UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

IN RE: WHOLESALE GROCERY PRODUCTS ANTITRUST LITIGATION	Civil Action No. 09-md-02090 ADM/TNL MDL No. 2090
THIS DOCUMENT RELATES TO: ALL ACTIONS	

MIDWEST PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT BETWEEN PLAINTIFF D&G, INC. ON BEHALF OF THE CHAMPAIGN DC NON-ARBITRATION CLASS AND DEFENDANT SUPERVALU INC. AND ENTRY OF FINAL JUDGMENT

TABLE OF CONTENTS

I. INTRODUCTION

Midwest Plaintiffs, through Plaintiff D&G, Inc., individually and on behalf of the Champaign DC Non-Arbitration Class (the "Class"), seek final approval of their settlement with Defendant Supervalu Inc., pursuant to the terms and conditions of the Settlement Agreement dated July 24, 2017.[1] The Settlement, pursuant to which Supervalu already has paid the total amount of $8.75 million in cash into an interest-bearing escrow account for the benefit of the Class, is fair, reasonable, and adequate, and it provides a real and immediate benefit to class members. In addition, it is recommended by experienced Class Counsel and supported by all class members.

The Court preliminarily approved this settlement on August 10, 2017, and ordered that the Champaign DC Non-Arbitration Class be notified of the proposed settlement.[2] Class Counsel and the claims administrator did so, and gave all class members the opportunity to comment on or object to the Settlement. No class member has objected to the Settlement. Thus, the Class's approval of this Settlement affirms Midwest Plaintiffs' recommendation that the Settlement be approved. This memorandum and its accompanying declarations summarize the litigation and settlement processes.

---

[1] A copy of the Settlement Agreement is attached as Exhibit 1 to the Declaration of Elizabeth R. Odette in Support of Midwest Plaintiffs' Unopposed Motion For Preliminary Approval of Class Settlement Between Plaintiff D&G, Inc. on Behalf of the Champaign DC Non-Arbitration Class and Defendant Supervalu Inc., Approval of Notice to Settlement Class, Appointment of a Settlement Administrator, and to Schedule a Final Approval Hearing ("Odette Preliminary Approval Decl."). *See* ECF No. 823-1 (July 24, 2017). Any capitalized terms have the definitions given in the Settlement Agreement if not otherwise defined herein.

[2] Order Granting Preliminary Approval Of Proposed Settlement Agreement between D&G, Inc. on Behalf of the Champaign DC Non-Arbitration Class and Supervalu Inc. ("Preliminary Approval Order"), ECF No. 840.

Accordingly, Midwest Plaintiffs respectfully request that the Court grant final approval to the Settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties Vigorously Contested This Multi-District Litigation

Midwest Plaintiffs discussed the factual and procedural background of this case in some detail in their memorandum in support of their motion for preliminary approval of the Settlement ("Preliminary Memo.") at 2-6 (ECF No. 822) and their memorandum in support of their motion for approval of a proposed plan of distribution to the Champaign Non-Arbitration Class and partial reimbursement of expenses ("Distribution Memo.") at 1-5 (ECF No. 876). Rather than repeat that discussion here, Midwest Plaintiffs respectfully direct the Court's attention to those briefs. *See also* Odette Preliminary Approval Decl., ¶¶ 2-6 (ECF No. 823); Declaration of W. Joseph Bruckner in Support of Midwest Class Plaintiffs' Motion for Approval of Distribution to the Champaign Non-Arbitration Class and Partial Reimbursement of Expenses ("Bruckner Distribution Decl."), ¶¶ 2-4 (ECF No. 877). Suffice it to say that both sides have aggressively litigated this case since it was commenced in 2008, including multiple trips to the Eighth Circuit, multiple rounds of dispositive and class certification briefing, and extensive discovery and fact development by all sides. The Settlement is the product of years of hard-fought litigation and arms-length settlement negotiation. Odette Preliminary Approval Decl., ¶ 8.

