have each devoted significant time and resources to achieve financial relief to the Settlement Class as a whole. The Settlement itself is further proof of Plaintiffs' adequacy. *See Tweedie v. Waste Pro of Fla.*, 8:19-cv-1827, 2021 WL 3500844, at *6 (M.D. Fla. May 4, 2021) ("[B]y reaching a class-wide settlement of the claims in this action, Tweedie demonstrated that she is generally adequate to prosecute the action and conduct the proposed litigation.").

Class Counsel—attorneys experienced in class actions and antitrust litigation—have also vigorously litigated Plaintiffs' claims and materially advanced the Settlement Class's interests. Class Counsel have collected significant document and deposition discovery from Defendants. Indeed, Class Counsel obtained hundreds of thousands of documents, totaling millions of pages of material, and retained specialized Norwegian-fluent reviewers to help them understand those documents. Class Counsel's significant discovery efforts are reflected in the nearly 30 discovery conferences they attended before Magistrate Judge Louis.

In addition, Class Counsel retained the services of Dr. Tasneem Chipty, a highly respected antitrust economist, to provide opinions concerning class-wide impact and damages. Class Counsel

and Dr. Chipty performed significant analyses of Defendants' voluminous transaction data prior to the mediation. Class Counsel also served numerous interrogatories and took ten depositions of Defendants' corporate representatives. Aside from engaging in this wide-ranging discovery and in both shepherding and learning from their expert, Class Counsel expended significant time and resources preparing amended complaints with strengthened allegations and in successfully responding to Defendants' Motion to Dismiss. *See In re Health Ins. Innovations Sec. Litig.*, No. 8:17-CV-2186-TPB-SPF, 2021 WL 1341881, at *7 (M.D. Fla. Mar. 23, 2021) (factor satisfied where counsel "vigorously represented the Class" and reached a settlement after "an exhaustive factual investigation . . . prior to filing the Complaint," "opposing Defendants' motion to dismiss;" and "propounding discovery requests and reviewing responses from Defendants"), *report & recommendation adopted*, No. 8:17-CV-2186-TPB-SPF, 2021 WL 1186838 (M.D. Fla. Mar. 30, 2021). Class Counsel have more than adequately represented the Settlement Class's interests.

2. The Settlement Was Negotiated at Arm's Length – Rule 23(e)(2)(B).

The proposed Settlement satisfies the second Rule 23(e)(2) factor because it was achieved through arm's length negotiations among capable counsel with the assistance and supervision of an experienced mediator, former federal Magistrate Judge, Edward Infante (N.D. Cal.). *See* Mediator's Report, ECF No. 511-1. Prior to the mediation, there had been no settlement communications. Instead, the Parties were engaged in extensive discovery and aggressive litigation led by their experienced and knowledgeable counsel. *See* MANUAL FOR COMPLEX LITIG., § 30.42 ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery.") (marks omitted); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1318-19 (S.D. Fla. 2005) (Altonaga, J.) ("*Lipuma*") (approving settlement where "benefits conferred upon the Class are substantial, and are the result of informed, arms-length negotiations by experienced Class Counsel").

The use of a mediator supports the conclusion that the settlement process was not collusive. *See* Fed. R. Civ. P. 23(e)(2)(B) advisory committee's note (2018) ("[T]he involvement of a neutral . . . in [the parties'] negotiations may bear on whether they were conducted in a manner that would protect and further the class interests."); *Morris v. Affinity Health Plan*, 859 F. Supp. 2d 611, 618-19 (S.D.N.Y. 2012) ("The involvement of . . . an experienced and well-known . . . class action mediator[] is also a strong indicator of procedural fairness."). And because of the extensive

discovery already conducted, the Parties were thoroughly informed about the facts of the case and the risks both sides would face absent settlement.[3] The circumstances of the negotiation thus support a finding of fairness. *In re Checking Account Overdraft Litig.*, 275 F.R.D. 654, 661 (S.D. Fla. 2011) ("*Checking*") ("Settlement negotiations that involve arm's length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness.").

