

**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 DISTRIBUTION OF NET SETTLEMENT FUND**

TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

I. INTRODUCTION .....1

II. BACKGROUND.....2

    A. Claims Administration .....2

    B. Distribution of Net Settlement Fund .....7

III. ARGUMENT .....7

    A. The Court Should Approve the Administrative Recommendations of  
    the Claims Administrator and Co-Lead Counsel Concerning  
    Acceptance or Rejection of Timely Claims and Authorize Payment of  
    these Claims .....9

    B. Any Claims Submitted After the Date of this Filing Should be Denied.  
    ..... 10

IV. CONCLUSION ..... 10

## I. INTRODUCTION

Midwest Plaintiffs, through Plaintiff D&G, Inc., individually and on behalf of the Champaign DC Non-Arbitration Class (the “Settlement Class”), move for an order approving distribution of settlement funds to qualified claimants from their settlement with Defendant Supervalu Inc. This motion and the plan of distribution are pursuant to the terms and conditions of the Settlement Agreement dated July 24, 2017,<sup>1</sup> and this Court’s Order Granting Midwest Class Plaintiffs’ Motion for Approval of Plan of Distribution to the Champaign Non-Arbitration Class and Partial Reimbursement of Expenses (ECF No. 898). The Court-appointed settlement administrator, JND Legal Administration LLC, in consultation with Midwest Plaintiffs’ Co-Lead Counsel, has diligently processed claims and determined each claimant’s eligibility. There was significant participation in the claims process by Class Members: more than half of eligible class members submitted claims that now are being recommended for approval. Those claims will be paid promptly upon approval by the Court of this motion, as described in detail below.

As of the date of this filing, the Net Settlement Fund contains a balance of \$4,549,000 (\$4,574,000 minus \$25,000 reserved to pay settlement administration expenses), after accounting for Court-approved expenses and the reservation for attorneys’

---

<sup>1</sup> 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.”) (ECF No. 823-1). Any capitalized terms have the definitions given in the Settlement Agreement if not otherwise defined herein.

fees and a service award. Declaration of Elizabeth R. Odette (“Odette Distribution Decl.”) ¶ 2 (filed herewith). Co-Lead Counsel propose that the Court order that the Net Settlement Fund be distributed on a *pro rata* basis as described herein and attached as Exhibit 1 to the Odette Distribution Decl. and as previously approved to satisfy qualifying Class Member claims.

## II. BACKGROUND

### A. Claims Administration

On September 7, 2016, this Court certified five Midwest Classes after factual and expert discovery, briefing, and oral argument, including the Champaign DC Non-Arbitration Class (later designated as the Settlement Class). ECF No. 651 at 31-32. The Court also appointed D&G, Inc. d/b/a Gary’s Foods as the representative of the Champaign DC Non-Arbitration Class. *Id.* Accordingly, this Court approved a Notice Plan, pursuant to which the Court: (a) approved the long form notice, the creation of a case-specific website, and the creation of a toll-free number with telephone script; (b) appointed JND as the Notice Administrator; and (c) directed JND to cause the long form notice to be mailed to members of the certified classes, and to create the toll-free number and case website. ECF No. 727 at 12. In accordance with the Notice Plan, JND administered the notification process, case-specific website, and toll-free number. *See* ECF No. 743 (Declaration of Jennifer M. Keough Regarding Mailing of the Class Notice).

As part of the Notice Plan, Class Members who chose to exclude themselves from the Classes were required to do so by July 1, 2017. ECF No. 727 at 12-13. JND compiled a report of those Class Members that timely requested exclusion from the Champaign DC

Non-Arbitration Class (as well as the other Midwest Classes), which was filed with the Court on July 31, 2017. *See* ECF No. 828; ECF No. 828-1 (list of class members who opted out, including Niemann Foods, a member of the Champaign Non-Arbitration DC Class).