This settlement resulted from the parties' day-long mediation with Professor Eric Green, a widely respected mediator, in Boston on May 25, 2017. Preliminary Memo. at

6. As a result, Midwest Plaintiffs agreed with Supervalu to settle the claims by the Champaign Distribution Center non-arbitration class, the only class to allege claims against Supervalu. Defendant C&S was part of the May 25 mediation, but Midwest Plaintiffs did not settle with C&S. After this Court preliminarily approved the proposed settlement with Supervalu on August 10, 2017, the Court scheduled a final approval hearing for November 15, 2017. Preliminary Approval Order at 4.

B. Material Terms of the Settlement Agreement

The terms of the settlement are set forth fully in the Settlement Agreement. Odette Preliminary Approval Decl., Ex. 1. Per the Settlement Agreement, Supervalu has already paid $8,750,000 into escrow as consideration for Class members to release all claims that were, or could have been, raised arising out of the subject matter of the litigation, including all such claims that relate in any way to Defendants' September 6, 2003 Asset Exchange Agreement or the pricing of wholesale grocery products and services purchased during the Class Period. *See* Odette Final Approval Decl., Ex. 1 at 9. Supervalu also agreed that if this case goes to trial against C&S, Supervalu will authenticate certain of its business records under Federal Rules of Evidence 803(6) and 901. *Id*. at 10; Preliminary Approval Memo. at 7. Co-Lead Counsel have informed the Class that all members who submit a qualifying claim will receive a *pro rata* share of the net settlement fund (the settlement fund, plus accrued interest, less any award of attorneys' fees or reimbursement of expenses and less applicable taxes, tax preparation expenses, and costs of notice and administration, that may be awarded or approved by the Court) based on qualifying purchases. *See* Odette Final Approval Decl., Ex. 2 at 6; *see*

also Distribution Memo. at 6. There will be no reversion of the Settlement Fund to Supervalu. *See* Odette Final Approval Decl., Ex. 1 at 13.

C. The Court Preliminarily Approved the Settlement, and the Champaign Non-Arbitration Class and the Appropriate Government Officials All Have Been Duly Notified of the Proposed Settlement.

On July 26, 2017, Plaintiff D&G and Defendant Supervalu presented the proposed Settlement to the Court (ECF No. 819), and the Court granted preliminary approval on August 10 (ECF No. 840).

Pursuant to the Preliminary Approval Order, Midwest Plaintiffs sent notice to all known Class members of the proposed Settlement and the fairness hearing to be held on November 15, 2017. The Claims Administrator, JND Legal Administration LLC, mailed a long-form notice by first class mail to Class members identified through reasonable efforts. JND Decl., ¶¶ 8-13 and Ex. A.[3] On a public website dedicated to this litigation, www.wholesalegroceryproductsclassaction.com, JND also posted both the notice of the objection deadline and also the notice of the claims process, in addition to many other case-related documents, including the full text of the Settlement Agreement, instructions on how to obtain, complete and submit a claim against the Settlement Fund, instructions on how to attend the Court's fairness hearing, instructions on how to object to the Settlement, and other details regarding the Settlement and the approval process. JND

[3] References to the "JND Decl." are to the Declaration of Jennifer Keough Regarding the Settlement Administration of the Class Settlement Between Plaintiff D&G, Inc. on Behalf of the Champaign DC Non-Arbitration Class and Defendant Supervalu, Inc., filed herewith.

Decl., ¶¶ 16-17. JND has also operated a toll-free telephone number to field Class member questions. JND Decl,. ¶¶ 18-19.

On August 1, 2017, Supervalu notified the appropriate federal and state officials pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715(b), which requires that appropriate federal and state officials (in this case, the U.S. and state attorneys general) be notified of any proposed class action settlement.[4] The statute provides that a court may not grant final approval to a proposed settlement sooner than 90 days after such notice is served. The 90-day waiting period ran on October 30, 2017, and none of the notified federal or state officials have objected to or otherwise commented on the proposed settlement. *Id*.

The Court set November 1, 2017, as the deadline for Class members to object to the Settlement. Preliminary Approval Order at 4. No Class member has objected to the proposed settlement or to any other aspect of the litigation. Odette Final Approval Decl., ¶ 4; JND Decl., ¶ 22.