3. The Proposed Relief Is Adequate – Rule 23(e)(2)(C).

The Settlement also satisfies the third factor, namely, whether "the relief provided for the class is adequate," after considering the subfactors set forth in Rule 23(e)(2)(C).

a. Costs, risks, and delay of trial and appeal

In evaluating the fairness, reasonableness, and adequacy of a proposed settlement, a court must consider "whether the possible rewards of continued litigation with its risks and costs are outweighed by the benefits of settlement." *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 697-98 (M.D. Fla. 2005); *Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 692 (S.D. Fla. 2014). Where "success at trial is not certain for Plaintiff[s]," this factor weighs in favor of approval. *Burrows v. Purchasing Power, LLC*, No. 1:12-CV-22800, 2013 WL 10167232, at *6 (S.D. Fla. Oct. 7, 2013). Accordingly, this factor strongly supports approval of the Settlement.

The relief provided to the Settlement Class by the proposed Settlement is substantial, particularly when considering the cost savings, increased certainty, and accelerated timing of payments to Settlement Class Members. Indeed, Plaintiffs have achieved an $85,000,000.00 fund for a Settlement Class with approximately 800 members, ensuring that the Settlement Class Members' recovery is far from nominal. While Plaintiffs were and remain optimistic about their ability to prevail upon the claims asserted, they are nonetheless realistic that antitrust class actions are notoriously difficult to prosecute, amplifying the litigation risks to the Settlement Class.[4]

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[3] *See Francisco v. Numismatic Guaranty Corp. of Am.*, No. 06-61677-CIV, 2008 WL 649124, at *11 (S.D. Fla. Jan. 31, 2008) ("Class Counsel had sufficient information to adequately evaluate the merits of the case and weigh the benefits against further litigation" where counsel received responses to interrogatories, document requests, conducted two 30(b)(6) depositions and obtained "thousands" of pages of documentary discovery).

[4] *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("'Indeed, the 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.'") (quotation omitted); *In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 341 (E.D. Pa. 2007) ("*Auto Refinishing*") (approving settlements in part because the "antitrust class action is

Plaintiffs' successful prosecution of this case on behalf of the Settlement Class faced significant hurdles. Many of the Defendants are foreign entities, the alleged conduct occurred years ago and often involves personnel whom Defendants no longer employ. Absent the Settlement, Plaintiffs would have faced continued litigation risk because Defendants, represented by skilled legal counsel, would fiercely contest Plaintiffs' claims at every stage, including class certification, summary judgment, and trial, as well as possible appeals at each of these stages. *See Lipuma*, 406 F. Supp. 2d at 1322 (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement). Indeed, even though Defendants have agreed to resolve this case, they continue to vigorously contest their liability. This Settlement ensures the Settlement Class an ample recovery while negating the significant risks of continued litigation, including the further accumulation of the substantial costs necessary to proceed.

b. Proposed method of distribution

A distribution plan should be approved when it allocates relief in a way that is "fair, adequate, and reasonable." *In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 241 (5th Cir. 1982); *In re Sunbeam Sec. Litig.*, 176 F. Supp. 2d 1323, 1328 n.2 (S.D. Fla. 2001). Such a plan will pass muster so long as "it has a 'reasonable, rational basis,' particularly if 'experienced and competent' class counsel support it." MCLAUGHLIN ON CLASS ACTIONS, § 6.23 (17th ed. 2020).

Each Settlement Class Member who submits a valid claim will be entitled to receive a cash payment in an amount based on the claim's volume of commerce in comparison with the submissions of other claimants on a *pro rata* basis. The claims process in this case will be simple and straightforward, in part because Defendants kept records of their customers and their purchase amounts. Using an online portal, Settlement Class Members will be able to check and accept their claim volume based upon that data. In the event the Settlement Class Member's own data differs, the Settlement Class Member can submit documentation of its volume of commerce for reevaluation by JND, subject to audit. After all claims are processed, JND will promptly distribute cash payments via check to Settlement Class Members. This distribution process, used in many other cases, is fair, adequate, and reasonable.[5]

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arguably the most complex action to prosecute[;] [t]he legal and factual issues involved are always numerous and uncertain in outcome") (quotation omitted).

[5] *See, e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-CV-2058 JST, 2017 WL 2481782, at *5 (N.D. Cal. June 8, 2017) (distribution plan "'fairly treats class members by awarding a pro rata share' to the class members based on the extent of their injuries."); *Four in*

c. Proposed award of fees, including time of payment

As set forth below in Appendix A, in advance of the deadline for Settlement Class Members to opt-out of the Settlement, Class Counsel will request an award of costs and attorneys' fees not to exceed 30% of the Settlement Fund. The requested award of costs and fees is reasonable.[6] Moreover, Plaintiffs' fee request is, of course, subject to the Court's approval.

