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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
EASTERN DIVISION

IN RE: FRESH AND PROCESS POTATOES) Civil Case No. 4:10-md-02186 BLW
ANTITRUST LITIGATION)
_____)
)
THIS DOCUMENT RELATES TO:)
)
Direct Purchaser Plaintiffs’ Action.)
)
_____)

**DIRECT PURCHASER PLAINTIFFS’ MOTION FOR COURT
DETERMINATION OF SETTLEMENT FUND DISTRIBUTION TO
ACRS/SYSCO FOODS**

Direct Purchaser Plaintiffs (“DPPs”), on behalf of themselves and in their representative capacity on behalf of the Settlement Class, respectfully move the Court to enter an order determining whether and the extent to which Sysco Foods headquarters, by and through third-party claims filer ACRS Group LLC, may participate in the distribution from the Settlement Fund established by the Settlement Agreement (ECF 829-2) between DPPs and all Defendants¹

¹ Defendants in this matter were: Albert T. Wada; Wada Farms, Inc.; Wada Family, LLC; Wada Farms Potatoes, Inc.; Wada Farms Marketing Group, LLC; Wada-Van Orden Potatoes, Inc., Pro Fresh LLC; Cedar Farms, LLC, Blaine Larsen Farms, Inc.; Cornelison Farms, Inc.; Michael

in this Action despite its submission of its claim form nearly eight months after the claims submission deadline. This motion is based upon Plaintiffs' Memorandum accompanying this Motion and the Declaration of Markham Sherwood, Director of Class Action Services at Kurtzman Carson Consultants LLC ("KCC"), the Court-appointed Claims Administrator, and is made on the following grounds:

- 1) Under paragraph 9 of the Court's Order finally approving the Settlement Agreement, the Court retains jurisdiction over the implementation, enforcement and performance of the Agreement (ECF No. 902);
- 2) On June 14, 2016, third-party filer ACRS Group LLC submitted a claim for distribution of proceeds from the Settlement Fund for the benefit of Sysco Foods headquarters and 94 affiliates (the "ACRS/SYSCO claim"), eight months after the court-ordered claims submission deadline of October 16, 2015;
- 3) Approval of the ACRS/Sysco claim, the largest submitted, would materially impact the distribution to other DPP Settlement Class Member claimants whose claims have been deemed eligible and have been verified, reducing their distributions by approximately 26%;
- 4) In its December 14, 2015 Order granting final approval to the Settlement Agreement (ECF No. 902), the Court authorized KCC to accept late-filed claims based on representations by Settlement Class Counsel and KCC regarding the number of late filed

Cranney d/b/a/ Cranney Farms; Driscoll Potatoes, Inc.; Idahoan Foods LLC; Kim Wahlen; KCW Farms, Inc.; Lance Funk d/b/a Lance Funk Farms; Pleasant Valley Potato, Inc.; Potandon Produce L.L.C.; Raybould Brothers Farms, LLC; Ronald D. Offutt Jr.; RD Offutt, Co.; Rigby Produce, Inc.; Snake River Plains Potatoes, Inc.; United Potato Growers of America, Inc.; United Potato Growers of Idaho, Inc.; and United II Potato Growers of Idaho, Inc.

claims at the time Settlement Class Counsel filed their motion for final approval of the Settlement Agreement and for approval of the Plan of Allocation in November 2015;

- 5) In so authorizing KCC to accept late-filed claims, the Court did not have the benefit of information about the circumstances now presented—a claim filed 8 months late with a material impact on other claimants.

Accordingly, Plaintiffs respectfully request that the Court enter an order determining whether and to what extent ACRS/Sysco may participate in the distribution of the Settlement Fund despite the submission of its claim eight months after the claims submission deadline.

