

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

IN RE: POTASH ANTITRUST LITIGATION (II)	MDL Docket No. 1996 Case No. 08-cv-6910 (Consolidated with 08-cv-5635)
THIS DOCUMENT APPLIES TO: DIRECT PURCHASER ACTIONS	Judge R. Castillo

**DIRECT PURCHASER PLAINTIFFS' MOTION
TO PRELIMINARILY APPROVE SETTLEMENT WITH THE AGRIUM, MOSAIC
AND PCS DEFENDANTS AND TO APPROVE CLASS NOTICE PROGRAM**

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Direct Purchaser Plaintiffs (“DPPs” or “Plaintiffs”) have reached a settlement with the remaining Defendants in this case—Agrium, Inc. and Agrium U.S., Inc. (the “Agrium Defendants”); The Mosaic Company, n/k/a MOS Holdings Inc. and Mosaic Crop Nutrition, LLC, (the “Mosaic Defendants”); and Potash Corporation of Saskatchewan Inc., and PCS Sales (USA), Inc, (the “PCS Defendants”) (collectively the “Settling Defendants”). If approved, this settlement will resolve this case in its entirety. Under the agreement, the Settling Defendants agree to pay \$80 million to resolve the Direct Purchaser Plaintiffs Class’ claims against them, bringing the total settlements in the Direct Purchaser case to \$90 million in cash.

DPPs now move this Court for an order (1) preliminarily approving the settlement reached with the Settling Defendants; (2) certifying a settlement class; (3) confirming appointment of Class Counsel; (4) confirming appointment of the named Plaintiffs as Class Representatives; (5) directing distribution of notice of the settlement to the Settlement Class to provide them with the details of the proposed settlement and to give Settlement Class Members the opportunity to opt out or to object to the proposed settlement; and (6) scheduling a hearing date for DPPs’ motion for final approval of the proposed settlement and for their application for attorneys’ fees and reimbursement of expenses.

DPPs submit that this proposed settlement is an excellent result for the Class, that it easily falls within the range of possible final approval, and accordingly that preliminary approval should be granted so that the Class can be notified of the settlement and given an opportunity to be heard.

I. INTRODUCTION

DPPs have now reached a settlement in this class action with the Agrium Defendants, the Mosaic Defendants, and the PCS Defendants. As noted, the Settling Defendants have agreed to

pay \$80 million in exchange for release of the DPPs' claims against them, bringing the total of settlements with the Direct Purchaser Plaintiff Class in this case to \$90 million.

At the time this settlement was reached, Class Counsel were thoroughly familiar with the many factual and legal issues in this case, having litigated this case from pre-filing investigation through extensive motion and appellate proceedings, remand, and, as the Court is aware, vigorously contested discovery practice. Only then was the agreement reached through arms-length negotiations with the valuable assistance of the mediator, Magistrate Judge Morton Denlow (Ret).

This proposed settlement is well within the range of reasonableness, the standard for preliminary approval of such settlements. Moreover, the proposed Settlement Class meets the requirements of Fed. R. Civ. P. 23. The Settling Defendants' \$80 million cash payment provides a substantial benefit to the Class and, as will be demonstrated at the final approval stage of this settlement, constitutes an excellent result. In addition, this payment to the Class will be made in full within 20 days of preliminary approval, and upon final approval will be available to the Class regardless of whether and to what extent Class members opt out of the Class. Unlike many settlements of this size in similar circumstances, in this case there is no provision allowing the Settling Defendants to rescind the Settlement depending on the level of opt-outs. Declaration of Bruce L. Simon In Support of Direct Purchaser Plaintiffs' Motion to Preliminarily Approve Settlement With the Agrium, Mosaic and PCS Defendants and to Approve Class Notice Program ("Simon Decl.") ¶ 13.

The agreement, if finally approved after notice to the Class and an opportunity to be heard, will resolve a case that is been strenuously litigated for over four years. DPPs' Class

Counsel respectfully request that the settlement be preliminarily approved, and that the proposed schedule and plan for class notice and a final approval hearing be confirmed.

II. PROCEDURAL HISTORY

A. LITIGATION OF THIS CASE.

DPPs allege that the Defendants in this consolidated action conspired to restrict supply and fix prices of potash sold to U.S. purchasers in violation of Section One of the Sherman Antitrust Act, 15 U.S.C. § 1. The first of these coordinated cases was filed on September 11, 2008.

