

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

IN RE: POTASH ANTITRUST LITIGATION

MDL Docket No. 1996

No. 08-C-6910

THIS DOCUMENT APPLIES TO:

Judge Ruben Castillo

ALL INDIRECT PURCHASER ACTIONS

**INDIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF
SETTLEMENTS WITH SETTLING DEFENDANTS**

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Indirect Purchaser Plaintiffs¹, by and through their undersigned counsel, respectfully submit this memorandum in support of their motion for preliminary approval of the Stipulation and Agreement of Settlement (“Settlement” or “Settlement Agreement”) executed by the Indirect Purchaser Plaintiffs and Defendants Agrium, Inc., Agrium U.S., Inc., The Mosaic Company (n/k/a MOS Holdings Inc.), Mosaic Crop Nutrition, L.L.C., Potash Corporation of Saskatchewan Inc., and PCS Sales (USA), Inc. (collectively, the “Settling Defendants”). A copy of the Settlement Agreement and its exhibits are attached hereto as Exhibit A.

I. PRELIMINARY STATEMENT

The Settlement Consideration. The Indirect Purchaser Plaintiffs entered into a Settlement Agreement with the Settling Defendants on January 30, 2013. In exchange for dismissal of all of the pending litigation and the release set forth in Section III.C. below, the Settling Defendants have agreed to provide the following consideration to the Settlement Class.

First, the Settlement provides for a cash payment of \$17,500,000 for the benefit of the Settlement Class. **Second**, the Settlement does **not** provide for a reversion to the Settling Defendants of any monies in the Settlement Fund. Therefore, all funds that would otherwise be due to class members who opt out of the Settlement Class or who fail to submit a claim, will be redistributed to those class members who do submit a claim. **Finally**, this Settlement was reached before the motion for class certification. Thus, all members of the Settlement Class will have the ability to review the terms of the Settlement and make an informed decision about whether or not to opt out of the Settlement.

¹ Unless otherwise stated, capitalized terms used herein shall have the same meanings as set forth in the Settlement Agreement, dated January 30, 2013.

The Settlement Negotiation Process. The Settlement negotiations were conducted at arm's-length between highly experienced counsel and included mediation under the direction of the Honorable Morton Denlow (Ret.). *Even at final approval*, settlements reached by experienced, fully-informed counsel after arm's-length negotiations with the assistance of a mediator are entitled to a presumption that the settlement was fair, reasonable and adequate. *In re Sturm, Ruger & Co., Inc. Securities Litig.*, 2012 WL 3589610, * 4 (D. Conn. Aug. 20, 2012).

Summary of The Relief Requested From The Court Now. Notice of this Settlement now needs to be sent to the Class who must be provided with an opportunity to opt out of or object to the Settlement. Fed. R. Civ. P. 23(e). After that occurs (on a schedule to be set by this Court), the Court will be in a position to evaluate the Settlement and determine whether to finally approve it. Accordingly, the Indirect Purchaser Plaintiffs, on behalf of themselves and the proposed Settlement Class, now move the Court to enter the attached [Proposed] Order Granting Certification of a Settlement Class And Preliminary Approval of Class Action Settlement and thereby (a) preliminarily approve the Settlement, (b) certify the Settlement Class, (c) appoint Lovell Stewart Halebian Jacobson LLP ("Lovell Stewart") and Miller Law LLC ("Miller Law") as class counsel and (d) appoint class representatives.

II. BACKGROUND

A. Allegations in the Indirect Purchaser Plaintiffs' Complaint

This litigation arises from an alleged conspiracy among the Defendants to fix the prices of potash products. Potash is principally used as an agricultural fertilizer. Corrected Second Amended Consolidated Class Action Complaint [Docket No. 459] ("Second Amended Complaint") at ¶44. Farmers, gardeners and anyone who uses fertilizers use potash for root production to help crops fight diseases and to enhance crop yields. ¶44.