Dated: August 22, 2017

Respectfully submitted,

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_____)	

**DIRECT PURCHASER PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR COURT DETERMINATION OF SETTLEMENT FUND
DISTRIBUTION TO ACRS/SYSCO FOODS**

I. INTRODUCTION

Direct Purchaser Plaintiffs (“DPPs”), on behalf of themselves and in their representative capacity on behalf of the Settlement Class, submit this memorandum in support of their Motion for Court Determination of Settlement Fund Distribution to ACRS/Sysco Foods.

Settlement Class Counsel, together with the Claims Administrator, have worked over the past 18 months to validate or otherwise resolve nearly 1,400 of claims submitted seeking distribution from the Settlement Fund established by the 2015 Settlement Agreement between DPPs and Defendants in this Action. Many of the claims were problematic, such as hundreds that were submitted by claimants that were not members of the class.

As a result of the extensive claims validation efforts, the validity (or lack thereof) of all claims but one—that submitted by third-party filer¹ ACRS Group LLC for the benefit of Sysco Corporation and 94 of its affiliates (“ACRS/Sysco claim”)—has been resolved and Settlement Class Counsel and the Claims Administrator are prepared to distribute the Settlement Fund to Settlement Class Members whose claims have been validated. Because of the unique circumstances surrounding the ACRS/Sysco claim, Plaintiffs now seek the Court’s determination as to that claim so they may finalize allocation and distribute the Settlement Fund.²

Sysco Corporation filed its claim through third-party claim filer ACRS on June 14, 2016, nearly eight months after the claims deadline of October 16, 2015 had passed.³ Because of the volume of ACRS/Sysco’s valid claimed purchases, if ACRS/Sysco is deemed eligible to receive

¹ A Third-Party Filer is an entity that files a claim on behalf of a claimant pursuant to an assignment or alternatively, a service agreement, *see* Decl. of Markham Sherwood ¶ 8, filed herewith, in exchange for a fee, usually a percentage of the recovery.

² Under the Court’s Order finally approving the Settlement Agreement, the Court retains jurisdiction over the implementation, enforcement and performance of the Agreement. ECF No. 902 ¶ 9.

³ As discussed in greater detail in Part III, the Sysco entities were sent direct Long-Form Notice of the Settlement Agreement, along with a claim form, by U.S. mail.

a distribution from the Settlement Fund, Sysco would receive the largest distribution of any claimant, accounting for more than approximately 26% the Net Settlement Fund and reducing the distribution to other claimants by about the same percentage.

In its December 2015 final approval order, the Court provided the Claims Administrator with authority to approve late-filed claims based on representations by the Claims Administrator and Settlement Class Counsel about the late claims received as of the date DPP's motion for final approval was filed: they were few and modest relative to all claims filed (12 late claims of 1,395 claims submitted) and the delay in submission amounted to a few days or weeks. KCC later accepted three late-filed claims (others were rejected on different bases), all of which were among the late-filed claims identified to the Court when DPPs sought authority to pay such claims in November 2015. *See* Decl. of Markham Sherwood ¶ 18 ("Sherwood Decl.").

But no determination has been made as to whether ACRS/Sysco should be allowed to participate in the Settlement Fund because its claim was both submitted exceptionally late and, if paid, would significantly reduce distribution to other claimants, and the Court lacked the benefit of both pieces of information when, in late 2015, it authorized the Claims Administrator to accept late claims. Settlement Class Counsel thus respectfully seek the Court's determination now, based on information provided herein, whether and to what extent ACRS/Sysco may participate in the Settlement Fund.

