

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE BROILER CHICKEN ANTITRUST
LITIGATION

Case No. 1:16-cv-08637

This Document Relates To:

Honorable Thomas M. Durkin

THE DIRECT PURCHASER PLAINTIFF
ACTION

**MEMORANDUM REGARDING DIRECT PURCHASER PLAINTIFFS' MOTION
FOR FINAL APPROVAL OF THE SETTLEMENTS WITH DEFENDANTS
PECO FOODS, INC., GEORGE'S, INC., GEORGE'S FARMS, INC.,
AND AMICK FARMS, LLC**

Settling Defendants Peco Foods, Inc., George's, Inc., George's Farms Inc., and Amick Farms, LLC ("Settling Defendants") submit this memorandum in connection with the Direct Purchaser Plaintiffs' motion for final approval of the Settling Defendants' settlements.

PRELIMINARY STATEMENT

Settling Defendants fully support the settlements and urge the Court to approve them. Settling Defendants submit this memorandum solely to address an issue relating to entities that requested exclusion from the class (*i.e.*, "opt-outs") for claims that Settlement Class Members partially assigned to them, which affects the calculation of the Settlement Amount, including the "Reduction of Settlement Amount Based on Opt-Outs" under the settlements with Peco Foods, Inc., George's, Inc., and George's Farms, Inc. (the "Peco and George's Settlements"). (*See* ECF No. 3324, Exs. A and B at § II.E.10.b.)

The Peco and George's Settlements contain reduction mechanisms in the event that class members who opt out of the Settlement Class represent more than 50% of all Defendants' United States total annual sales for 2008-2017. (*See id.*) These Settlement Agreements call for a reduction of 2% for each percentage point exceeding 50%. Thus, if it is determined that 50.6% of the class opts out, then the Settlement Amounts—\$5.15 million for Peco and \$4.25 million for George's—are reduced by 1.2%. DPP Class Counsel, the Settlement Administrator, and the Settling Defendants have worked cooperatively to implement these portions of the Settlement Agreements. For the overwhelming majority of class members, the Settling Defendants have no reason to challenge the Settlement Administrator's determinations.¹

¹ The Amick Farms, LLC Settlement Agreement has a different settlement reduction mechanism and termination provision based on class members who opt out of the Settlement Class. (*See* ECF No. 3324, Ex. C at § II.E.10.b.)

However, there is one category of purported opt-out requests that the Settling Defendants believe should be treated differently than they are currently being treated by the Settlement Administrator. The scenario at issue is demonstrated by the following:

A direct purchaser of Broilers (*e.g.*, a distributor) sells to multiple customers. The direct purchaser did not request exclusion from the class, and thereby is a Settling Class Member. However, one of the direct purchaser's customers asserts that it has been given an assignment of claims from the direct purchaser, limited to claims arising from the purchase of Broilers re-sold to that particular indirect purchaser/assignee. The assignee requests exclusion from the class as to those partially assigned claims.

If the claims that are partially assigned are treated as a valid opt-out, this scenario creates significant uncertainty. Without agreement from the assignor, assignee, Settlement Class, and Settling Defendants as to the value of the partial assignment opt-outs—which does not exist here—there is an open question about what portion of the direct purchaser's claims are released and eligible for compensation under the settlements, and what value has been opted out through the partially assigned claims and thus represents potentially remaining liability. The issue raised in this response is limited to *partial* assignments, as distinct from full assignments where a direct purchaser has assigned 100% of its claims to an assignee. These partial assignment opt-outs are set forth in Exhibit B attached to the DPP's proposed orders granting final approval to the settlements. (*See* ECF Nos. 3777-1 (Peco and George's Proposed Order) and 3777-2 (Amick Proposed Order).)

The Settling Defendants submit that, with one exception, the "partial assignment opt-outs" should be rejected. As courts have held, a partial assignee cannot opt out of a class action in which the assignor is participating, with one narrow exception explained more fully below. By rejecting partial assignment opt-outs where there is no express agreement reflecting a meeting of the minds as to the volume of commerce represented by any partial assignment, the court approving the class settlement establishes a clear record as to which claims are released by the settlement and which

are not, and prevents future disputes about ambiguities regarding the court's approval order. Consistent with these legal principles, the Court should enter the Settling Defendants' proposed orders entering final judgment and granting final approval of the settlements. If the Court agrees, the opt-out percentage is less than 50% and the amounts of the Peco and George's Settlements will remain at \$5.15 and \$4.25 million, respectively.

Alternatively, if the Court were inclined to permit the exclusion of partially assigned claims, Settling Defendants respectfully submit that the final approval order should reflect the precise dollar value of the commerce being excluded from the settlements through each partial assignment so that all parties have a clear understanding of what has been released through the settlement and what potential liability remains.

BACKGROUND

Following the Court's December 20, 2019 order granting preliminary approval of the Settlements (ECF No. 3359), DPP Class Counsel and the Settlement Administrator implemented the Court-approved notice plan to members of the Settlement Class—*i.e.*, entities that purchased Broilers directly from Defendants during the Class Period. As required by Federal Rule of Civil Procedure 23, the notice explained the binding effects of class membership and how to exclude oneself from the Settlement Class. The deadline to request exclusion from the Settlement Class was March 9, 2020. The Settlement Administrator reviewed and processed applications for requests for exclusion.

Many of the entities that directly purchased Broilers from Defendants are food distributors who resold the Broilers to other entities, including restaurants and grocers. As DPP Class Counsel informed the Court through a publicly filed April 15, 2020 Notice, several of the opt-out notices received by the Settlement Administrator provided that they were submitted "with the intent to exclude certain assigned claims from other Class Members." (ECF No. 3567 at 2.) In other words,

these opt-out notices attempted to exclude from the class settlement, claims based on direct purchases of Broilers by direct purchasers that were later re-sold to the opt-out entity. (*See, e.g.*, Ex. A to Declaration of Nicci Warr (“Warr Decl.”) (attached hereto as Exhibit 1); *see also* Opt-Out Notices Deemed Invalid by Administrator (ECF 3757-8), Ex. F1.)²

None of the opt-out notices alleging partial assignments from other Class Members provided any documentation regarding the alleged assignments or information about the volume of purchases that were allegedly assigned. (*See* DPP April 15, 2020 Notice (ECF No. 3567) at 3 (“For each of these assignment of claims, the information provided is insufficient to determine whether a valid assignment of claims has occurred and, if so, the dollar value of the purchases being assigned.”).) Consequently, the Settlement Administrator contacted the parties seeking exclusion for partial assignments to inform them that to facilitate the validation of these partial assignment opt-outs, they would need to complete a Notification of Irrevocable Assignment confirming both the assignment and the value of the purchases assigned, as well as provide the Settlement Administrator with sufficient information to validate the value of the partial assignments of claims (the “stipulation process”). (*See* ECF No. 3757-9, Ex. G (template email and Notification of Irrevocable Assignment form).) The Notification of Irrevocable Assignment was designed to provide assurance that the alleged assignee and alleged assignor agreed that a partial assignment had occurred and the volume of commerce associated with the partial

² Some of these notices also requested exclusion of claims based on *direct* purchases by the opt-out entity. The exclusion of claims based on direct purchases is not at issue.

In some instances, both the alleged assignee and the alleged assignor submitted an opt-out notice for the partially assigned claims. In other instances, only the alleged assignee submitted an opt-out notice. In these later instances, absent verification from the alleged assignor of the partial assignment, it is not clear whether there is agreement that *any* claims have been assigned, much less any agreement on the volume of claims.

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