On December 2, 2008, the Judicial Panel on Multidistrict Litigation transferred related actions to this Court. The litigation of this case has been recounted in detail in Direct Purchaser Plaintiffs' Motion To Preliminarily Approve Settlement With Defendants JSC Uralkali And JSC Silvinit And To Conditionally Certify Settlement Class And Approve Class Notice Program, ECF No. 444, and rather than repeat it here Plaintiffs respectfully direct the Court's attention to that filing. Suffice it to say that the case has been vigorously litigated through motions to dismiss the Complaint and appeals addressing the application of the Sherman Act and the Foreign Trade Antitrust Improvements Act. The parties began negotiating the review and production of voluminous Electronically Stored Information, including detailed motion practice with Magistrate Judge Rowland's valuable involvement and direction. *See* ECF Nos. 479, 501, 515. The Court set a trial date of February 10, 2014, ECF No. 467, and at the time this agreement was reached all parties were working very hard to complete fact discovery, class certification, expert discovery, and otherwise proceed to trial.

In the interim, several months ago DPPs negotiated a settlement with JSC Uralkali and JSC Silvinit. Defendant JSC Uralkali agreed to pay \$10 million on behalf of itself, JSC Silvinit, and their affiliates. The Court has preliminarily approved that settlement. ECF No. 474. JSC

Uralkali and JSC Silvinit also agreed to cooperate with DPPs' Class Counsel in prosecuting the case against the Settling Defendants, including attorney proffers, document production, and witnesses for interviews, video depositions, and testimony. Simon Decl. ¶ 5. This cooperation had commenced and was ongoing at the time this latest settlement was reached.

B. THE CURRENT SETTLEMENT AGREEMENT.

The parties began to discuss settlement in earnest in the summer of 2012, at this Court's direction. ECF No. 353 ("The Court also requests the parties to exhaust any settlement possibilities prior to the next status hearing."); Transcript of August 30, 2012 Hearing (discussing mediation and setting September 25 settlement conference); ECF Nos. 380, 390 (confirming settlement conference). During the summer, the parties negotiated the Settling Defendants' production of settlement-related transaction and production data, which was produced to Plaintiffs on September 7, 2012. Simon Decl. ¶ 8. A mediation session initially set for September 25, 2012 was cancelled due to the parties' then-widely divergent settlement positions. *See* ECF Nos. 399 (resetting settlement conference to October 5, 2012), 400 (excusing defendants that had already settled from settlement conference). The parties held a settlement conference in chambers on October 5, 2012. *See* ECF No. 408 (noting settlement conference and requesting parties "to meet and confer during the remainder of the month and fully exhaust all remaining settlement possibilities"). The parties conferred with Magistrate Judge Morton Denlow (Ret.) on October 26, 2012 to arrange another mediation effort, and scheduled a mediation session for November 7, 2012, with submissions of demands and offers due before that meeting. Simon Decl. ¶ 9.

The parties met on November 7, but did not reach an agreement. In the meantime, the parties continued to litigate their discovery issues. *Id.* Over the following months, in addition to

the mediation sessions described above, the parties had many phone calls and exchanged emails in an effort to resolve the case. *Id.* ¶ 10.

In January 2013, the parties resumed their discussions in earnest. Through the efforts of Magistrate Judge Morton Denlow (Ret.), the parties reached an agreement in principal on January 15, 2013. *Id.* ¶ 11.

Among other material terms, the Settlement Agreement provides that the Settling Defendants will pay \$80,000,000 into an escrow settlement account within twenty days of the Court's preliminary approval order. Simon Decl. Ex. 1. Of those funds, \$400,000 is available for notice costs and costs of administration of the settlement, and is non-refundable in the event the settlement is not finalized. *Id.* at Ex. 1 ¶ 4(a). The Settlement amount will be paid in full, and unlike many settlements of this size in similar circumstances, the Settling Defendants have no right to rescind the Settlement in the event that a certain number of Class members opt out of the Class. *Id.* ¶ 13. In exchange, Plaintiffs and the Settlement Class agree to release their antitrust claims for the potash sales that are the subject of the Complaint, but not claims for product defects, personal injuries, or breach of contract in the ordinary course of business. *Id.* at Ex. 1 ¶ 14. The parties released under the Settlement Agreement include the Settling Defendants, their corporate parents, subsidiaries, divisions, affiliates, predecessors, and successors. *Id.* at Ex. 1 ¶ 1(t).