II. FACTUAL BACKGROUND

A. The Settlement Agreement & Notice to the Class

In 2010, Plaintiffs, direct purchasers of fresh potatoes, filed their class action complaint against potato growers, packers, marketers and processors alleging Sherman Act Section 1 violations arising from a conspiracy to restrict the supply of potatoes, causing class members to

pay potato prices that were higher than they otherwise would have been absent the conspiracy. After years of litigation, in April 2015, DPPs entered in to a Settlement Agreement with all Defendants, which provided for a \$19.5 million settlement fund as well as injunctive relief.⁴ In June 2015, the Court preliminarily approved the Settlement Agreement as well as the Notice Plan.⁵

Accordingly, during the summer of 2015, the Court-appointed Claims Administrator, Kurtzman Carson Consultants (“KCC”), implemented the Notice Plan. During the week of July 2, 2015, it mailed the direct Long-Form Notice with a Claim Form to thousands of known DPP Class Members and summary postcard notices to nearly 20,000 potential class members; direct and summary notice that was returned undeliverable was remailed where updated mailing addresses were available.⁶ In addition, Publication Notice was provided via a press release distributed to media outlets likely to reach Settlement Class Members and in trade publications, and an extensive targeted internet promotional campaign was undertaken.⁷ Pursuant to this Court’s Order approving the Notice Plan, the deadline for filing claims was October 16, 2015.⁸

B. Final Approval of the Settlement Agreement and Plan for Allocation of the Settlement Fund.

On November 25, 2015, DPPs moved the Court for final approval of the Settlement Agreement and for approval of their proposed Plan of Allocation and Distribution of the

⁴ See Mot. for Prelim. Approval of Settlement Agreement, Ex. 1 (Settlement Agreement between Direct Purchaser Pls. and Defs.) (ECF No. 829-2).

⁵ Order Granting Prelim. Approval of Proposed Settlement Agreement between DPPs and All Defs., Certifying the Settlement Classes, and Approving the Notice Plan & Form of Notice and Directing Notice to the Classes, June, 17, 2015 (ECF No. 841).

⁶ See Suppl. Aff. of Daniel Rosenthal re: Implementation of DPP’s Settlement Notice Plan, Notice Dissemination and Clams Administration ¶¶ 4-5, 7-8 (ECF No. 888-7) (“Suppl. Rosenthal Aff.”).

⁷ *Id.* ¶¶ 9, 11-14.

⁸ *Id.* ¶ 23.

Settlement Fund (“Allocation Plan”) to the Settlement Class.⁹ The Allocation Plan provided for a pro rata distribution of the Net Settlement Fund based on each verified claimant’s dollar value of qualifying purchases relative to the total dollar value of all claims submitted for qualifying purchases by all verified claimants, and for a minimum \$25 award to each verified claimant whose award would otherwise be less than that amount.¹⁰

The Allocation Plan also sought Court approval for authorization to pay otherwise valid claims that were submitted after the October 16, 2015 claims deadline. At the time DPPs proposed their Allocation Plan on November 25, 2015, approximately six weeks after expiration of the claims deadline, only 12 claimants had filed late claims forms, nine of which were filed online only days after the October 16, 2015 deadline, and three of which were submitted via mail with postmarked dates after that deadline. Decl. of Markham Sherwood ¶ 18 (attached hereto) (“Sherwood Decl.”). DPPs averred that, though untimely, the late-filed claims were few and submitted shortly after the claims deadline, and payment of late claims, once verified, maximized the benefit of the Agreement to the Settlement Class and of the release to Defendants.¹¹

On December 14, 2015, the Court granted final approval to the Settlement Agreement, entered a Consent Order providing injunctive relief and final judgment as to all Defendants, and approved the proposed Allocation Plan, including authorization to pay late-filed claims.¹²

⁹ Pls. Mot. for Final Approval of the Class Action Settlement between Defendants & DPPs, Entry of Consent Order, & Approval of the Proposed Plan of Allocation. Nov. 25, 2015 (ECF No. 888).

¹⁰ Pls.’ Mem. in Supp. of Mot. for Final Approval of the Class Action Settlement at 18-19 (ECF No. 888-1) (“Final Approval Mem.”).

The Net Settlement Fund is the Settlement Amount plus interest earned, less Court-awarded fees, costs, incentive awards, and expenses for taxation matters, notice, and claims administration. *See* Final Approval Mem. at 18 & Settlement Agreement ¶ 53.