Subsequent to the Court's certification of these five classes, Midwest Plaintiffs settled with defendant Supervalu on behalf of the Champaign DC Non-Arbitration Class, the only class that had claims against Supervalu. On July 26, 2017, Midwest Plaintiffs moved for preliminary approval of the Supervalu settlement and for authority to notify the class of the settlement. ECF No. 819. On August 10, 2017, the Court preliminarily approved the settlement, approved notice to the Settlement Class, appointed JND as the Settlement Administrator, and set a schedule for dissemination of notice, objections, and final approval of the Settlement. *See* ECF No. 840 at 3-4. Accordingly, JND administered the settlement notification process, including mailed notice, and updates to the case-specific website and toll-free number. *See* ECF No. 889 (Declaration of Jennifer M. 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.). Within 14 days after preliminary approval was granted on August 10, 2017, Co-Lead Counsel notified all members of the Champaign DC Non-Arbitration Class of their right to review and, if they chose, object to the proposed settlement. *Id.*

Prior to the Final Approval Hearing for the Settlement, Plaintiffs also moved for approval of a plan to distribute part of the Supervalu settlement proceeds to the Champaign Non-Arbitration Class and for partial reimbursement of expenses. ECF No. 874. In that

motion, Plaintiffs proposed that the majority of the Supervalu settlement fund (\$4,574,000 minus an accounting for necessary reserves for claims administration and accounting for escrow fees, the proposed and approved reimbursement of expenses and reserve for motion of attorneys' fees and service award as described below) be distributed *pro rata* to qualified claimants. *See* ECF No. 876 at 8. In conjunction with that motion, on September 25, 2017, JND sent all members of the Settlement Class claim forms, together with instructions on how to complete and return the claim form and how to object, if they chose, to the plan of distribution. Claim forms were addressed individually to each class member and showed each class member what Supervalu's transaction data showed as that class member's total purchases during the Class Period. *See* ECF No. 876 at 10; *see also* ECF No. 877 (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); ECF No. 889 at 3. The deadline for class members to object to the Settlement was November 1, 2017, and the deadline to submit a claim form was December 1, 2017. *Id.* This information also was made available to all Class Members on the case website.<sup>2</sup>

The Court held the final fairness hearing for the Settlement on November 15, 2017. No Class Member objected to the proposed Settlement. *See* ECF No. 889 at 5. On November 16, 2017, the Court granted final approval to the Settlement, approved the Notice Program as fully compliant with Fed. R. Civ. P. 23 and the requirements of due

---

<sup>2</sup> Wholesale Grocery Products Antitrust Litigation Case Website, <http://www.wholesalegroceryproductsclassaction.com/>

process as the best notice practicable under the circumstances, and approved the escrow account established by Supervalu as a Qualified Settlement Fund. ECF No. 897. The same day, the Court entered its order approving the plan of distribution to the Settlement Class and Co-Lead Counsel's request for partial reimbursement of expenses. ECF No. 898.

Pursuant to the Court's Order regarding the plan of distribution and reimbursement of expenses, Co-Lead Counsel have held back from distribution 30 percent of the Settlement Fund for possible future award for attorneys' fees consistent with the practice in the Eighth Circuit, and \$10,000 for a potential service award for class representative D&G. *See* ECF No. 898 at 2; ECF No. 876 at 12. Pursuant to the Settlement Agreement, Co-Lead Counsel also will reserve \$25,000 for payment of settlement administration for "costs and expenses associated with disseminating notice to the Settlement Class" and "costs and expenses associated with the administration of the Settlement, including but not limited to, processing claims and fees of the Class Action Settlement Administrator." *See* ECF No. 840 at 6 ¶ 6(b)&(c); *see also* ECF 823-1 Section II. C. 2. at 12 (authorizing Co-Lead Counsel without prior order of the Court to withdraw up to \$25,000 from the Settlement Fund to pay the costs of notice and administration of the Settlement); *see also* Odette Distribution Decl. ¶ 3. Together with the \$1.5 million approved as partial reimbursement of costs and litigation expenses reasonably and necessarily incurred in prosecuting and resolving the Action, this leaves \$4,549,000 (\$4,574,000 minus \$25,000 reserved for settlement administration expenses) as the Net Settlement Fund. *Accord* ECF No. 876 at 8.