III. ARGUMENT

A. CLASS ACTION SETTLEMENT PROCEDURE REQUIRES PRELIMINARY APPROVAL, NOTICE, AND FINAL APPROVAL.

A class action may not be dismissed, compromised, or settled without the Court's approval. Judicial proceedings under Fed. R. Civ. P. 23 have led to defined procedures and

specific criteria for approval of class action settlements. Approval of a class action settlement under Rule 23(a) consists of three steps:

- First, the Court is asked to grant preliminary approval of the proposed settlement class and conditionally certify the settlement class;
- Second, upon preliminary approval, notice of the settlement is given to all affected class members; and,
- Third, the Court conducts a formal fairness hearing, also called the final approval hearing, at which class members who elect to do so may be heard regarding the settlement, and at which counsel may introduce evidence and present argument concerning the fairness, adequacy, and reasonableness of the settlement.

See 4 Newberg on Class Actions §§ 11.22-11.27 (4th ed. 2002) (“*Newberg*”) (describing class action settlement procedure). This procedure safeguards class members’ procedural due process rights and enables the Court to fulfill its role as the guardian of class interests. *Id.*

In this first step, Plaintiffs ask the Court to conditionally certify a settlement class and preliminarily approve the proposed settlement. Plaintiffs further seek reappointment of Class Representatives and reaffirmation of Class Counsel. Plaintiffs also seek the Court’s approval of their proposed notice program so they may notify affected Class Members of the settlement. The proposed notice plan is consistent with that already approved by this Court in regard to the first settlement with JSC Uralkali and JSC Silvinit (*see* ECF No. 474).

B. THE PROPOSED SETTLEMENT IS WITHIN THE RANGE OF POSSIBLE APPROVAL AND SHOULD BE PRELIMINARILY APPROVED UNDER FED. R. CIV. P. 23(e).

“Federal courts naturally favor the settlement of class action litigation.” *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996). The first step in approval is for the court to determine whether the proposed settlement is within the range of possible approval sufficient to justify sending notice to the class of the proposed settlement and holding a final approval hearing. *See In re*

AT&T Mobility Wireless Data Servs. Sales Litig., 270 F.R.D. 330, 346 (N.D. Ill. 2010). If so, a proposed settlement subsequently may be finally approved by the Court if it is determined to be lawful, fair, reasonable, and adequate. *Isby*, 75 F.3d at 1196; *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985). At the preliminary approval stage, however, “the court’s task is merely to determine whether the proposed settlement is within the range of possible approval, not to conduct a full-fledged inquiry into whether the settlement meets Rule 23(e)’s standards.” *Am. Int’l Grp., Inc. v. ACE INA Holdings, Inc.*, Nos. 07 C 2898 & 09 C 2026, 2011 WL 3290302, *6 (N.D. Ill. July 26, 2011) (quotation omitted); *see also In re Bromine Antitrust Litig.*, 203 F.R.D. 403, 416 (S.D. Ind. 2001).

Five factors aid courts in analyzing preliminary approval:

- (1) the strength of plaintiffs’ case compared to the terms of the proposed settlement;
- (2) the likely complexity, length and expense of continued litigation;
- (3) the amount of opposition to settlement among [a]ffected parties;
- (4) the opinion of competent counsel; and
- (5) the stage of the proceedings and the amount of discovery completed.

AT&T, 270 F.R.D. at 346; *Am. Int’l Grp.*, 2011 WL 3290302, at *5; *see Isby*, 75 F.3d at 1198-99 (factors to aid court’s analysis). As demonstrated below, the factors mentioned in *Isby* and *AT&T* support preliminarily approving this settlement.

First, this settlement provides a recovery of \$80 million in cash for the Settlement Class. This is a substantial recovery, given the challenges of proving that the Defendants conspired to restrict their output and raise prices across international markets and into the United States. The

Settling Defendants have vigorously challenged Plaintiffs' claims and would continue to do so if the litigation were to continue. In addition to proving that a class should be certified, Plaintiffs would have to prove liability, causation (or antitrust impact), and damages in the context of an alleged conspiracy that took place across multiple international markets. In light of these challenges, \$80 million is a substantial recovery for class members.

Second, the complexity, length, and expense of this case would be enormous if the litigation continued. Antitrust class actions such as this are "notoriously complex, protracted, and bitterly fought." *Wesley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989). Continued litigation would "require resolution of many difficult and complex issues," require considerable expense, and "likely involve weeks, perhaps months, of trial time." *Isby*, 75 F.3d at 1199 (quoting *Taifa v. Bayh*, 846 F. Supp. 723, 727 (N.D. Ind. 1994)). This case is over four years old, and has involved intensive motion, appellate, and discovery practice. Keeping this case on a contested litigation course would take another year to get to trial, with a contested class certification motion before trial, and the prospect of further appeals after trial. The Court recently appointed its own ESI discovery expert to assist with the complex issues the parties faced, further suggesting intense discovery proceedings. In addition, the Settling Defendants have filed a petition for a writ of certiorari with the U.S. Supreme Court to address issues surrounding the application of the Foreign Trade Antitrust Improvements Act to the conduct in this case, which was the central issue in the Court of Appeals' 2012 *en banc* decision in this case. Under the Settlement the *cert* petition may be withdrawn upon the fulfillment of certain conditions regarding the finality of the Settlement. Simon Decl. ¶ 14. Furthermore, if for any reason the Supreme Court of the United States does issue a ruling or decision in this matter, the Settlement provides that any such ruling or decision shall have no effect on this Settlement, and