¹¹ Final Approval Mem. at 19.

¹² Order Granting Final Approval, Providing for Entry & Enforcement of Consent Order, & Approving the Proposed Plan of Allocation & Distribution, Dec. 14, 2015 (ECF No. 902) (“Final

C. Net Settlement Fund

In August 2015, DPPs moved the Court for an award of fees, costs, and incentive payments to the class representatives.¹³ On December 14, 2015, in its Final Approval Order, the Court awarded DPPs \$6.435 million in attorneys' fees and \$1,550,856.38 for cost reimbursement, and approved \$25,000 in incentive awards to each of the two DPP class representatives.¹⁴

Accordingly, Net Settlement Fund, after deduction of attorneys' fees, costs, and incentive awards, is currently \$11,525,234.53. This includes interest of \$61,150.91 earned and is less \$60 paid from the fund for state taxes owing. After remaining amounts owed to KCC for claims administration are withheld,¹⁵ the amount available for distribution is \$11,482,041.82.¹⁶

D. Claims Validation & Administration.

KCC received 1,395 claims for payment from the DPP Settlement Fund for purchases of potatoes. Sherwood Decl. ¶ 7. Following the Court's final approval Order, Settlement Class Counsel and KCC began work to validate the claims submitted—an exhaustive and time-consuming process that spanned approximately 18 months. Each claim form was reviewed for completeness and for sufficiency of documentation. *Id.* ¶ 8. A extremely large number of

Approval Order").

¹³ DPP's Mot. for Award of Attorneys' Fees & Reimbursement of Litig. Expenses & for Incentive Awards to Class Representatives, Aug. 18, 2015 (ECF No. 869).

¹⁴ Final Approval Order (ECF No. 902).

¹⁵ In their motion for an award of fees and costs, Plaintiffs included amounts then owed KCC for notice and claims administration costs as of the date of that motion. *See* Decl. of J. Pizzirusso in Supp. of DPPs' Mot. for an Award of Attorneys' Fees and Reimbursement of Litig. Expenses, Ex. B (ECF No. 383-2). The Court subsequently authorized Settlement Class Counsel to remit to KCC up to a total of \$125,000 in notice and administration costs, inclusive of the amount already owing to KCC already included in DPPs' fee petition. Final Approval Order ¶ 6 (ECF No. 902). Accordingly, the remainder owed to KCC must be deducted from the Net Settlement Fund prior to distribution.

¹⁶ This amount may be reduced modestly for any holdback required for payment of 2017 taxes.

deficiencies were found: some claim forms were submitted with zero dollar amounts, without any identification of the entities from which the potatoes were purchased, and/or without any documentation; some claims appeared to ineligible indirect purchases from retail establishments and distributors; some claimants submitted duplicate claims; third-party filers failed to provide proof of agency for the claimants represented; some claimants sought payment for purchases of Process or feed-grade potatoes, rather than Fresh Potatoes or combined both Fresh and Process Potatoes in their documentation; among other deficiencies. *See id.* ¶ 8.

In addition, because of the complex Settlement Class Definition, considerable research was required to verify that entities from which claimants purchased Fresh Potatoes were covered under the Settlement Class Definition. *Id.* ¶ 9. That definition provides that purchases of Fresh Potatoes from UPGI, UPGI II, UPGA, UPGA's Cooperative Members, and from the members of each of those entities (identified in exhibits C-E to the Settlement Agreement) are compensable under the Settlement Agreement, along with purchases from parents, subsidiaries and affiliates thereof, and purchases from those who packed or marketed potatoes for any of those entities.¹⁷ Settlement Agreement ¶ 22. Accordingly, KCC and Settlement Class Counsel were also required to research not only whether the entities from which claimants purchased were affiliates of the entities identified in Exhibits C-E, but also whether they packed or marketed Fresh Potatoes grown by any of those entities (regardless of corporate affiliation). *Id.*

Following initial determinations of eligibility, KCC sent deficiently notices to claimants, providing them with an opportunity to defend their claims and submit additional documentation regarding eligibility of their purchases and/or of the entity from which they purchased. *Id.* ¶ 10.