The Indirect Purchaser Plaintiffs allege the Defendants, between July 1, 2003 and the present, combined, conspired and agreed with one another to fix the prices of potash products in violation of Section 1 of the Sherman Act, Section 16 of the Clayton Act, various State antitrust, consumer protection and unfair competition laws. *See* Counts I-IV. The Indirect Purchaser Plaintiffs further allege that Defendants were unjustly enriched such that the Indirect Purchaser Plaintiffs are entitled to the disgorgement of profits. *See* Count V.

The Defendants have denied, and continue to deny, the allegations of the Complaint.

B. The Procedural History of The Indirect Purchaser Action

On September 15, 2008, certain Indirect Purchaser Plaintiffs filed an initial class action complaint in United States District Court for the Northern District of Illinois. *Gillespie v. Agrium Inc., et al.*, 08-cv-5253, Docket No. 1. The Court appointed Lovell Stewart and Miller Law as interim co-lead counsel for the Indirect Purchaser Plaintiffs on December 4, 2008. Docket No. 48.

On April 3, 2009, the Indirect Purchaser Plaintiffs filed their Amended Consolidated Class Action Complaint (“Amended Complaint”). Docket No. 50. Defendants moved to dismiss the Amended Complaint. Docket No. 105. On November 3, 2009, this Court entered a Memorandum Opinion and Order [Docket No. 202] granting in part and denying in part Defendants’ motion to dismiss the Amended Complaint. *In re Potash Antitrust Litig.*, 667 F.Supp.2d 907 (N.D. Ill. 2009).

Appeal to the Seventh Circuit. On September 23, 2011, the Seventh Circuit vacated this Court’s November 3, 2009 Order and remanded with instructions. *Minn-Chem, Incorporated, et al. v. Agrium Incorporated, et al.*, 657 F.3d 650 (7th Cir. 2011). On December 1, 2011, rehearing *en banc* was granted and the opinion and judgment issued by the Seventh

Circuit panel on September 23, 2011 was vacated. *Minn-Chem, Incorporated, et al. v. Agrium Incorporated, et al.*, 10-1712, Docket No. 58 (7th Cir. December 1, 2011). On June 27, 2012, on rehearing *en banc*, the Seventh Circuit affirmed this Court's November 3, 2009 Order. *Minn-Chem, Incorporated, et al. v. Agrium Incorporated, et al.*, 683 F.3d 845 (7th Cir. 2012).

Petition For Writ of Certiorari. On November 23, 2012, the Settling Defendants filed a petition for a writ of certiorari with the Supreme Court of the United States. *Agrium Incorporated, et al. v. Minn-Chem, Incorporated, et al.*, No. 12-650. Plaintiffs' response to that petition is currently due February 22, 2013.

Corrected Second Amended Complaint. On November 30, 2012, the Indirect Purchaser Plaintiffs filed a motion for leave to file an amended complaint in an attempt to cure certain deficiencies in the Amended Complaint that were identified by the Court in its November 3, 2009 Memorandum Opinion and Order. Docket No. 454. The Court granted the motion and the Indirect Purchaser Plaintiffs thereafter filed their Second Amended Consolidated Class Action Complaint. Docket Nos. 458 and 459. The Settling Defendants moved to dismiss the Second Amended Complaint. Docket No. 452. As of the date of this filing, that motion is fully briefed and is now pending before the Court.

Prior Settlements. On December 11, 2012, the Court preliminarily approved the Indirect Purchaser Plaintiffs' settlement with Defendants JSC Uralkali and JSC Silvinit. Docket No. 472. The settlement provided for a \$2,750,000 cash payment and an agreement to cooperate. Docket No. 457 at p. 5.

The Settlement. The Indirect Purchaser Plaintiffs and the Settling Defendants participated in a mediation on Monday, January 21, 2013 before the Honorable Morton Denlow

(Ret.). The parties reached an agreement in principle on the same day and subsequently negotiated the terms of the Settlement and executed same by January 30, 2013.