shall not provide the Settling Defendants with any basis to rescind, cancel, or terminate this Settlement Agreement. *Id.* Thus, the length, complexity, and expense of this case therefore support preliminary approval.

Third, there is no known opposition to the settlement. *Id.* ¶ 16.

Fourth, Class Counsel, experienced antitrust class action lawyers, believe this settlement provides substantial benefit to the Settlement Class and recommend its approval. *Id.* ¶¶ 15-16. *See Am. Int'l Grp.*, 2011 WL 3290302, at *8 (court “entitled to rely heavily on the opinion of competent counsel”) (citations omitted). Furthermore, the settlement is a result of arms-length negotiations after lengthy ongoing litigation, involving numerous discussions and the assistance of a well-regarded mediator, Magistrate Judge Morton Denlow (Ret.). Simon Decl. ¶¶ 8-11. *See In re Schering-Plough Corp. Sec. Litig.*, No. 01-CV-0829, 2009 WL 5218066, at *3 (D.N.J. Dec. 31, 2009) (use of highly regarded mediator part of “a pattern that demonstrates arm’s-length negotiating”); *Bernhard v. TD Bank, N.A.*, No. 08-4392, 2009 WL 3233541, at *2 (D.N.J. Oct. 5, 2009) (use of retired federal judge as mediator supports the inference of arm’s length negotiation).

Fifth, the stage of the proceedings and the amount of discovery completed supports preliminary approval of this settlement. Counsel were well informed at the time the agreement was reached. Settlement discussions occurred after Class counsel researched, analyzed, and evaluated numerous factual and legal issues, conducted contentious pre-trial proceedings with Defendants, defeated Defendants’ extensive motions to dismiss DPPs’ Complaint, and won a unanimous *en banc* appellate decision upholding their Complaint. Simon Decl. ¶ 12. In addition, Plaintiffs obtained and reviewed discovery documents from the Settling Defendants after discovery stays were lifted. *Id.*

This settlement provides \$80 million in cash for the Settlement Class. It saves considerable judicial and attorney time and expense, and obtains a strong and certain result for the Class after over four years of litigation. Experienced Class Counsel recommend its approval. *Id.* ¶ 16. Consequently, the proposed settlement is “at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard.” *In re Baldwin-United Corp.*, 105 F.R.D. 475, 482 (S.D.N.Y. 1984). This Court should therefore grant preliminary approval of the proposed settlement.

C. THE COURT SHOULD PRELIMINARILY CERTIFY THE SETTLEMENT CLASS.

A court may certify a class action for settlement purposes. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-20 (1997). A settlement class must meet the certification requirements under Rule 23(a) and one or more of the requirements of Rule 23(b). As shown below, the proposed Settlement Class meets these requirements.

DPPs seek certification of the following Settlement Class:

All persons and entities who purchased Potash in the United States directly from one or more of the Settling Defendants, or from Defendants JSC Uralkali or JSC Silvinit or their affiliates including JSC Belarusian Potash Company, BPC Chicago L.L.C. and JSC International Potash Company, between July 1, 2003 and January 30, 2013. Excluded from the Class are defendants, their parent companies, subsidiaries and affiliates, all governmental entities, and any judges or justices assigned to hear any aspect of this action.

1. The Requirements of Rule 23(a) Are Satisfied.

a) The Class Is So Numerous That Joinder Is Impracticable.