III. ARGUMENT

A. Final Approval Should Be Granted

Whether a proposed settlement should be approved is within the sound discretion of the district court, which should be exercised in the context of public policy strongly favoring the pretrial settlement of controversies, particularly in the context of class action

[4] Declaration of Elizabeth R. Odette in Support of Midwest Plaintiffs' Motion for Final Approval of Class Settlement Between Plaintiff D&G, Inc. on Behalf of the Champaign DC Non-Arbitration Class and Defendant Supervalu Inc. and for Approval of Plan of Allocation ("Odette Final Approval Decl."), ¶ 3, filed herewith.

lawsuits. *See MSK Eyes, Ltd. v. Wells Fargo Bank, N.A.*, 546 F.3d 533, 541 (8th Cir. 2008) (noting "strong public policy of encouraging settlement"); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) ("[S]trong public policy favors agreements, and courts should approach them with a presumption in their favor.") (internal citation omitted); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation[.]"); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) (approval of a settlement "is committed to the sound discretion of the trial judge").

Review of a proposed settlement generally proceeds in two stages: first, preliminary approval, followed by a fairness hearing on final approval. *See Manual for Complex Litigation* § 21.632 (4th ed. 2004). This procedure safeguards class members' procedural due process rights and enables courts to fulfill their roles as guardians of class interests. *See* 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.22 et seq. (4th ed. 2002). This Court preliminarily approved the Settlement and now, respectfully, should grant final approval.

B. <u>The Standard for Final Approval Has Been Satisfied in This Case</u>

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, before a class action may be settled, voluntarily dismissed or compromised, the court must determine whether the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(1)(A); *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988) (quoting *Grunin*, 513 F.2d at 123); *see also DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1176 (8th Cir. 1995). In

determining whether a settlement is fair, reasonable, and adequate, courts in the Eighth Circuit examine a range of factors. These factors typically include assessing: "(1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement." *In re UnitedHealth Grp. Inc. Shareholder Derivative Litig.*, 631 F. Supp. 2d 1151, 1156 (D. Minn. 2009). The court must also assess whether a proposed settlement is "within the range of possible approval due to an absence of any glaring substantive or procedural deficiencies." *Martin v. Cargill, Inc.*, 295 F.R.D. 380, 383 (D. Minn. 2013). The Settlement here is fair, reasonable, and adequate and falls within the range of possible approval.

1. The Settlement Was Negotiated at Arm's Length and Therefore Satisfies the Procedural Component for Final Approval.

"Before approving a class action settlement, the district court must reach a reasoned judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion among, the negotiating parties[.]" *Ficalora v. Lockheed Cal. Co.*, 751 F.2d 995, 997 (9th Cir. 1985); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005) ("[P]rior to approving settlement . . . the court must determine there has been no fraud or collusion in arriving at the settlement agreement[.]").

If a settlement is negotiated at arm's length, there is a presumption that the settlement is procedurally sound. *See, e.g., In re UnitedHealth Grp. Inc. Shareholder Derivative Litig.*, 631 F. Supp. 2d at 1158 ("Where sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of

the settlement.") (quoting *City P'ship Co. v. Atlantic Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)).

Courts additionally consider whether the settlement was reached with the assistance of a mediator. *See, e.g., Desert Orchid Partners, L.L.C. v. Transaction Sys. Architects, Inc.*, Nos. 8:02CV553, 8:02CV561, 2007 WL 703515, *2 (D. Neb. Mar. 2, 2007) (finding the assistance of "qualified mediators" supports approval of a settlement); *In re Schering-Plough Corp. Sec. Litig.*, No. 01-CV-0829, 2009 WL 5218066, *3 (D.N.J. Dec. 31, 2009) (use of highly-regarded mediator part of "a pattern that demonstrates arms-length negotiating").