Class Counsel also intend to apply for up to $150,000 from the Settlement Fund to pay for the actual costs and expenses incurred in connection with providing notice and the administration of the Settlement, as well as up to $2,250,000 for costs and expenses in this case. The expenses for which Class Counsel will seek reimbursement are limited to matters essential for the litigation, primarily the work Plaintiffs' experts have undertaken. Class Counsel also incurred significant costs associated with hiring a team of contract reviewers fluent in Norwegian to review Defendants' documents, expenses which greatly assisted Plaintiffs in the litigation and procuring the Settlement.

The Settlement Agreement is neither dependent nor conditioned upon the Court approving any amount of fees, or, indeed, any payment of fees at all. *See* SA ¶ 2.

d. Identification of all agreements made in connection with the Proposal

Rules 23(e)(2)(C)(iv) and (e)(3) require identification of "any agreement made in connection with the [settlement] proposal." The only such agreement is set forth in the separate document (referenced in the Settlement Agreement) addressing the threshold volume of commerce opting out of the Settlement upon which Defendants may terminate it. SA ¶ 19. As discussed above, the Parties will provide this letter to the Court for *in camera* review upon request.

4. The Settlement Treats All Settlement Class Members Equitably – Rule 23(e)(2)(D).

The final Rule 23(e)(2) factor turns on whether the proposed settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). "Matters of concern could

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One Co. v. S.K. Foods, L.P., 2:08-CV-3017 KJM EFB, 2014 WL 4078232, at *15 (E.D. Cal. Aug. 14, 2014) (approving "allocation providing for a pro rata distribution of the net settlement fund based on verified claimants' volume of qualifying purchases" as "fair, adequate, and reasonable").

[6] *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330 (S.D. Fla. 2011) (awarding 30% fee, inclusive of expenses); *see also Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1243 (11th Cir. 2011) (affirming award above 25% benchmark); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1294 (11th Cir. 1999) (affirming award of fees based upon a benchmark of 30%).

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(e)(2)(D) advisory committee's note (2018). Here, the Settlement treats all Settlement Class Members equitably, with a fair method of accounting for distribution of the settlement proceeds on a *pro rata* basis, and no differences in the scope of relief between any Settlement Class Members.

5. The *Bennett* Factors Support Preliminary Approval.

The *Bennett* factors likewise support preliminary approval of the Settlement. *See Bennett*, 737 F.2d at 986. While Plaintiffs are confident in their case and have prevailed at significant stages of the litigation thus far—including overcoming Defendants' motion to dismiss and succeeding on important discovery disputes—antitrust cases are complex and notoriously difficult to litigate. *See In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1334 (N.D. Ga. 2000) ("*Motorsports*") ("The fact that this is a complex, antitrust suit only adds to the uncertain outcome of the case should it proceed to the trial stage."); *see also Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 559 (N.D. Ga. 2007) ("*Columbus*") ("courts have found that antitrust actions generally present complex, novel issues, and that plaintiffs can rarely guarantee recovery at trial."). Indeed, this case presents its own complex issues, including foreign Defendants, conduct primarily occurring internationally, and much of the most pertinent discovery maintained in Norwegian. These issues and others are hurdles to the Settlement Class's ultimate recovery. Thus, the first and fourth *Bennett* factors support preliminary approval.

With respect to the other two *Bennett* factors—the range of possible recovery and the point on or below the range at which a settlement is fair, adequate and reasonable—Plaintiffs have achieved a substantial recovery of $85 million for the Settlement Class. The Settlement also resolves the burdens and risks associated with prosecuting a complex antitrust class action with international dimensions. Plaintiffs are aware that they "will continue expending a great deal of time and money to attempting to recover a judgment that may not succeed or result in any larger recovery." *Columbus*, 258 F.R.D. at 559; *Motorsports*, 112 F. Supp. 2d at 1334 ("[A]ny victory that the Plaintiffs may obtain at trial could be tied up in the appellate process for years, effectively delaying or even eliminating any possible recovery."). This is a significant result—providing tens of millions of dollars of relief to the Settlement Class.