A class must be so numerous as to make joinder of all parties “impracticable.” Fed. R. Civ. P. 23(a)(1). Joinder is impracticable if it is extremely difficult or inconvenient. *See Levitan v. McCoy*, No. 00-C-5096, 2003 WL 1720047, *3 (N.D. Ill. Mar. 31, 2003). Courts consider the

number of class members and “common sense assumptions” to determine whether a proposed class satisfies the numerosity element. *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 184 (N.D. Ill. 1992) (internal quotation omitted) (certifying class between 129 and 300 members); *see also Hubler Chevrolet, Inc. v. Gen. Motors Corp.*, 193 F.R.D. 574, 577 (S.D. Ind. 2000) (“While there is no magic number held to satisfy this requirement, classes of forty or more members have generally been found to be sufficiently numerous.”). This Settlement Class includes all entities that purchased potash from any Defendant in the United States during the Class Period. Based on the contact information provided to date by the Settling Defendants for their customers during the relevant time period, Class Counsel reasonably estimates that there are thousands of Settlement Class members, and that they are geographically dispersed across the United States. Simon Decl. ¶ 19. The notice administrator for the previous settlement recently mailed 4,604 class notices to Class Members across the United States, so there are well over 4,000 Settlement Class Members. Since their numbers and dispersion make joining them all impracticable, the numerosity requirement is satisfied.

b) The Class Shares Common Questions Of Fact And Law.

Commonality requires a legal or factual question common to the class. Fed. R. Civ. P. 23(a)(2). It does not require all questions of law or fact to be identical “but merely that the class claims arise out of the same legal or remedial theory.” *See Johns v. DeLeonardis*, 145 F.R.D. 480, 483 (N.D. Ill. 1992). A “single course of conduct that results in injury to the class as a whole” usually suffices. *Id.* Commonality is easily met in antitrust cases, since plaintiffs “‘have a shared interest in attempting to prove that Defendants engaged in a conspiracy to fix, raise, and maintain the prices’ of the product.” *In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 167 (S.D. Ind. 2009) (quoting *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 405 (S.D. Ohio 2007)).

DPPs' core allegations are that the Defendants formed and operated an illegal cartel to restrict supply and raise prices for potash. The Settling Defendants deny these allegations and deny liability generally. Since all of the Direct Purchaser Settlement Class Members' Sherman Act claims arise from the same legal theory based on these same allegations, they have "a shared interest in attempting to prove" Defendants' alleged conspiracy to fix prices. In addition, DPPs and the Settlement Class share other legal and factual questions, including but not limited to:

- Each Defendant's alleged role in the purported conspiracy;
- Whether Defendants' alleged conduct violated Section 1 of the Sherman Act;
- Whether Defendants' alleged conduct inflated the price of potash sold in the United States to allegedly supracompetitive levels; and
- Whether Defendants shared non-public information, restricted potash output, or committed other conduct to further the alleged conspiracy.

Consequently, the Settlement Class satisfies Rule 23(a)(2)'s commonality requirement.

c) Plaintiffs' Claims Are Typical of the Claims of the Class.

Claims of the class representatives must be typical of all class members' claims. Fed. R. Civ. P. 23(a)(3). Typicality does not require the claims of class members and representatives to be identical, only substantially similar. *Ruiz v. Stewart Assocs.*, 171 F.R.D. 238, 242 (N.D. Ill. 1997). A "plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998) (quotation omitted); *Kernats v. Comcast Corp.*, No. 09-C-3368, 2010 WL 4193219 at *4 (N.D. Ill. Oct. 20, 2010) (quotation omitted).

"Typicality in the antitrust context will be established by plaintiffs and all class members alleging the same antitrust violations by the defendant." *Ready-Mixed Concrete*, 261 F.R.D. at

168 (quoting *Estate of Garrison v. Warner Brothers*, No. CV95-8328, 1996 WL 407849, at *2 (C.D. Cal. June 25, 1996)); *see also In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 185 (D.N.J. 2003) (typicality found where all harmed by illegal price-fixing conspiracy).

DPPs here allege and must prove the same Sherman Act violations that absent Settlement Class Members would have to prove: the existence, operation, and effects of the alleged conspiracy to restrict output and fix, raise, and maintain prices. DPPs assert the same legal claims on behalf of themselves and the proposed class; namely, that they purchased potash directly at supracompetitive prices as a result of the alleged antitrust conspiracy between Defendants. Defendants' alleged price-fixing scheme is the basis for the claims of each Plaintiff and for Class Members who purchased potash directly from Defendants during the Class Period. Because the named Plaintiffs' claims arise out of the same alleged anticompetitive conduct, are based on the same alleged theories, and will require the same kinds of evidence to prove those theories, Rule 23(a)(3)'s typicality requirement is satisfied.

d) Plaintiffs Will Fairly and Adequately Represent The Class' Interests.