In the instant case, there is no dispute that the proposed Settlement is the product of extensive, arm's length negotiations. The Settlement was reached after two mediation sessions over the course of several years. These mediations culminated in resolution before Professor Eric Green, a well-respected mediator, after over eight years of active litigation and negotiations between highly experienced counsel. Odette Preliminary Approval Decl., ¶ 8. There was no fraud or collusion and there are no indicators to the contrary. *Id*. at ¶ 9. At the time of settlement, the parties had completed fact and expert discovery; the Class had been certified; and several appeals and procedural hurdles had been cleared. *Id*. Over the course of litigation and mediation, Midwest Plaintiffs' Counsel gained extensive knowledge regarding the merits, strengths, and weaknesses of the claims asserted. *Id*. at ¶ 10. Based on their familiarity with the factual and legal issues, Midwest Plaintiffs' Counsel was able to make well-informed, good faith, assessments of the costs and risks of proceeding to trial before reaching an agreement.

These assessments were also made based on Midwest Plaintiffs' Counsel's extensive experience litigating claims of this type. *Id*. at ¶ 11. Thus, the Settlement here is "the product of hard-fought adversarial negotiations" between the parties. *Wietzke v. CoStar Realty Info., Inc.*, No. 09-cv-2743, 2011 WL 817438, *5 (S.D. Cal. Mar. 2, 2011).

2. The Settlement's Substantial Consideration Favors Approval When Balanced against the Case's Strength and the Complexity and Expense of Further Litigation.

The Settlement provides substantial value to Class members. Supervalu has paid $8,750,000 for the benefit of the Class. The proposed settlement, if approved, will resolve the claims of the Champaign Non-Arbitration Class against Supervalu and allow the claims process to proceed, providing the resulting benefits to Class members without further litigation or appeals. Courts consistently hold that the complexity, expense and likely duration of litigation are all factors supporting approval of a settlement. *See, e.g.*, *In re Corrugated Container Antitrust Litig*., 643 F.2d 195, 217 (5th Cir. 1981). In particular, "antitrust cases, by their nature, are highly complex." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044 (2005)*; In re Shopping Carts Antitrust Litig*., MDL No. 451, 1983 WL 1950, *6 (S.D.N.Y. Nov. 18, 1983) ("[A]ntitrust price fixing actions are generally complex, expensive and lengthy.").

This case is no different. Midwest Plaintiffs assert complex claims arising under the Sherman Antitrust Act. Further prosecution against Supervalu would be not only complex, but expensive and time-consuming. The Court need only look to the ongoing litigation against the remaining Defendant, C&S, to assure itself of this fact. Almost nine years into this case, after several trips to the Eighth Circuit, extensive fact and expert

discovery, and class certification, summary judgment and *Daubert* motions decided, Plaintiffs' claims against C&S, absent settlement, are going to trial. ECF No. 883.

Without approval of the settlement, the Class faces risks in relation to potential summary judgment and *Daubert* motions,[5] and a lengthy trial, "with its attendant pretrial order, laborious winnowing of proof before trial, and post-trial skirmishing." *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 591 (S.D.N.Y. 1992). Additionally, any trial judgment would still be subject to the continuing risks of litigation through probable appeals. Even large judgments recovered after litigation and trial can be completely lost on appeal or as a result of a post-trial judgment as a matter of law. *E.g.*, *TVT Records v. Island Def Jam Music Grp.*, 412 F.3d 82, 96 (2d Cir. 2005) (reversing and setting aside $54 million judgment).

These risks, coupled with the substantial benefits to the Class, favor final approval of the Settlement.

3. Experienced Class Counsel Believe the Proposed Settlement Reflects a Reasonable Assessment of the Strength of the Class's Claims.

Courts give substantial weight to the experience of the attorneys who prosecuted the case and negotiated the settlement. *Christina A. v. Bloomberg*, No. Civ. 00-4036, 2000 WL 33980011, *4 (D.S.D. Dec. 13, 2000) ("The Court attributes significant weight to Plaintiffs' attorney's assertion that the Settlement Agreement is fair, reasonable and

[5] *See* Stipulation regarding Motion for Summary Judgment and Motion to Exclude the Expert Testimony of Dr. Jeffrey Leitzinger as to Settling Parties D&G, Inc. on Behalf of the Champaign DC Non-Arbitration Class and Supervalu Inc. (ECF No. 826) filed with this Court on July 28, 2017.