III. THE SETTLEMENT AGREEMENT

A. The Settlement Class

The Settlement Agreement defines the Settlement Class as set forth below.

All persons or entities who purchased potash indirectly for end use and not for resale from the Defendants in the United States during the period July 1, 2003 through January 30, 2013. The Class excludes Defendants, and their parents, subsidiaries, affiliates, officers, directors, and employees and any alleged co-conspirators and their parents, subsidiaries, affiliates, officers, directors, and employees. Also excluded, are any federal, state, or local governmental entity, and any judge or judicial officer presiding over this matter, judicial staff and the members of their immediate families.

Settlement Agreement ¶1.c.

B. The Settlement Consideration

The Settlement Agreement provides that the Settling Defendants shall pay \$17,500,000 in cash to be deposited into an escrow account. Settlement Agreement ¶7. Additionally, the Settlement provides that there will not be any reversion. *See* Section IV.A.1 *infra*.

C. The Release

In exchange for the above consideration provided by the Settling Defendants, the Indirect Purchaser Plaintiffs and the Settlement Class have agreed to release and discharge Settling Defendants as set forth in paragraphs 14 and 15 of the Settlement Agreement.

D. The Proposed Notice Plan and Plan of Allocation

Within fourteen (14) days of the entry of an order preliminarily approving the instant settlement, Indirect Purchaser Plaintiffs shall submit to the Court for its approval (a) a proposed notice plan that will be sent to both the settlement class certified pursuant to this settlement as

well as the settlement class certified in connection with the settlement with the foreign Defendants and (b) a proposed Plan of Allocation.

IV. ARGUMENT

As a preliminary matter, the Settlement here was reached by experienced, fully-informed counsel after arm's length negotiations with the assistance of a mediator. This entitles the Settlement to a presumption that the settlement was fair, reasonable and adequate ***even at the final approval stage***. *In re Sturm, Ruger & Co., Inc. Securities Litig.*, 2012 WL 3589610, * 4 (D. Conn. Aug. 20, 2012). For this reason and all the reasons set forth below, the Settlement strongly merits preliminary approval.

A. The Court Should Preliminarily Approve The Settlement

A class action settlement must be evaluated in a light most favorable to settlement. *See Isby v. Bayh*, 75 F. 3d 1191, 1199 (7th Cir. 1996), *quoting Armstrong*, 616 F. 2d at 315.

The MANUAL FOR COMPLEX LITIGATION, FOURTH (2004) ("Manual") provides that "[t]he judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." Manual, §21.632 at 320-21 (2004).

The reduced standards for preliminary approval are merely that the proposed settlement is possibly within the range of what may later be found to be a reasonable and fair settlement at the final approval hearing. Manual, §21.632 at 320, fn. 976, *citing In re Amino Acid Lysine Antitrust Litig.*, MDL No. 1083, 1996 U.S. Dist. LEXIS 5308, at *11 (N.D. Ill. Apr. 22, 1996) (conducting a preliminary review of whether a proposed settlement is within the range of reasonableness and raising questions for the fairness hearing); *see Armstrong v. Board of School Directors of the*

City of Milwaukee, 616 F.2d 305, 314 (7th Cir.1980), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998).

The Court need not now determine that the Settlement is, in fact, fair and reasonable. Moreover, this Court has wide discretion in making the first-stage determination of the appropriateness of a settlement. *Armstrong*, 616 F.2d at 313. The Supreme Court has cautioned, however, that in reviewing a proposed class settlement, a court should “not decide the merits of the case or resolve unsettled legal questions.” *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also E.E.O.C., v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985) *cert. denied*, 487 U.S. 1004 (1986). Because the object of settlement is to avoid, not confront, the determination of contested issues, the approval process should not be converted into an abbreviated trial on the merits. *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1987) (“the district court need not undertake the type of detailed investigation that trying the case would involve”). Instead, a court’s inquiry should be “limited to the consideration of whether the proposed settlement is lawful, fair, reasonable, and adequate.” *Isby*, 75 F.3d at 1196.