Representative parties must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy requires that class representatives retain adequate counsel and have no conflicting interests with other class members. *Ready-Mixed Concrete*, 261 F.R.D. at 168 ("The adequacy standard involves two elements: one relates to the adequacy of the named plaintiffs' representation of the class and requires that there be no conflict between the interests of the representative and those of the class in general; the other relates to the adequacy of class counsel's representation."); *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992) (to same effect); *Eggleston v. Chicago Journeymen Plumber's Local Union No. 130*, 657 F.2d 890, 896 (7th Cir. 1981) (requiring "competent and experienced counsel able to conduct the

litigation”); *cf.* Fed. R. Civ. P. 23(g)(1)(A) (counsel appointment requirements). Some cases also inquire whether the named plaintiff “has a sufficient interest in the outcome of a case to ensure vigorous advocacy.” *Wahl v. Midland Credit Mgmt., Inc.*, 243 F.R.D. 291, 298 (N.D. Ill. 2007) (quoting *Sebo v. Rubenstein*, 188 F.R.D. 310, 316 (N.D. Ill. 1999)). When class representatives and members seek the common goal of the largest recovery for the class, their interests do not conflict. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981) (citation omitted); *see In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 453 (S.D.N.Y. 2004) (“There is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery.”).

The Settlement Class Members’ interests are well protected by the named Plaintiffs, and the named Plaintiffs have no interests that conflict with or are antagonistic to the interests of the Class. Simon Decl. ¶ 15. These Settlement Class Members share an aligned, overriding interest in obtaining the largest possible dollar recovery from this case. The named Plaintiffs purchased potash from one or more Defendants, and have an interest in pursuing these claims. *Id.* In addition, Class Counsel are qualified, experienced, and thoroughly familiar with antitrust class action litigation. *See* Minute Order (Feb. 24, 2009) (ECF No. 34) (appointing Class Counsel); Motion Of All Direct Purchaser Plaintiffs To Appoint Interim Co-Lead And Liaison Class Counsel (Feb. 9, 2009) (ECF No. 7); *see also* Simon Decl. ¶ 17. Class Counsel have successfully prosecuted many antitrust actions, developed this case, have invested substantially in it, diligently pursued it through appellate proceedings, and this settlement is the result of arms-length negotiations after ongoing litigation, involving numerous discussions and the assistance of a well-regarded mediator, Magistrate Judge Morton Denlow (Ret.). *Id.*, ¶ 16. Accordingly, Rule 23(a)(4)’s requirements are satisfied.

2. The Proposed Settlement Class Satisfies Rule 23(b)(3).

In addition to the requirements of Rule 23(a), Plaintiffs here must show that (1) “questions of law and fact common to the members of the class predominate over any questions affecting only individual members”; and (2) that “a class action is superior to the other available methods for the fair and efficient adjudication of the controversy.” *Wahl*, 243 F.R.D. at 299 (quoting Fed. R. Civ. P. 23(b)(3)). Both are true here.

a) Common Questions of Law and Fact Predominate Over Individual Questions.

Common questions predominate when generalized evidence “proves or disproves an element in the case on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member’s individualized position.” *Foundry Resins*, 242 F.R.D. at 408 (quoting *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 307 (E.D. Mich. 2001)). Predominance is shown when a business practice harms class members in a consistent way, aside from individual questions. *See Wahl*, 243 F.R.D. at 299-300 (form letters supported predominance). Antitrust claims naturally satisfy predominance. *See Amchem Prods.*, 521 U.S. at 625 (“Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.”). “As a general rule in price-fixing cases . . . courts have consistently found that common issues regarding the existence and scope of the conspiracy predominate over questions affecting only individual members.” *Foundry Resins*, 242 F.R.D. at 408; *see In re Carbon Black Antitrust Litig.*, No. CIV.A.03-10191-DPW MDL No. 1543, 2005 WL 102966, *15 (D. Mass. Jan. 18, 2005) (“the common question of the existence of a horizontal price-fixing conspiracy has almost invariably been found to satisfy Rule 23(b)(3)”; *Hughes v. Baird & Warner, Inc.*, No. 76 C 3929, 1980 WL 1894, at *3 (N.D. Ill. Aug. 20, 1980)

(“Clearly, the existence of a conspiracy is the common issue in this case. That issue predominates over issues affecting only individual sellers.”).

The existence, operation, and effects of this alleged conspiracy to restrict output and fix, raise, and maintain prices are central issues in this case that call for proof common to DPPs and all Settlement Class Members. Furthermore, DPPs contend that the structural characteristics of the potash industry facilitated the alleged conspiracy itself and resulted in changes in potash pricing that had a common impact on all Class Members. *See Foundry Resins*, 242 F.R.D. at 410. Therefore, this case satisfies the predominance requirement.

b) A Class Action Is Superior To Any Other Method of Adjudicating This Case.