The fifth factor additionally supports preliminary approval because no opposition to the

Settlement currently exists or is anticipated. The Settlement was negotiated at arm's length under the guidance of a respected mediator over the course of two days, and it provides significant relief to the Settlement Class.

The final *Bennett* factor—the timing of the settlement—likewise supports preliminary approval. While this litigation has already lasted nearly three years, the Settlement has been achieved after the Parties have conducted significant discovery and are thus aware of the strengths and weaknesses of the litigation, yet not so late as to have incurred too significant costs or become an unnecessary burden on the resources of the Parties or the Court. *See Lipuma*, 406 F. Supp. 2d at 1323-24 ("Complex litigation . . . 'can occupy a court's docket for years on end, depleting the resources of the parties and the taxpayers while rendering meaningful relief increasingly elusive.'") (quotation omitted); *Motorsports*, 112 F. Supp. 2d at 1337 ("An antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome. A trial would take weeks, if not months to complete, notwithstanding the massive pretrial preparation that would be required of the parties."). Litigating this action has already taken significant resources, including expert analysis, the use of Norwegian-language reviewers, and the considerable expenditure of time briefing and arguing motions and discovery disputes. And there are still major case milestones ahead, including class certification, the close of discovery in December of 2022, dispositive motions, *Daubert* motions, and of course, trial, which is set for next year. Instead, the "[s]ettlement will alleviate the need for judicial exploration of these complex subjects, reduce litigation cost, and eliminate the significant risk that individual claimants might recover nothing." *Lipuma*, 406 F. Supp. 2d at 1323 (quotation omitted).

In sum, the *Bennett* factors, in addition to the Rule 23 factors, support preliminary approval.

B. The Proposed Settlement Class Meets the Requirements for Conditional Class Certification for Settlement Purposes.

Rule 23(e)(1)(B)(ii) also requires that the Parties demonstrate that certification of the Settlement Class for settlement purposes is likely. As discussed below, the proposed Settlement Class here satisfies the applicable requirements of Rule 23(a) and of Rule 23(b)(3).[7] Plaintiffs,

[7] A settlement class must satisfy all provisions of Rule 23(a), plus one of the subdivisions of Rule 23(b). *See* Fed. R. Civ. P. 23. Rule 23(a) requires Plaintiffs to establish that: (1) the members of the proposed class are so numerous that joinder of the individual claims would be impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the proposed class representatives are typical of the claims of the class members; and (4) the proposed class

therefore, respectfully request that the Court certify the Settlement Class for settlement purposes. *See Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671 (S.D. Fla. 2006) ("A class may be certified solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue.") (internal marks omitted).

1. Settlement Class Members are Sufficiently Numerous that Joinder Is Impracticable.

The first factor in Rule 23(a) is satisfied because the Settlement Class consists of approximately 800 persons throughout the United States and joinder of all those Settlement Class Members is impracticable. *See* Fed. R. Civ. P. 23(a)(1); *Kilgo v. Bowman Trans.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity satisfied where plaintiffs identified at least 31 class members "from a wide geographical area").

2. There Are Common Issues of Law and Fact.

"[C]ommonality requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Williams v. Mohawk Indus., Inc*., 568 F.3d 1350, 1355 (11th Cir. 2009) ("*Williams*") (internal marks omitted); *see also Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 313 (S.D. Fla. 2001) (same). Courts in the Eleventh Circuit "have consistently held that allegations of price-fixing, monopolization, and conspiracy by their very nature involve common questions of law or fact." *In re Delta/AirTran Baggage Fee Antitrust Litig*., 317 F.R.D. 675, 694 (N.D. Ga. 2016) (citations omitted); *see also Richburg v. Palisades Collection LLC*, 247 F.R.D. 457, 462 (E.D. Pa. 2008) ("'Antitrust, price-fixing conspiracy cases, by their nature, deal with common legal and factual questions . . .'") (quotation omitted).

This case is no different. Numerous questions of law and fact centering on Defendants' alleged common course of conduct in selling salmon to Settlement Class Members at prices that Plaintiffs assert were inflated by Defendants' alleged conspiracy, as set forth in the operative Third

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representatives will adequately represent the interests of the class. Fed. R. Civ. P. 23(a). Rule 23(b)(3) requires that the common questions of law and fact must predominate over individual questions, and the class must be superior to other available methods for fairly and efficiently adjudicating the controversy. "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." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("*Amchem*").

