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Docket Number:	UWY-CV-14-6023215-S
Case Name:	BRETT, DOUGLAS Et Al v. PEPPERIDGE FARM, INCORPORATED
Type of Transaction:	Pleading/Motion/Other document
Date Filed:	Jul-9-2021
Motion/Pleading by:	PULLMAN & COMLEY LLC (047892)
Document Filed:	155.00 MEMORANDUM IN SUPPORT OF MOTION For Preliminary Approval of Class Settlement Agreement (DKT. 154 - Revised Motion)
Date and Time of Transaction:	Friday, July 9, 2021 3:23:27 PM

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DOCKET NO. X10-UWY-CV-14-6023215-S	:	SUPERIOR COURT
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DOUGLAS BRETT, TERRENCE FOX, STEVEN PULFORD, and MARK RYAN, on behalf of themselves and all others similarly situated,	:	J.D. OF WATERBURY
	:	COMPLEX LITIGATION DOCKET
Plaintiffs,	:	
	:	
vs.	:	JULY 9, 2021
	:	
PEPPERIDGE FARM, INC.,		
Defendant.		

MEMORANDUM OF LAW IN SUPPORT OF REVISED MOTION FOR CERTIFICATION OF SETTLEMENT CLASS AND PRELIMINARY APPROVAL OF CLASS SETTLEMENT AGREEMENT

The plaintiffs seek approval of a lengthily- and intricately-negotiated class settlement agreement of this action, intended to resolve independent contractor misclassification and wage-and-hour claims asserted on behalf of distributors of defendant Pepperidge Farm, Incorporated ("Pepperidge Farm") bakery products across the State of Connecticut. The plaintiffs, and the members of the putative class, are current and former bakery sales development associates (formerly known as Sales Development Associates or "SDAs," and now known as Independent Direct-Store-Delivery Partners or "IDPs"). That is, they are or were parties to (or affiliated with entities that are or were parties to) "Consignment Agreements" with defendant Pepperidge Farm under which they (or their entities) are or were responsible for distributing, and have or had the largely exclusive right to distribute, Pepperidge Farm bread and similar products in designated geographic territories, to grocery markets and other retail outlets as well as to end users such as restaurants.

The gist of the complaint is that while the Consignment Agreements purport to make the SDAs independent contractors operating businesses of their own, and the SDAs purchased their

distribution rights understanding and desiring that they would be business owners, this has not happened in practice. The complaint alleges that instead, Pepperidge Farm has exercised such tight and detailed control over the means and manner of the SDAs' work in Connecticut that the SDAs are *de facto* employees of Pepperidge Farm, and therefore should properly be reclassified as such. It seeks damages for the difference between the compensation paid to them under the consignment agreements – which calculate their compensation solely as a percentage commission on the bread sold in their territories – and what would have been due to them as wages if they were acknowledged to be employees, as well as for the lost value of the businesses that the plaintiffs purchased and that could not be resold if the SDAs were to be reclassified as employees. Pepperidge Farm denies the allegations in the complaint and maintains that SDAs have been properly classified as independent businesspersons.

The cornerstone of the proposed settlement, as discussed in more detail below, is to put in place detailed contractual protections of the SDAs' independence. For example, it reaffirms their ability to employ others in operating their businesses rather than personally performing all of the contracted services, guarantees them latitude in ordering and shelving practices and in scheduling services for stores in their territories, and guarantees Pepperidge Farm's cooperation in sales of the SDAs' businesses to others. It also creates a new dispute-resolution system, consisting of both internal channels within Pepperidge Farm and an outside arbitration system, that would allow SDAs to enforce these guaranties on a cost-effective individual basis that has until now been at times difficult for disputes over their existing contracts given the disparity between the cost of individual-plaintiff court proceedings and the value of such a dispute. The settlement also includes some monetary compensation for the disputed conduct in the.

Collectively, these terms are intended not only to cement the desired independence of the SDAs' work now, but also to protect their capital investments by ensuring that they have contractually-guaranteed independent businesses that they can sell to others in the future.

I. THE ALLEGATIONS OF THE COMPLAINT, THE PROCEDURAL HISTORY, AND THE PARTIES' NEGOTIATIONS

A. The Allegations of the Complaint

Pepperidge Farm is a food manufacturer that produces, as relevant here, bread, rolls, and stuffing.[1] 3d Amd. Cmplt. (doc.144.00), ¶ 7. Named plaintiffs Douglas Brett, Terrence Fox, and Mark Ryan are SDAs who operate out of Pepperidge Farm's Cheshire, Connecticut depot (which was located in Waterbury when this action was filed), and distribute to stores and end-users in greater Waterbury or Litchfield County. *Id.*, ¶¶ 1-2 & 4. Named plaintiff Steven Pulford is a former SDA who operated out of the Waterbury depot at the time the action was brought. *Id.*, ¶ 3.