Rule 23(b)(3) requires a “predominance” class action to be superior to other methods of handling the case. Courts recognize that in antitrust cases, class actions regularly are less complicated, time-consuming, and expensive than individual trials. *Carbon Black*, 2005 WL 102966, at *22 (“Antitrust class actions are expensive endeavors and joining forces with other similarly situated plaintiffs is often the only way to effectuate a case.”). Further, the class action approach saves judicial resources. *Bromine*, 203 F.R.D. at 416.

This case meets Rule 23(b)(3)’s superiority requirement. Here, a Settlement Class Member’s interest in prosecuting an individual claim is far outweighed by the efficiency of the class mechanism. Thousands of entities purchased potash during the class period; thus, settling these claims in the context of a class action conserves judicial and private resources and hastens Settlement Class recovery. Numerous individual plaintiffs would encounter various problems with prosecution of claims and collection of any judgments in the United States and Canada from these Settling Defendants. DPPs see no management difficulties in this settlement. *Cf. Amchem Prods.*, 521 U.S. at 620 (for settlement class certification, court need not review trial

management “for the proposal is that there be no trial”). The proposed Settlement Class is substantially superior to other available methods for fair and efficient adjudication of the controversy with these Settling Defendants.

D. CLASS COUNSEL’S APPOINTMENT SHOULD BE CONFIRMED.

“An order certifying a class action . . . must also appoint class counsel under Rule 23(g).” Fed. R. Civ. P. 23(c)(1)(B). In appointing class counsel, courts must consider the following factors: “(i) the work that counsel has done in identifying or investigating potential claims in the action; (ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class.” Fed. R. Civ. P. 23(g)(1)(A).

The work done by Class Counsel since their appointment as Interim Co-Lead Counsel provides a substantial basis for the Court to find that they are well qualified to serve as class counsel. Simon Decl. ¶17. In addition to appointing the same counsel as Interim Co-Lead and Liaison Counsel as Class Counsel at the outset of this litigation, ECF No. 34, the Court reappointed them in approving the previous partial settlement in this case. Order Preliminarily Approving Proposed Settlement And Certifying Settlement Class And Approving Class Notice Program ¶¶ 4-5 (Dec. 11, 2012) (ECF No. 474). Due to the language of Rule 23(c)(1)(B), and out of an abundance of caution, DPPs respectfully request that the Court confirm that appointment as to this settlement and its Settlement Class.

E. PLAINTIFFS’ PROPOSED CLASS NOTICE PROGRAM MEETS THE REQUIREMENTS OF RULE 23(e).

Rule 23(e)(1) states that “[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal.” Notice of a proposed settlement must inform class members of the following: (1) the nature of the pending litigation; (2) the general terms of

the proposed settlement; (3) that complete information is available from court files; and (4) that any class member may appear and be heard at the fairness hearing. *See* 3 *Newberg* § 8.32; *In re Packaged Ice Antitrust Litig.*, No. 08-md-1952, 2011 WL 717519, at *5 (E.D. Mich. Feb. 22, 2011) (quoting the *Newberg* passage); *see also* *City of Greenville v. Syngenta Crop Prot.*, No. 3:10-CV-188, 2012 WL 1948153, at *4 (S.D. Ill. May 30, 2012) (Rule 23(e) notice contents “sufficient” with above elements) (quoting *AT&T*, 270 F.R.D. at 351). For a Rule 23(b)(3) predominance class, the notice must also state that class members have an opportunity to opt out, that the judgment will bind all class members who do not opt out, and that any member who does not opt out may appear through counsel. Fed. R. Civ. P. 23(c)(2)(B). The form of notice is “adequate if it may be understood by the average class member.” 4 *Newberg* § 11.53.

Notice to class members must be “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); *see Amchem Prods.*, 521 U.S. at 617; *City of Greenville*, 2012 WL 1948153, at *4; *Stoller v. Baldwin-United Corp.*, 650 F. Supp. 341, 343-44 (S.D. Ohio 1986) (approving combination of mailing and publication).

Plaintiffs’ proposed notice plan in this case includes: (1) direct notice given by mail or email to each class member who can be identified by reasonable effort; (2) a summary notice published in three trade journals (*Ag Ads*, *Ag Professional*, and *Crop Life*); and (3) the posting of both forms of notice on a public website. Simon Decl. ¶ 18 and Exhibit 1.C thereto. Like the proposed settlement class, this proposed notice program is essentially the same as the Court approved in connection with the previous settlement. *See* ECF No. 474.

As the Court may recall, Plaintiffs have retained KCC, an experienced national class action notice provider and class administrator, to assist with class notice for this settlement.