Amended Consolidated Class Action Complaint, are common to the Settlement Class. *See Checking*, 275 F.R.D. at 676.

Proof of Defendants' alleged conspiracy to fix prices of Atlantic farm-raised salmon will be the heart of this case at trial and is crucial to the claims of all Settlement Class Members. Each Settlement Class Member must prove the existence, scope, effectiveness, and impact of this alleged conspiracy, as well as the appropriate monetary relief to remedy the injury allegedly caused by Defendants. Rule 23(a)(2) is thus satisfied by common questions, including all factual and legal questions to determine whether Defendants violated Section 1 of the Sherman Act, such as:

- whether Defendants and their co-conspirators entered into an agreement to fix, raise, or maintain salmon prices in interstate commerce in the United States?
- whether each Defendant entered into the agreement?
- whether such agreement was a violation of Section 1 of the Sherman Act?

The proposed Settlement Class will readily satisfy the commonality requirement at final approval.

3. Plaintiffs' Claims Are Typical of the Settlement Class's Claims.

Rule 23(a)(3) requires that the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." The Eleventh Circuit explained that "[t]he claim of a class representative is typical if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory. A class representative must possess the same interest and suffer the same injury as the class . . . ." *Williams*, 568 F.3d at 1357. Typicality will not be destroyed by factual variations between the class representatives and the unnamed class members. *Id.* at 1357 ("typicality requirement may be satisfied despite substantial factual differences when there is a strong similarity of legal theories").

Plaintiffs' claims are typical of the proposed Settlement Class's claims because Plaintiffs' claims arise from the same course of conduct as the claims of the other members of the proposed Settlement Class, namely, the Defendants' alleged violations of the antitrust laws. Each Plaintiff alleges that it paid inflated prices arising from Defendants' misconduct and asserts claims under the same legal theories. As such, the typicality factor will be satisfied at final approval.

4. Plaintiffs Have Adequately Represented the Settlement Class.

In assessing adequacy, here, Plaintiffs "share the same interests as absent class members, assert claims stemming from the same event that are the same or substantially similar to the rest of the class, and share the same types of alleged injuries as the rest of the class." *In re Equifax Inc.*

Customer Data Sec. Breach Litig., No. 1:17-md-2800-TWT, 2020 WL 256132, at *5 (N.D. Ga. Mar. 17, 2020).[8] Each Plaintiff has the same incentive to seek an equitable share of the Settlement Fund as absent Settlement Class Members; there is no divergence between their interests. And Plaintiffs have furthered their shared interests with other Settlement Class Members by selecting well-qualified counsel, who are highly experienced and capable in the field of class action and antitrust litigation. Class Counsel have litigated scores of such cases to resolution—through both settlement and trial—and are recognized as top practitioners in their field. Plaintiffs have prosecuted the action by participating in the discovery process, subjecting themselves to substantial document productions and providing interrogatory responses necessary to propel the case forward. Because Plaintiffs' interests align with those of the Settlement Class and they have adequately prosecuted the action to a beneficial resolution, Rule 23's adequacy factor will be satisfied at final approval.

5. The Proposed Settlement Class Satisfies Rule 23(b)(3) for Settlement Purposes.

a. Common questions predominate over individualized issues.

The predominance requirement of Rule 23(b)(3) requires that "[c]ommon issues of fact and law . . . ha[ve] a direct impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010) ("*Sacred Heart*") (internal marks omitted). "Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1191 (11th Cir. 2009) (citations omitted).

If they were to file their own individual actions, the proposed Settlement Class Members here would seek to prove their claims by using the same class-wide evidence of Defendants' alleged agreement to fix, raise, or stabilize salmon prices and of the wrongful exchange of price-driving, competitively sensitive information among Defendants. They would not introduce a "great

[8] The adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 594. The Court must determine: "(1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1323 (11th Cir. 2008).

deal of individualized proof or argue a number of individualized legal points" to establish the elements of their claims. *Sacred Heart*, 601 F.3d at 1170; *Checking*, 275 F.R.D. at 660. Thus, for purposes of settlement, predominance is satisfied here.

b. A class action is superior to the alternate methods of adjudication.