It is undisputed that the plaintiffs and other members of the putative class purchased territorial rights to conduct such distribution. The purchase price for these rights is large – allegedly it is typically twice the annual expected income from the territory. *Id.*, ¶ 11. These rights and the accompanying performance obligations are set out in "Consignment Agreements" between the SDAs and Pepperidge Farm, which purport to make the SDAs independent contractors with business that they not only can operate in their own manner, but can develop, grow, and sell. *Id.*, ¶¶ 13-14.

[1] Pepperidge Farm refers to this set of its products as "bakery" goods, as distinct from its "snack" or "biscuit" goods, such as cookies and crackers. Pepperidge Farm snacks/biscuits are distributed by a separate group of SDAs who are not within the putative class on whose behalf the plaintiffs have brought this suit, and the case does not challenge Pepperidge Farm's business practices with respect to snacks/biscuits.

The plaintiffs allege that instead, however, Pepperidge Farm has imposed on them a set of policies and procedures that control minute details of their daily work, to an extent that the SDAs have been misclassified as independent contractors. *Id.*, ¶¶ 18-19 & 22-24. Pepperidge Farm denies these allegations.

The named plaintiffs seek certification of a class of "all current and former distributors of Pepperidge Farm bread products in Connecticut who are or have been classified as independent contractors by Pepperidge Farm, whether or not they are explicitly called 'SDAs.'" *Id.*, ¶ 26. Pepperidge Farm denies that the case is suitable for class treatment other than for purposes of settlement.

The Third Amended Complaint makes five claims on behalf of the plaintiffs and the putative class:

- The First Count seeks money damages under the Connecticut wage statute, Connecticut General Statutes section 31-71a *et seq.*, for, inter alia, failure to pay the plaintiffs and other putative class members for all of the hours they have worked, failure to pay overtime rates for overtime work, making a variety of unauthorized deductions from the plaintiffs' and other putative class members' pay, and charging fees for furnishing employment.
- The Second Count is a common-law unjust enrichment claim seeking, among other things, disgorgement of the amounts by which Pepperidge Farm has been unjustly enriched through the misclassification, such as payroll taxes it has avoided paying, and the money it has received for "sales" of the "territories."

- The Third Count seeks a declaratory judgment that the plaintiffs and other members of the putative class are employees, not independent contractors, and that Pepperidge Farm must treat them as such in the future.
- The Fourth Count alleges that Pepperidge Farm made fraudulent misrepresentations to the plaintiffs and the members of the putative class, when they "purchased" their "territories," that they would be independent contractors with the discretion to operate their own businesses, and in reliance on those representations, they paid money to "purchase" businesses that do not exist, as well as to finance, equip, and insure those "businesses."
- The Fifth Count alleges that Pepperidge Farm made negligent misrepresentations to the plaintiffs and other members of the putative class members akin to the fraudulent misrepresentations alleged in the Fourth Count.

B. Procedural History

This action has been pending for approximately seven years, most of which has been spent in protracted settlement discussions. While certain legal issues related to the class allegations have been litigated in the pleading practice, the plaintiffs have not filed a motion for class certification because a settlement has been anticipated on a class basis for a number of years.

The complaint has been challenged and refined over a series of motions to strike, a request to revise, and several amended or revised pleadings. The operative complaint is the plaintiffs' Third Amended Complaint of May 16, 2019 (doc 144.00).

The plaintiffs' original complaint contained only the wage statute and unjust enrichment claims. In May, 2014, Pepperidge Farm moved to strike that complaint. Doc. 106.00. Before

that motion was adjudicated, the plaintiffs amended their complaint, adding the declaratory judgment claim. Doc. 112.00.

In August, 2014, Pepperidge Farm moved to strike the amended complaint, arguing that individualized proof would necessarily be required as to the claims of each member of the putative class, and therefore that as a matter of law, common issues in the adjudication of the claims could never predominate over individualized ones. Doc. 113.00. The court denied that motion. Doc. 113.10.

In April, 2015, the plaintiffs amended their complaint again, adding the fraud and negligent misrepresentation claims. Doc. 124.00. Pepperidge Farm filed a request that the plaintiffs revise the Second Amended Complaint to make the misrepresentation allegations more specific, doc. 128.00, which the plaintiffs did. Doc. 130.00.