¹⁷ This is because, in general, potato growers do not sell Fresh Potatoes to buyers; potatoes are graded and packed by another entity and sold through that entity or a third-party marketer.

Some claimants responded with documentation that appeared fabricated, requiring additional research and evaluation; some bankrupt entities sought additional time to document their purchases because of the limited availability of historical purchase data; some filers sought information regarding the eligibility of the entities from which they purchased; and some third-party filers sought documentation of agency; among other responses. *Id.* ¶¶ 8, 10. This process also took months as KCC evaluated these responses and continued to work with claimants, and concluded in late May 2017 with resolution of claims by bankrupt entities or their trustees. *Id.* ¶ 15

In short, Class Counsel and KCC have engaged in significant efforts since Final Approval to verify that only class members and only valid claims were being paid from Settlement proceeds. Accordingly, after 18 months of careful claims administration, KCC found 152 of the submitted claims to be valid and eligible for distribution from the Settlement Fund. *Id.* ¶ 7.

Only the ACRS/Sysco Claim remains unresolved. Settlement Class Counsel and KCC are prepared to distribute the Net Settlement Amount to claimants following the Court's resolution whether ACRS/Sysco may, and to what extent, participate in the distribution.

III. LATE FILED CLAIMS

A. Late-Filed Claims Accepted

The deadline for filing claims for payment from the Settlement Fund was October 16, 2015. When Plaintiffs filed their Final Approval papers on November 25, 2015, as KCC and Plaintiffs then reported, KCC had received several late filed claims, and sought Court-approval for discretion accept such late-filed claims. Final Approval Mem. at 18; Suppl. Rosenthal Aff. ¶ 23.¹⁸ As of that date, twelve claims forms were untimely submitted: 9 were filed online within

¹⁸ There is a discrepancy between Plaintiffs' statement in their Final Approval Memorandum and the Supplemental Rosenthal Affidavit accompanying that motion regarding the number of late claims

days of the claims deadline and 3 were sent by mail postmarked just after the claims deadline. Suppl. Rosenthal Aff. ¶ 23. Settlement Class Counsel sought authority for KCC to accept late filed claims (if verified) in the motion for final approval of the Settlement Agreement and for approval of the Allocation Plan because, although untimely, most were submitted within days of the claims deadline and payment of these claims (once verified) would maximize the benefit of the Agreement to Settlement Class and of the release to Defendants. Final Approval Mem. at 19. KCC later received an additional 5 late-filed claim forms via mail (excluding ACRS/Sysco's claim form). Sherwood Decl. ¶ 18.

Of these 17 late-filed claims (other than the ACRS/Sysco claim), 14 were determined ineligible for reasons other than untimeliness. *Id.* Of the three determined to be eligible, all were among those reported to the Court at the time Plaintiffs sought final approval of the Settlement and the Allocation Plan: one was filed online the day after the October 16, 2015 claims deadline; two others were received by mail postmarked on October 21, 2015 and November 2, 2015. *Id.* Those three accepted late claims account for direct Fresh Potato purchases in the amount of 7.3% combined (two of which are *de minimis* amounts) relative to total verified purchases claimed by all eligible claimants. *Id.*

B. The ACRS/Sysco Late-Filed Claim

ACRS Group LLC, a third-party filer, submitted a claim for the benefit of Sysco headquarters and 94 Sysco Foods affiliates postmarked June 14, 2016, nearly eight months after the claims submission deadline of October 16, 2015. *Id.* ¶ 12. This submission was preceded by conversations and communications between KCC staff and representatives of ACRS, during

filed. The memorandum, in error, reported that the number of late filed claim forms was 9; the correct number, as reported in the Affidavit is 12. *Compare* Final Approval Mem. at 19 *with* Suppl. Rosenthal Aff. ¶ 23.

which ACRS inquired whether the Sysco's late claim would be permitted; KCC informed ACRS that while KCC would process the claim, it may be denied for untimeliness. *Id.* ¶ 11.