Because of the large number of potential claims, the desirability for consistency in adjudications of these claims, the limited interest that Settlement Class Members would have in controlling the prosecution of claims, and the economic factors that would render individual actions cost-prohibitive, a class action is also the superior means of adjudication. *See In re Health Ins. Innovations Secs. Litig.*, No. 8:17-CV-2186-T-60SPF, 2020 WL 10486665, at *6 (M.D. Fla. Oct. 21, 2020) ("Here, the thousands of potential claims, the desirability of consistent adjudication of those claims, the high probability that individual members of the proposed class would not have a great interest in controlling the prosecution of the claims, and the economical hurdles that would make litigating the issues individually less feasible – all these factors weigh in favor of a class action as the preferable method for adjudicating these claims."); *report & recommendation adopted*, 2020 WL 10486666 (M.D. Fla. Nov. 19, 2020); *see* Fed. R. Civ. P. 23(b)(3).[9] "And because Plaintiff seeks class certification for settlement purposes, the Court need not inquire into whether this Action, if tried, would present intractable management problems." *Fruitstone*, 2021 WL 354189, at *4 (citing *Amchem*, 521 U.S. at 620).

For these reasons, the Court should certify the Settlement Class for purposes of settlement.

C. The Proposed Notice is the Best Practicable Under the Circumstances.

Where there is a class settlement, Rule 23(e)(1) requires the court to "direct notice in a reasonable manner to all class members who would be bound by the proposal." In the context of Rule 23(b)(3) actions, "the court must direct to class members the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B).

The Due Process Clause also requires that class members be apprised of the action and afforded an opportunity to object. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

[9] In determining whether a class action is a superior means of adjudicating a controversy, courts look to four factors: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D); *see Amchem*, 521 U.S. at 620.

Courts may exercise substantial discretion in determining an appropriate notice plan. *See Juris v. Inamed Corp.*, 685 F.3d 1294, 1317 (11th Cir. 2012). The best practicable notice is that which is "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." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). To satisfy this standard, "[n]ot only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action." *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1227 (11th Cir. 1998) (internal marks omitted); *see also* MANUAL FOR COMPLEX LITIG., § 21.312 (listing relevant information).

Here, the proposed notice plan should be approved because it is the best notice that is practicable under the circumstances and fully comports with due process and Rule 23. Intrepido-Bowden Decl. ¶ 12. JND have designed a notice program that provides individual, direct notice via U.S. mail to the Settlement Class Members, with skip tracing and other methods to find changed addresses as well as a press release providing publication notice of the Settlement. The Notice describes, in straightforward language, Settlement Class Members' rights under the settlement and all other relevant information.[10] *See* 4 NEWBERG ON CLASS ACTIONS § 11:53 (4th ed. 2002) (notice is "adequate if it may be understood by the average class member"). The Notice is also consistent with the sample provided by the Federal Judicial Center.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court vacate all currently pending case deadlines and enter the proposed order preliminarily approving the Settlement Agreement, directing notice of the proposed Settlement to the Settlement Class, appointing Class

[10] The Notice includes: (i) the case caption; (ii) a description of the Settlement Class; (iii) a description of the Settlement Agreement, including the monetary consideration provided to the Settlement Class; (iv) the names of Class Counsel; (v) information about and the date of Fairness Hearing (vi) information about the deadline for filing objections to the Settlement Agreement; (vii) a statement of the deadline for filing requests for exclusion from the Settlement Class; (viii) the consequences of exclusion or remaining in the Settlement Class; (ix) how Class Counsel will be compensated and that additional information regarding Class Counsel's fees and costs will be posted on the website prior to the deadline for objections; and (x) how to obtain further information about the proposed Settlement Agreement, including through the website maintained by the Claims Administrator that will include links to the notice, motion for approval, and for attorneys' fees and other important documents in the case. *See* Fed. R. Civ. P. 23(c)(2)(B).

Counsel and the Settlement Class Representatives for settlement purposes, and setting a hearing for the purpose of deciding whether to grant final approval of the Settlement. As set forth in the Proposed Order, Plaintiffs propose the schedule in Appendix A to effectuate the Settlement and final approval.

Dated: May 25, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify the foregoing document is being served this day on all counsel of record via transmission of notice of Electronic Filing generated by CM/ECF.

By: */s/ Peter Prieto*
Peter Prieto