Next, it is also well established that there is an overriding public interest in settling litigation. This is particularly true in class actions. *See Isby*, 75 F.3d at 1196 (“Federal courts naturally favor the settlement of class action litigation.”); *E.E.O.C.*, 768 F.2d at 888-89 (noting that there is a general policy favoring voluntary settlements of class action disputes); *Armstrong*, 616 at 312 (“It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement.”) Class action settlements minimize the litigation expenses of both parties and reduce the strain such litigation imposes upon already scarce judicial resources. *Armstrong*, 616 F.2d at 313 (*citing Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)).

Finally, the Seventh Circuit has identified six factors for analyzing whether a class action settlement should be given **final** approval. The Indirect Purchaser Plaintiffs employ these same six factors in order to demonstrate that preliminary approval of the proposed Settlement is strongly merited here. The six factors are:

- 1) the strength of the plaintiff's case on the merits measured against the terms of the settlement;
- 2) the complexity, length, and expense of continued litigation;
- 3) the amount of opposition to the settlement;
- 4) the presence of collusion in gaining a settlement;
- 5) the stage of the proceedings; and
- 6) the amount of discovery completed.

General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1082 (7th Cir. 1997)

(“*General Electric*”).

1. The strength of the plaintiff's case on the merits measured against the terms of the settlement

The Risks of Continuing Litigation. This Court previously dismissed all but three of the Indirect Purchaser Plaintiffs' State law claims set forth in their Amended Complaint. *In re Potash Antitrust Litig. (II)*, 667 F. Supp. 2d 907 (N.D. Ill. 2009) (dismissing all claims except for Michigan and Kansas state law antitrust claims and Iowa unjust enrichment claim). The Indirect Purchaser Plaintiffs believe that their Corrected Second Amended Complaint cured the deficiencies previously addressed by the Court. However, at the time the Settlement was reached, the Indirect Purchaser Plaintiffs were faced with the immediate risk posed by the Settling Defendants' pending motion to dismiss that Complaint. Docket No. 452. In that motion, the Settling Defendants argue that the Corrected Second Amended Complaint suffers from the same deficiencies that previously resulted in dismissal. As such, if the Settling Defendants' motion to dismiss were to be granted, the Indirect Purchaser Plaintiffs would be left with only three State law claims. *Id.*

The Indirect Purchaser Plaintiffs also faced the immediate risk of Defendants' pending petition for a writ of *certiorari*. *Agrium Incorporated, et al. v. Minn-Chem, Incorporated, et al.*, No. 12-650. According to Defendants, a Supreme Court reversal of the Seventh Circuit's interpretation of the Foreign Trade and Antitrust Improvements Act, 15 U.S.C. §6a ("FTAIA") would be dispositive of all of the Indirect Purchaser Plaintiffs' State law claims. While the Indirect Purchaser Plaintiffs do not agree, they recognize a risk should the Supreme Court grant Defendants' petition and reverse the Seventh Circuit.

In addition to the two foregoing immediate risks, the Indirect Purchaser Plaintiffs would eventually face (a) the risk of certifying a class and withstanding interlocutory appeal under Rule 23(f), (b) the risk of summary judgment and (c) the risk of *Daubert* and other *in limine* motions.

The Indirect Purchaser Plaintiffs would have tried to overcome the foregoing risks, but if such risks materialized, their impact would have been substantial and perhaps dispositive of the Indirect Purchaser Plaintiffs' claims. The proposed Settlement eliminates all the foregoing risks.

The Benefits To the Settlement Class. First, the Settlement provides for a cash payment of \$17,500,000 for the benefit of the Settlement Class. This all cash payment will ensure that members of the Settlement Class who submit valid proofs of claims will receive compensation for their claims now.