Plaintiffs have no reason to believe Sysco headquarters and its affiliates did not receive notice of the Settlement. KCC's records show that, on July 2, 2015, long-form notice of the Settlement Agreement along with a claim form, which included the claims submission deadlines, was mailed to 200 Sysco locations in the United States, including the 94 Sysco affiliates included in the ACRS/Sysco claim, as well as to a Sysco entity at same address used by Sysco Corporation in its late-filed claim. *Id.* ¶ 13. The notice to Sysco headquarters was not returned as undeliverable; four of the notices to the 94 Sysco affiliates included in Sysco's claim were returned undeliverable. *Id.* As noted, however, publication notice of the Settlement was extensive.

Additionally, two of the Sysco affiliates to whom long-form notice was mailed did timely submit independent claims for their respective purchases of Fresh Potatoes (Sysco-Cleveland and Sysco-San Diego). Their potato purchases were also subsequently included in the ACRS/Sysco claim despite their prior independent claims. *Id.* ¶ 14. Sysco-San Diego withdrew its individual claim, and its purchases remain in the ACRS/Sysco claim; Sysco-Cleveland's purchases were removed from the ACRS/Sysco claim. *Id.* KCC found that the ACRS/Sysco claim, as modified through the claims verification process (to remove certain ineligible purchases and the Sysco-Cleveland claim) is otherwise valid but for untimeliness.

Upon being informed about this late filed claim, the date upon which it was submitted, and its likely impact on other claimants, Settlement Class Counsel concluded that it would be appropriate to submit the question of whether and to what extent ACRS/Sysco may participate in the distribution (and to what extent) to the Court after the claims validation process concluded,

when the impact of accepting that claim on other claimants could be accessed and reported to the Court. *Id.* ¶ 16. Settlement Class Counsel so informed ACRS. *Id.*

The ACRS/Sysco claim is by far the largest claim submitted. If accepted, based on Sysco's validated purchases of Fresh Potatoes, its claim would constitute nearly 26 percent of all total valid purchases claimed and thus would receive that share of the Net Settlement Amount—or approximately \$2.98 million of the approximately \$11.5 million available for distribution to Settlement Class claimants. *Id.* ¶ 21. Accordingly, including the ACRS/Sysco claim in the distribution reduces the amounts that other claimants would otherwise receive by 26% as well. *Id.* For example, without inclusion of ACRS/Sysco in the distribution, the next largest claimant would receive \$2.67 million; if ACRS/Sysco participates in the distribution, that claimant's award would be reduced to \$1.97 million. Exhibit A to the Sherwood Declaration compares the amount of the distribution each claimant would receive, based on their valid and approved claims, both with and without approval of the ACRS/Sysco claim. *See id.* ¶ 21 & Ex. A. The claimants' names are excluded and identified by KCC's claimant identification numbers.

Although the Court authorized the Claims Administrator to approve late-filed claims, at the time Settlement Class Counsel sought that discretion in November 2015, the ACRS/Sysco claim had not yet been filed and thus the Court, was unable to evaluate the circumstances now presented in considering whether to grant it. Plaintiffs thus now respectfully seek an Order from this Court regarding whether and to what extent ACRS/Sysco may participate in the distribution from the Settlement Fund.

Dated: August 22, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of August 2017, a true and correct copy of the foregoing MOTION FOR COURT DETERMINATION OF SETTLEMENT FUND DISTRIBUTION TO ACRS/SYSCO FOODS and all accompanying exhibits and declarations were caused to be filed with CM/ECF with service by electronic mail to the following:

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