

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

HARRY PLOSS, as Trustee for the)	
HARRY PLOSS TRUST DTD)	
8/16/1993, on behalf of Plaintiff)	
and all others similarly situated,)	
)	Case No. 15 C 2937
Plaintiffs,)	
)	Judge John F. Kness
v.)	
)	
KRAFT FOODS GROUP, INC. and)	
MONDELÉZ GLOBAL LLC,)	
)	
Defendants.)	

**DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION
FOR APPROVAL OF CLASS NOTICE**

Defendants Kraft Foods Group Inc. and Mondelēz Global LLC (collectively, “Kraft”) respectfully request that the Court approve Plaintiffs’ proposed class notice with the following modifications. First, the Court should adopt Kraft’s proposed language concerning the preservation of documents. Plaintiffs’ proposal is needlessly equivocal with regard to preservation and may result in the destruction of records essential to class members’ claims and Kraft’s defenses. Second, the Court should include Kraft’s single sentence concerning the potential for class member discovery. Plaintiffs’ objection ignores the law and withholds critical information from class members. Third, the Court should order Kraft’s name removed from the proposed case website because its inclusion gratuitously prejudices Kraft. And fourth, Plaintiffs’ proposed notice makes it too difficult for class members to opt out. The opt out protocol should be amended to (1) allow class members additional time to opt out in light of Plaintiffs’ plan to contact most class members through intermediaries and (2) allow class members to opt out via

email or the case website, consistent with modern forms of communication and the difficulties imposed by the COVID-19 pandemic.

I. The Court should adopt Kraft's clear preservation language and reject Plaintiffs' equivocal approach.

Kraft's proposed preservation language actually directs potential class members to preserve the derivatives and cash wheat trading records that all parties agree are critical to class members' claims and Kraft's defenses. *See* Ex. 1 at 4; Ex. 2 at 3;¹ *see also* Dkt. No. 367 ("Pls.' Mem.") Ex. C at 4. This notice provision is preferable to Plaintiffs' equivocal approach.

As an initial matter, there is no serious dispute that class members' trading records are essential. Plaintiffs' class certification expert admitted that trading records are critical to determine damages. *See* Dkt. No. 240, Pirrong Rep. ¶ 318 ("An exact calculation of damages requires knowledge of the exact pattern of sales and purchases by each individual or firm that traded during the period Kraft's manipulation distorted the price. This cannot be known prior to the receipt of proofs of claim from class members."); *see also* Dkt No. 264-2, Pirrong Tr. 355:6-24, 460:4-21 (admitting individual records are necessary to calculate offsets and ascertain a complete record of a class member's trading). Consistent with their expert's view, earlier this year Plaintiffs asked the Court to allow an interim notice to "instruct[] [class members] to retain their pertinent trading records." Dkt. No. 336 ¶ 4. Judge Chang agreed, and instructed the parties to negotiate an interim notice "so that the records get retained." Dkt. No. 340 at 4:7-22.

Plaintiffs do not dispute that such records may be needed. Instead, they suggest a clear preservation directive is unnecessary because, in their view, class member records may never be necessary. *See* Pls. Mem. at 12-13 (listing various factors that would render preservation

¹ Kraft has attached its proposed notices as Exhibits 1 and 2 to this response and highlighted the disputed provisions.

unnecessary, including settlement and trial outcome). But their argument misses the point of a preservation notice, which is to make sure records are maintained *in case* they become necessary as the case progresses.

Recognizing the importance of individual trading records, Kraft's proposal informs class members that they "should preserve" these records because the records may be necessary to establish and quantify class members' claims (including offsets) if Plaintiffs prevail at trial. *See* Pls.' Mem. Ex. C at 4. Plaintiffs' proposal, by contrast, merely "encourage[s]" class members to preserve such records. *Id.* Worse, Plaintiffs offer such encouragement only after informing class members that Plaintiffs intend to seek such information from CME in the first instance. Aside from the obvious chilling effect it will have on preservation, Plaintiffs' reference to CME data is both dubious and not a substitute for class members' trading records.