JND received 23 valid and qualifying claim forms that were timely submitted on or before the claims deadline of December 1, 2017, a 52% response rate from 44 class members. Keough Distribution Decl. ¶ 5; *accord* ECF No. 889 at 2. No late valid and qualifying claim forms were received. Keough Distribution Decl. ¶ 5. Of the 23 claim forms submitted, 22 checked Box A and accepted the Supervalu transaction data as the claimant's total purchases during the class period. *Id.* As allowed by the Court-approved claim form, one claimant checked Box B and submitted alternative purchase amounts accompanied by supporting documentation. *Id.* After verifying its data, JND and Co-Lead Counsel used that claimant's purchase amounts in determining the distribution properly due. *Id.*

JND also received 295 claim forms that were rejected for failing to contain the information required to verify the individual or entity submitting the claim form as a member of the Champaign DC Non-Arbitration Class. Keough Distribution Decl. ¶ 6, Exhibit A; Odette Distribution Decl. ¶ 4. Claimants whose claim forms were rejected and provided a mailing address<sup>3</sup> have been notified by mail that their claim is denied, that any objection to this determination is due by January 26, 2018 and the process to object, and that the Court will hear the Motion for Distribution of Net Settlement Fund on February 7, 2018. Keough Distribution Decl. ¶ 7. The notice also referenced the case website so that claimants may access additional information, including contact information for the Settlement Administrator and Co-Lead Counsel. *Id.*

---

<sup>3</sup> Two claimants failed to provide a mailing address on their submitted claim form. Keough Distribution Decl. ¶ 7.



Based on this information, JND and Co-Lead Counsel recommend that non-qualifying claims reflected in Keough Distribution Decl., Exhibit A be denied, and that qualifying claimants be paid according to the *pro rata* distribution chart in Odette Distribution Decl., Exhibit 1, which accounts for all claims filed and the Net Settlement Fund amount. Keough Distribution Decl. ¶ 8.

**B. Distribution of Net Settlement Fund**

Upon entry of an order approving the distribution as originally submitted or as modified by the Court, the escrow agent will distribute the Net Settlement Fund in the amount of \$4,549,000.00 to Settlement Administrator JND and JND will issue payment of each qualified claimant's *pro rata* share of the Distribution Fund by promptly mailing payments to Class Members at the address indicated on their Claim Form or as updated in JND's database. In addition, the escrow agent will file any tax returns and pay any taxes due from the Settlement Fund. JND recommends (and Co-Lead Counsel concur) that the checks disbursed to qualified claimants bear the notation "Non-Negotiable After 90 Days" and that no check be negotiable more than 120 days after the date of the check. Keough Distribution Decl. ¶ 9. The additional 30 days will allow for bank processing and a small extension of time for individuals who present their checks to the bank after 90 days but the bank continues to accept the check for payment. *Id.*

**III. ARGUMENT**

This Court has already approved the plan of distribution for the Champaign DC Non-Arbitration Class as fair, reasonable, and adequate. ECF No. 981. Based on Co-Lead Counsel's supervision of JND's claims administration process, Co-Lead Counsel propose

that the Court accept JND's recommendations regarding payment of qualifying claims and denial of non-qualifying claims. As of now, no valid and qualifying late claims have been filed; in the event that any more claims are filed, JND recommends, and Co-Lead Counsel concur, that no claims filed after the date of this filing be paid.