provides significant benefits to the Plaintiff class. Indeed, Plaintiffs' lead attorney . . . based this assertion on his 22 years of experience in this field and his participation in similar cases in 15 other states."). Co-Lead Counsel's approval of a settlement weighs in favor of the settlement's fairness. *E.E.O.C. v. Faribault Foods, Inc.*, Civ. Nos. 07-3976 (RHK/AJB), 07-3986 (RHK/AJB), 07-3977 (RHK/AJB), 07-3985 (RHK/AJB), 2008 WL 879999, *4 (D. Minn. Mar. 28, 2008); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 240 (D.N.J. 2005). Here, Midwest Plaintiffs' Counsel, who have extensive antitrust class action experience, conducted an extensive factual and legal analysis in connection with the claims and allegations asserted in the Action and believe that the benefit conferred by the Settlement is an excellent result for the Class. Odette Final Approval Decl., ¶ 5.

While Co-Lead Counsel believe in the merits of this case, they recognize that the outcome of further litigation in any case is uncertain. The Settlement avoids that uncertainty, while securing a significant benefit to the members of the Class.

4. Supervalu Has Paid Its $8,750,000 Settlement Consideration into Escrow.

Supervalu has paid $8,750,000 into an interest-bearing escrow account. Odette Final Approval Decl., ¶ 2. This payment removes any concerns about the ability to pay the settlement amount. *See In re UnitedHealth Grp. Inc. Shareholder Derivative Litig.*, 631 F. Supp. 2d at 1156.

5. Class Members Support the Settlement

The fact that no class member has objected to the proposed settlement supports a finding that it is fair, reasonable, and adequate. *See, e.g.*, *Wal-Mart Stores, Inc.*, 396 F.3d at 118 ("If only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement."); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 378 (D.D.C. 2002) (finding that "the settlement group's reaction to this settlement has been overwhelmingly positive and supports approval" and that "[t]he existence of a relatively few objections certainly counsels in favor of approval"); *In re Rambus Inc. Derivative Litig.*, No. C 06-3513, 2009 WL 166689, *3 (N.D. Cal. Jan. 20, 2009) ("The reaction of the class to the proffered settlement . . . is perhaps the most significant factor to be weighed in considering its adequacy . . . .") (internal quotations and brackets omitted). In this case, the complete absence of objections substantially supports the fairness of this Settlement.

Here, JND mailed notice to 57 addresses for the 44 Class Members, 55 addresses received a postcard notice, and posted notice on the case-specific website. JND Decl., ¶¶ 8, 11, 17. Both the mailed notice and the case website informed Class members of the terms of the Settlement and the November 1, 2017 deadline for objections. Preliminary Approval Order at 4. No Class member has objected. JND Decl., ¶ 22.

That no Class member has objected is an impressive result for a settlement of this prominence and for such a class of sophisticated businesses and individuals. The Class's overwhelming affirmation strongly supports the fairness and reasonableness of the Settlement.

IV. CONCLUSION

The proposed Settlement is fair, reasonable, and adequate, and provides a prompt and substantial cash benefit to Class members. It avoids the risks of additional litigation with Supervalu. Experienced Class Counsel recommend the Settlement, and no Class member has objected to the Settlement. For these reasons, Midwest Plaintiffs respectfully request that this Court approve the Settlement.

Dated: November 8, 2017

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/ Elizabeth R. Odette
W. Joseph Bruckner (#147758)
Elizabeth R. Odette (#0340698)
Kristen G. Marttila (#0346007)
Kate M. Baxter-Kauf (#392037)
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981
wjbruckner@locklaw.com
erodette@locklaw.com
kgmarttila@locklaw.com
kmbaxter-kauf@locklaw.com

Richard B. Drubel
Matthew J. Henken
BOIES, SCHILLER & FLEXNER LLP
26 South Main Street
Hanover, NH 03755
Tel: (603) 643-9090
Fax: (603) 643-9010
rdrubel@bsfllp.com
mhenken@bsfllp.com

Daniel A. Kotchen
Daniel L. Low
KOTCHEN & LOW LLP
1745 Kalorama Road NW, Suite 101
Washington, DC 20009
Tel: (202) 471-1995
Fax: (202) 280-1128
dkotchen@kotchen.com
dlow@kotchen.com

Co-Lead Counsel for Plaintiffs and Counsel for Midwest Plaintiffs