Plaintiffs have offered no reason to believe they will be able to obtain such information from CME. Indeed, if such information were actually available, Plaintiffs' notice plan does not comport with Rule 23. Rule 23 requires "the best notice that is practicable under the circumstances, *including individual notice to all members who can be identified through reasonable effort.*" Fed. R. Civ. P. 23(c)(2)(B) (emphasis added). But Plaintiffs intend to notify the majority of class members through their brokers, *see* Pls.' Mem. at 6-8, presumably because the identity of the actual class members are unknown. If Plaintiffs could obtain the identities of class members from CME in a single data dump, there would be no reason to notify only the brokers and rely on them to identify and contact class members. To the contrary, inserting a superfluous middleman into the notice process would be inconsistent with Rule 23's guidance to provide individual notice to all class members.

Even if Plaintiffs were able to obtain such data from CME, class member records will almost surely remain necessary to understand class members' profits and losses, account for class members that hold interests in multiple accounts, and account for gains that must be offset against Plaintiffs' losses. For example, one lead plaintiff—Harry Ploss—held interests in numerous different futures accounts with multiple commodity trading advisors and multiple brokers during the relevant time period. While some of those accounts were in his name, others were held by a trust. Plaintiffs agree that Ploss's losses must be offset by his gains to calculate his damages. *See* Dkt. No. 264-4, Robinson Rep. at ¶¶ 21-25. They also agree that the calculation must incorporate *all* of Ploss's accounts. *Id.*; *cf. Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009) (noting “each member of the class will have to submit a claim” and that “[s]ome of the class members . . . will submit a claim that will be rejected because the claimant cannot prove damages, having obtained off-setting profits”). The importance of accounting for appropriate offsets to damages here is not merely theoretical. When Plaintiffs' expert performed offset calculations for the named plaintiffs in this case, he determined that *five of the seven* named plaintiffs in this case—including Harry Ploss—either profited or suffered no losses as a result of the alleged price inflation. *See* Dkt. No. 264-4, Robinson Rep. Ex. 5. Any data available from CME, however, will almost certainly not be able to identify the various accounts in which Ploss holds a stake.

Likewise, CME data is incapable of providing information on cash transactions where hedgers obtained a gain in the cash market equivalent to their alleged loss in the futures market. As CME explains on its website, “[h]edging is essentially taking a position in the futures or options market that is opposite your current position in the cash market. Since the cash and futures prices tend to move up and down together, any gains or losses in the cash market will be

counterbalanced with gains or losses in the futures market.”² That is particularly true in the wheat market because cash transactions typically expressly incorporate the futures contract into the price term (*e.g.*, +0.75WZ means the cash price is the December futures price plus 75 cents/bushel).³ Accordingly, hedgers with short futures positions could have lost money if the futures price became artificially high; but they likely received a corresponding gain on their cash sale, because the cash price expressly included the allegedly inflated futures price—making the class member’s net damages zero. This is the point of hedging. Plaintiffs’ expert agreed that if “the cash price at which [a hedger] sold would be increased by as much as the futures price that they bought,” the hedger would have suffered no damages from an economic standpoint. Dkt. No. 264-2, Pirrong Tr. 350:14-351:5.

Although Plaintiffs have agreed to “encourage” class members to preserve records of their cash wheat trading in addition to futures trading, Plaintiffs disagree with Kraft’s language because it also tells class members *why* they should preserve such records: because “[c]lass members ... may be required to offset claims for money or benefits with any gains made on cash market transactions.” Plaintiffs do not offer any reason for keeping class members in the dark, nor is there one.⁴

² See <https://www.cmegroup.com/education/courses/introduction-to-agriculture/grains-oilseeds/how-to-hedge-grain-risk.html>.

³ See <https://www.cmegroup.com/education/courses/introduction-to-agriculture/grains-oilseeds/learn-about-basis-grains.html> (explaining cash price components).

⁴ Plaintiffs argue, in a footnote, that Kraft’s offset defense is wholly unavailable. This argument is irrelevant since Plaintiffs have already agreed to language “encouraging” the preservation of cash records. In any case, the authority Plaintiffs cite, *Transnor (Bermuda) Ltd. v. BP N. Am. Petroleum*, 736 F. Supp. 511, 522-23 & n. 15 (S.D.N.Y. 1990), is inapposite. In *Transnor*, the plaintiffs sought to expand their damages in a commodities claim to encompass *losses* that occurred outside the futures market. The court held that damages in a CEA claim are limited to “assets that are part of a futures market.” *Id.* at 523. Kraft’s offset defense affects the calculation of those damages, and whether such damages even occurred. The typical cash wheat contract includes the futures price in the cash price term, such that the value of any cash purchase or sale is directly impacted by the futures price. A class member whose loss on a hedging position in the futures market is directly (and intentionally) offset

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