

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

IN RE BROILER CHICKEN ANTITRUST  
LITIGATION

No. 16 C 8637

Judge Thomas M. Durkin

MEMORANDUM OPINION AND ORDER

Purchasers of chicken meat (a product known as “Broilers”) allege that Broiler producers conspired to raise prices in violation of the Sherman Act. At the outset of the case, the Court appointed interim class counsel for three classes of purchasers: (1) direct purchasers (the “Directs”); (2) commercial and institutional indirect purchasers (the “Indirects”); and (3) end-user consumers (the “End Users”; and all three classes together, the “Plaintiffs”). Each class has moved for certification pursuant to Federal Rule of Civil Procedure 23. Plaintiffs rely on expert opinions to support their motions, and Defendants have moved to exclude those experts pursuant to Federal Rule of Evidence 702 and *Daubert*. Defendants also produced an expert witness, but Plaintiffs have not moved to exclude his testimony. The Court held a two-day hearing on May 10-11, 2022, and heard testimony from the parties’ experts. *See* R. 5624; R. 5625.<sup>1</sup> This opinion addresses all three classes’ motions for

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<sup>1</sup> The Directs’ expert is Dr. Colin A. Carter. He has degrees from the University of California at Berkeley and is a Professor of Agricultural and Resource Economics at the University of California. The Indirects’ expert is Dr. Russell W. Mangum III. He earned masters and doctoral degrees from the University of Southern California and is a Senior Vice President at Nathan Associates, Inc., an economic consulting firm. The End Users’ expert is Dr. David L. Sunding. He has degrees from the University of California at Berkeley and is President of The Brattle Group. Defendants’ expert

certification and Defendants' corresponding *Daubert* motions. For the following reasons, Defendants' *Daubert* motions are denied, and Plaintiffs' motions for class certification are granted.

### Analysis

The Court may certify a class of plaintiffs pursuant to Federal Rule of Civil Procedure 23(a) if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Additionally, Plaintiffs in this case seek certification under Rule 23(b)(3), which requires them to demonstrate that: (1) “the questions of law or fact common to class members predominate over any questions affecting only individual members”; and (2) “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”

Plaintiffs bear the burden of satisfying Rule 23, which is not “a mere pleading standard.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). To meet this burden, Plaintiffs must “satisfy through evidentiary proof” each of Rule 23’s elements. *Id.* In

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is Dr. John H. Johnson, IV. He has a Ph.D. in economics from the Massachusetts Institute of Technology and is CEO of Edgeworth Economics, LLC. The experts prepared the following reports: Carter’s report, R. 3990-122; Carter’s rebuttal report, R. 4505; Mangum’s report, R. 3985-8; Mangum’s rebuttal report, R. 4493-3; Sunding’s report, R. 3971-4; Sunding’s rebuttal report, R. 4487-3; Johnson’s report, R. 4209-1, R. 4234-2, R. 4213-4; Johnson’s rebuttal report R. 4275-9.

deciding a class certification motion, the Court must conduct a “rigorous analysis” before it can determine whether Plaintiffs have satisfied Rule 23’s requirements. *Id.* This often means that a Court must resolve issues that also bear on the merits of the claim, but only if those issues “overlap” with class certification issues. *Id.* at 33-34. Despite the need for rigorous analysis, “the court should not turn the class certification proceedings into a dress rehearsal for a trial on the merits.” *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). Instead, the Court need only consider the evidence submitted by the parties and determine whether Plaintiffs have proven each of Rule 23’s elements by a preponderance of the evidence. *Id.*

The proposed class definitions are as follows. For the Directs:

All persons who purchased raw Broilers [directly] from any of the Defendants or their respective subsidiaries or affiliates either fresh or frozen, in the form of: whole birds (with or without giblets), whole cut-up birds, or parts (boneless or bone in) derived from the front half of the whole bird, for use or delivery in the United States from December 1, 2008 until July 31, 2019.

R. 3990 at 26. For the Indirects:

All entities that purchased Broilers indirectly from a Defendant or named co-conspirator in an Indirect Purchaser State<sup>2</sup> for their own use in commercial food preparation from January 1, 2009, until July 31, 2019.

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<sup>2</sup> The “Indirect Purchaser States” are: Arizona, California, the District of Columbia, Florida, Hawaii, Iowa, Illinois, Kansas, Massachusetts, Maine, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska, New Hampshire, New Mexico, Nevada, New York, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, or West Virginia. The Indirects seek damages for this class under the respective state laws. The Indirects also seek certification of a class for nationwide injunctive relief under federal law.

Excluded from the [Indirect] class are: Natural persons who purchased Broilers for their personal use and not for commercial food preparation; purchases of Broilers directly from Defendants; purchases of Broilers for resale in unaltered form; purchases of Broilers from an intermediary who has further processed the Broiler; the Defendants; the officers, directors or employees of any Defendant; any entity in which any Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any Defendant; any federal, state governmental entities, any judicial officer presiding over this action and the members of her/her immediate family and judicial staff, any juror assigned to this action; and any co-conspirator identified in this action.

R. 3968 at 2-3. And for the End Users:

All persons and entities who indirectly purchased the following types [of] raw chicken, whether fresh or frozen: whole birds (with or without giblets), whole cut-up birds purchased within a package, breast cuts or tenderloin cuts, but excluding chicken that is marketed as halal, kosher, free range, organic, diced, minced, ground, seasoned, flavored or breaded—from defendants or co-conspirators for personal consumption in the Repealer Jurisdictions<sup>3</sup> from January 1, 2012 to July 31, 2019.

R. 3971 at 6.<sup>4</sup>

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<sup>3</sup> The “Repealer Jurisdictions” are: California, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, and Wisconsin. The End Users seek damages for this class under the respective state laws.

<sup>4</sup> The Court notes that the End Users seek certification of a class that is narrower in scope, both substantively and temporally, than the classes sought by the Directs and Indirects, and narrower than the classes the Court has approved in settlements the End Users have reached with certain defendants. The Court ordered a brief explaining this change, which the End Users provided. *See* R. 5569. Bottom line, the End Users believe their proof more closely fits a narrower class. *See id.* at 1.

## **I. Numerosity, Adequacy, Commonality & Typicality**

Other than arguments about certain class representatives and the application of state laws, Defendants generally do not challenge whether the Plaintiffs have met their burden to establish the four elements of Rule 23 subsection (a). That is likely because those elements are easily met in this case.

### **A. Numerosity**

Defendants have produced electronic sales data identifying thousands of direct purchases of Broilers. *See* R. 3990-122 at 106 (¶ 173) (the Directs' expert used a data set containing 5,918 customers). The Indirects' class includes nearly every entity in the United States that serves chicken to individuals, whether for profit or otherwise, including restaurants, deli-counters, schools, hospitals, airlines, casinos, etc. *See* R. 3985-8 at 127-29 (¶¶ 230-32). The End User class includes nearly every individual consumer of chicken in the United States. *See* R. 3971 at 6. Joinder of this many plaintiffs would be impractical, and so the numerosity requirement is satisfied here for all three classes. *See Anderson v. Weinert Enterprises, Inc.*, 986 F.3d 773, 777 (7th Cir. 2021) ("Our cases have recognized that a forty-member class is often regarded as sufficient to meet the numerosity requirement."). Defendants do not dispute this.

### **B. Adequacy**

Adequacy is a two-part test: (i) the class representatives must not have claims in conflict with other class members, and (ii) the class representatives and proposed

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Defendants do not argue that this narrowing undermines any of the motions for class certification, so the Court has not focused on its significance in addressing them.

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