KCC has experience with administering over 1,300 settlements. Declaration of Patrick M. Passarella, filed herewith, ¶ 6. Its services include settlement funds escrow and reporting, class member data management, legal notification, call center support, and claims administration. KCC will send a notice packet to reasonably ascertainable Class Members by First Class U.S. mail. *Id.* at ¶ 10. To the extent not already done for the earlier settlement, KCC will check the names and addresses against the USPS Change of Address database, certify them through a coding accuracy system, use a delivery point validation system, and follow up on returned notices. KCC will also place quarter or half-page advertisements of the published notice in the three industry trade journals. KCC will also maintain the current informational website, which will provide additional information and documents, and a toll-free number for frequently asked questions and requests for mailing of further information. KCC has provided a web site at www.potashantitrust-classaction.com, which is currently in use for the previous settlement. Moreover, KCC has received and utilized the names and addresses of the Settling Defendants' customers during the relevant time period and utilized that information to mail notice to Class Members regarding the previous settlement. That process should streamline the mailing of notice this time, as some of the follow-up work and address verification described above will have already been done.

The content of the proposed Class Notice, which consists of a summary notice and a long-form notice, fully complies with due process and Rule 23. (The proposed long form and summary notices are attached to the Simon Declaration as Exhibit 1. C.) The Class Notice defines the Class, describes the nature of the action, defines the class claims, and explains the procedures for making comments and objections. The Class Notice describes the terms of the settlement with the Settling Defendants. Plaintiffs and the Claims Administrator are in the

process of devising an appropriate claim form and instructions, and will submit them to the Court for its approval prior to the proposed class notice date of March 1, 2013. The Class Notice also explains that DPPs will propose a plan of allocation to distribute the Settlement Fund. It explains that Class Counsel must submit the plan of allocation by the same date as they file the motion for final approval. It notes that the plan of allocation has not yet been determined, but it is common for the plan of allocation to be on a pro-rata basis in cases such as this, which means that the ratio between the amount of qualified claims and total settlements “will determine the amount that qualified claimants receive.” The notice states that upon the Court’s approval, the plan of allocation will be posted on the settlement website for this case. The Class Notice provides the date, time, and place of the final approval hearing, and informs Class Members that they may enter an appearance through counsel. The Class Notice also informs Settlement Class Members how to exercise their rights to participate in, opt out of, or object to the proposed settlement, how to make informed decisions regarding the proposed settlement, and tells them that if they do not opt out, the judgment will be binding upon them. It further informs them about the motion of Class Counsel for reimbursement of expenses, and their anticipated motion for a fee award. “Accordingly, the Notice goes far above and beyond the requirements imposed by Fed. R. Civ. P. 23(c)(2) and (e) and constitutes the best notice practicable under the circumstances of this lawsuit.” *City of Greenville*, 2012 WL 1948153, at *5 (quotation omitted).

F. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING.

The last step in the settlement-approval process is the final approval hearing, at which the Court may hear all evidence necessary to evaluate the proposed settlement. At that hearing, proponents of the settlement may explain and describe its terms and conditions and offer argument in support of the settlement approval, and members of the settlement class, or their counsel, may be heard in support of or in opposition to the settlement. Class Counsel also will

file their motion for attorneys' fees and reimbursement of expenses in advance of the deadline for objections and well in advance of the final approval hearing so that the Court may hear both motions at the same time.

Plaintiffs propose the following schedule of events:

<u>Event</u>	<u>Dates if Preliminary Approval is Granted by February 1, 2013</u>
Mailing of Notice	March 1, 2013
● <i>Ag Ads</i> Publication ● <i>Ag Professional</i> Publication ● <i>Crop Life</i> Publication	February 20, 2013 March 15, 2013 April 10, 2013
Motion for Attorneys' Fees and Reimbursement of Costs	April 22, 2013
Class Members' Deadline to (1) Comment or Object to Settlement or to Fee & Cost Application or (2) Opt Out	May 22, 2013
Motion for Final Approval of Settlement; Response to Comments or Objections; Motion to Approve Plan of Allocation	June 5, 2013
Hearing on Motion for Final Approval and Fee and Cost Application	June 12, 2013 ¹

¹ Or the first available date thereafter.

IV. CONCLUSION

For these reasons, DPPs respectfully request that the Court: (1) preliminarily approve the settlement reached with the Settling Defendants; (2) conditionally certify the proposed settlement class; (3) confirm appointment of Class Counsel; (4) confirm appointment of the named Plaintiffs as Class Representatives; (5) direct distribution of notice of the settlement to the Settlement Class; and (6) set a schedule for final approval of the proposed settlement.

Dated: January 30, 2013

Respectfully submitted,

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