Second, unlike many class action settlements, the Settlement here does **not** provide for a reversion to the Settling Defendants of any monies in the Settlement Fund. Here all funds that would otherwise be due to class members who opt out of the Settlement Class or who fail to submit a claim, will be redistributed to those class members who do submit a claim.

Accordingly, weighing the risks of continuing litigation against the benefits provided by the Settlement shows that Settlement is sufficiently fair, reasonable, and adequate to warrant preliminary approval and the sending of notice to the Settlement Class.

2. The complexity, length, and expense of continued litigation

In the absence of this Settlement, continued and prolonged litigation of this complex case against the Settling Defendants would likely have consumed many more years of the parties' and the Court's resources. The Settlement allows the Settlement Class to avoid the significant expenses of continued litigation. The costs of discovery, of experts, of briefing and arguing class certification, of preparing the inevitably voluminous pre-trial order, of summary judgment motion practice as well as trial and appeals would have been substantial. Further, appeals of any summary judgment decision or final judgment (which, given the size and nature of the Indirect Purchaser Plaintiffs' claims were almost guaranteed) all but ensured that this litigation would have dragged on without resolution or relief for many years in the absence of settlement. One of the major benefits of this Settlement is to provide a much more certain and prompt recovery to the Settlement Class, and without the additional major expenditures of time and money.

The Indirect Purchaser Plaintiffs submit that the Court should find that this *General Electric* factor weighs heavily in favor of preliminary approval.

3. The amount of opposition to the settlement

At the current stage of the litigation, no members of the Settlement Class, including the Indirect Purchaser Plaintiffs, have indicated any objections to the proposed Settlement. Not only is there no such opposition, but this Settlement is being made before the motion for class certification. Therefore, all members of the Settlement Class have the right to exclude themselves from the Settlement if they so choose.

This *General Electric* factor, obviously, favors preliminary approval.

4. The presence of collusion in gaining a settlement

In the absence of evidence to the contrary, a court should presume as a matter of law that the parties conducted settlement negotiations in good faith and reached the resulting agreement without collusion. *Mars Steel*, 834 F.2d at 681-82; *Armstrong*, 616 F.2d at 325; *see also* 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.41 (4th Ed. 2002). This presumption is applicable here.

The requirement that class action settlements be fair is designed to protect against collusion among the parties. *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1383 (D.Md. 1983). There is usually an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's-length negotiations. *See* 2 Newberg on Class Actions, § 11.40 at 451 (2d ed. 1985); *Goldsmith v. Tech. Solutions Co.*, No. 92-C-4374, 1995 U.S. Dist. LEXIS 15093, at *10 n.2 (N.D. Ill. October 10, 1995) ("it may be presumed that the agreement is fair and adequate where, as here, a proposed settlement is the product of arm's-length negotiations"). Settlements proposed by experienced counsel and which result from arm's-length negotiations are entitled to deference from the court. *See e.g., id.* at *10 n. 2; *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) ("A presumption of correctness is said to attach to a class settlement reached in arms'-length negotiations between experienced, capable counsel after meaningful discovery") *quoting Hanrahan v. Britt*, 174 F.R.D. 356, 366 (E.D. Pa. 1997).

There was no collusion here. On the contrary, the parties, through experienced, fully-informed counsel, engaged in mediation before an experienced mediator who previously served as a Magistrate Judge in this court. The involvement of a mediator in the settlement process

further entitles the parties to a presumption that that the proceedings were free of collusion. *In re AOL Time Warner, Inc. Sec. Litig.*, No. 02 Civ. 5575, 2006 WL 903236, at *6 (S.D.N.Y. Apr. 6, 2006) (noting that involvement of mediator in pre-certification settlement negotiations helped “ensure that the proceedings were free of collusion and undue pressure”).

Accordingly, this factor also strongly supports preliminary approval.

5 - 6. The stage of the proceedings; and the amount of discovery completed.