The approved plan of allocation aims to compensate qualifying claimants in proportion to each claimant's purchases. This proposed settlement distribution apportions available settlement funds on a *pro rata* basis to qualified claimants without favoring any class member over another. In antitrust cases such as this, such plans have consistently been deemed fair, reasonable, and adequate by numerous courts. *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 94 C 897, 1999 WL 639173, at \*4 (N.D. Ill. Aug. 17, 1999) ("We note that courts have utilized the pro rata distribution method in several prior price-fixing class actions. . . . We think this method will provide the most accurate measure of the damages suffered by each class member and, for this reason, we endorse the pro rata distribution method."); *accord In re Packaged Ice Antitrust Litig.*, 08-MDL-01952, 2011 WL 6209188, at \*15-16 (E.D. Mich. Dec. 13, 2011); *In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 345 (E.D. Pa. 2007); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 335 (E.D. Pa. 2007); *In re Remeron Direct Purchaser Antitrust Litig.*, CIV.03-0085 FSH, 2005 WL 3008808, at \*11 (D.N.J. Nov. 9, 2005) (citing cases); *see also* 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 12.10 (4th ed. 2002). For example, in administering the substantial LCD settlements, Judge Susan Illston noted that *pro rata* allocation "has been used in many

antitrust cases.” *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. MDL 3:07-md-1827, 2011 WL 7575004, at \*4 (N.D. Cal. Dec. 27, 2011).

**A. The Court Should Approve the Administrative Recommendations of the Claims Administrator and Co-Lead Counsel Concerning Acceptance or Rejection of Timely Claims and Authorize Payment of these Claims**

As explained above, JND has performed a diligent, thorough review of claim forms. JND reviewed and approved 23 claims submitted by verified class members and approved, 22 of which accepted the Supervalu transaction data; as allowed, one claimant submitted alternative purchase amounts accompanied by supporting documentation. Keough Distribution Decl. ¶ 5. Based on this process, JND has determined (and Co-Lead Counsel concurs) that there are 23 eligible claims to be paid as set out in the attached declarations. *See* Keough Distribution Decl. ¶ 8; Odette Distribution Decl. ¶4. Co-Lead Counsel and JND have determined that those qualifying claims should be paid as described above and attached as Exhibit 1 to the Odette Distribution Decl. JND reviewed and rejected 295 claims for failing to contain the information required to verify the individual or entity submitting the claim form as a member of the Champaign DC Non-Arbitration Class. Co-Lead Class Counsel agrees with JND’s determinations and thus proposes that the Court approve JND’s determinations concerning the denial of ineligible claims and the payment of eligible claims. Co-Lead Counsel therefore recommends that the Court deny the ineligible claims, authorize payment of the eligible claims, order that the escrow agent distribute the Net Settlement Fund to Settlement Administrator JND, and order JND to distribute the Net Settlement Funds in accordance with this proposed distribution of benefits.

**B. Any Claims Submitted After the Date of this Filing Should be Denied.**

As noted earlier, JND has received no valid and qualifying claims postmarked after the posted deadline of December 1, 2017. *See* Keough Distribution Decl. ¶ 5. As a result, JND recommends, and Co-Lead Counsel agrees, that the Court should disallow any late-filed claims yet to come. The Court has discretion to allow or disallow such claims. *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1128 (9th Cir. 1977) (court has discretion with respect to the disallowance of late claims); *Burns v. Elrod*, 757 F.2d 151, 154-55 (7th Cir. 1985); *see In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 194-97 (3d Cir. 2000) (holding that until the fund created by the settlement is actually distributed, the court retains its traditional equity powers to protect unnamed but interested persons; a court may assert this power to allow late-filed proofs of claim).

**IV. CONCLUSION**

For the foregoing reasons, Midwest Plaintiffs respectfully request that the Court approve the distributions and enter the proposed Distribution Order.

Dated: January 8, 2018

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](mailto:wjbruckner@locklaw.com)  
[erodette@locklaw.com](mailto:erodette@locklaw.com)  
[kgmarttila@locklaw.com](mailto:kgmarttila@locklaw.com)  
[kmbaxter-kauf@locklaw.com](mailto: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@bsflp.com](mailto:rdrubel@bsflp.com)  
[mhenken@bsflp.com](mailto:mhenken@bsflp.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](mailto:dkotchen@kotchen.com)  
[dlow@kotchen.com](mailto:dlow@kotchen.com)

***Co-Lead Counsel for Plaintiffs and  
Counsel for Midwest Plaintiffs***