The Indirect Purchaser Plaintiffs have pursued their claims against the Settling Defendants for more than four years. This includes two motions to dismiss, an appeal to the Seventh Circuit Court of Appeals and a pending petition for a writ of certiorari. Only after mediation were the parties able to agree to the Settlement.

Although formal discovery to this point has been somewhat limited, Co-Lead Counsel nonetheless had sufficient information to adjudge the appropriate contours of a fair settlement for this case. *Compare Schulte v. Fifth Third Bank*, 805 F.Supp.2d 560, 587 (N.D. Ill. 2011) (the fact that counsel conducted “no formal discovery prior to the settlement does not preclude final approval”). Among other things, Co-Lead Counsel reviewed the Settling Defendants’ production of transactional data and documents, had numerous lengthy discussions with multiple experts, exchanged mediation submissions with the Settling Defendants and researched numerous significant legal issues presented by this case.

Based on their extensive prior experience in indirect purchaser antitrust class actions, Co-Lead Counsel believe that the Settlement is fair, reasonable and adequate. *Schulte v. Fifth Third Bank*, 805 F.Supp.2d at 586 (the opinion of competent class counsel supports approval of a class action settlement); *Donovan v. Estate of Fitzsummons*, 778 F. 2d 298, 308 (7th Cir. 1985).

Accordingly, the *General Electric* factors also strongly support preliminary approval.

B. The Settlement Class Should Be Certified For Settlement Purposes

Rule 23(e) allows only for the settlement of a “certified class.” Fed. R. Civ. P. 23(e). On December 11, 2012, the Court certified virtually the same Settlement Class proposed to be certified here for purposes of the Indirect Purchaser Plaintiffs’ settlement with Defendants JSC Uralkali and JSC Silvinit. Docket No. 472 at ¶4-6. The Court found that the Settlement Class satisfied the prerequisites of Rule 23. *Id.* at ¶6. Accordingly, the Settlement Class here should also be certified for settlement purposes.

C. The Court Should Appoint Lovell Stewart and Miller Law As Class Counsel

Federal Rule of Civil Procedure 23(g)(1) provides that “...a court that certifies a class must appoint class counsel.” Fed. R. Civ. P. 23(g)(1). The Court has twice appointed Lovell Stewart and Miller Law as class counsel for the Indirect Purchaser Plaintiffs and found that the requirements of Rule 23(g) were fully satisfied by the appointment. *See* Docket Nos. 48 (08-cv-5253) and 472 at ¶6. The Court should again appoint Lovell Stewart and Miller Law as class counsel for the Indirect Purchaser Plaintiffs.

CONCLUSION

For the reasons stated above, the Indirect Purchaser Plaintiffs respectfully request that the Court enter the attached [Proposed] Order Granting Certification of a Settlement Class And Preliminary Approval of Class Action Settlement and thereby (a) preliminarily approve the Settlement, (b) certify the Settlement Class, and (c) appoint Lovell Stewart and Miller Law as class counsel.

Dated: January 30, 2013

Respectfully submitted,

By: /s/ Marvin A. Miller

Marvin A. Miller

MILLER LAW LLC

115 S. LaSalle Street, Suite 2910

Chicago, IL 60603

(312) 332-3400

/s/ Christopher Lovell

Christopher Lovell

LOVELL STEWART HALEBIAN

JACOBSON LLP

61 Broadway, Suite 501

New York, NY 10006

(212) 608-1900

***Indirect Purchaser Plaintiffs' Interim Co-
Lead Counsel***

CERTIFICATE OF SERVICE

I, Marvin A. Miller, an attorney, hereby certify that on January 30, 2013, I caused a true and correct copy of the foregoing **INDIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENTS WITH SETTLING DEFENDANTS**, to be filed and served electronically via the court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Marvin A. Miller
Marvin A. Miller
MILLER LAW LLC
115 S. LaSalle Street, Suite 2910
Chicago, IL 60603
(312) 332-3400