Along with the pleading practice, the plaintiffs and Pepperidge Farm both served significant discovery, exchanging various information as well as engaging in motion practice over the scope of the discovery. Docs. 137.00-138.00.

C. Negotiation History

In October, 2015, after more than a year and a half of intense litigation, the parties halted the action, with the court's permission, in order to try to reach a negotiated resolution to the case. Doc. 139.00. They engaged Attorney Michael Dickstein, a prominent mediator with national experience in employee/independent contractor misclassification actions, to assist in their discussions. Affidavit of Jonathan B. Orleans in support of Preliminary Approval of Class Settlement ("Orleans Aff."), ¶ 9; Affidavit of Adam S. Mocciolo in support of Preliminary Approval of Class Settlement ("Mocciolo Aff."), ¶ 9. A series of lengthy in-person mediation sessions ensued over the next several months, in which appearing counsel, some of the named

plaintiffs, and senior business people from Pepperidge Farm, participated. Those mediations yielded a number of breakthroughs and the broad outline of an agreement, but also revealed a small set of issues about which the parties found it particularly difficult to reach agreement. Among them were the monetary payment from Pepperidge Farm to the class, the financial allowance afforded to SDAs for returning bread that has gone stale in stores without being sold, and who will bear the burden and expense of "double-bagging" bread for distribution to stores that only sell to consumers in two-loaf packages. *Id.*, ¶ 10. The disputes over these issues have taken years to resolve, in numerous exchanges of drafts and ongoing discussions, sometimes directly between counsel and sometimes with the assistance of the mediator. The parties have thoroughly tested one another's negotiating limits on these issues, and both sides have periodically sought to end the negotiations when it seemed a resolution could not be reached. The final divides were only bridged in 2020, through telephone negotiations during the COVID-19 pandemic. *Id.*, ¶ 11.

D. Settlement Terms

The parties' agreement is documented in the memorandum of understanding submitted as Exhibit A to the motion for preliminary approval. That memorandum of understanding introduces a revised form of the "Consignment Agreement" between an SDA and Pepperidge Farm, which an SDA in the class who currently owns a territory will be required to adopt as the means of effectuating the settlement and obtaining his/her/its share of the settlement agreement (unless the SDA opts out). The principal terms of the proposed settlement are as follows:[2]

i. The percentage of wholesale prices used to determine SDAs' compensation for bakery products that they distribute will be fixed permanently at the percentage currently used

[2] This is a summary for purposes of the memorandum in support of preliminary approval only. The terms of the memorandum of understanding itself control over anything set out here.

(generally 20%), eliminating any discretion Pepperidge Farm may have had to reduce these commission rates in the future. This protects both the SDAs' incomes during the period they own the distribution rights, and the values of the territories when sold, as the values are a function of the incomes that the territories generate.

ii. An allowance of 1% to SDAs for "inventory shrink" incurred at stores that use an emerging billing system known as "scan-based trading," in which stores do not pay Pepperidge Farm for bread that has been delivered to them and shelved for sale until the bread actually passes through their cash registers during a retail customer's purchase. This provision eliminates a portion of the SDAs' financial exposure for bread that is stolen or lost from scan-based trading stores after being shelved.

iii. Each SDA will have a "floor" allowance of 3% for return of stale products. A varying allowance for such stale returns, so that an SDA can keep shelves full and product available at stores in his or her territory without incurring undue financial risk, has been a traditional feature of the arrangement between Pepperidge Farm and its SDAs, and in the bread distribution industry generally. The plaintiffs' complaint alleges that rather than setting the varying allowance in response to market conditions, Pepperidge Farm has used the allowance as a tool to compel SDAs' compliance with unrelated polices on shelving, days of store service, and the like that go beyond the scope of its proper control of their independent businesses. The plaintiffs allege that Pepperidge Farm reduces SDAs' stale allowances, and therefore their compensation, when they do not comply with Pepperidge Farm's directives. While Pepperidge Farm denies that allegation, the parties have agreed to compromise the dispute by guaranteeing that no SDA's allowance will be less than 3%. From the plaintiffs' perspective, this will reduce Pepperidge Farm's ability

to use the stale allowance as leverage to exert inappropriate control over the plaintiffs' business operations.

iv. For at least one year from the court's order of final approval of the settlement agreement, where a chain account requires that bread be shelved in its stores and offered to its retail customers as a two-loaf package, Pepperidge Farm will undertake the "double-bagging" of the bread at its own expense and before delivering the products to an SDA for further distribution. If after that year Pepperidge Farm ceases to perform the double-bagging itself, then it will pay SDAs an additional 2.5% of the wholesale price of the bread, beyond the otherwise applicable percentage, as compensation for double-bagging the bread themselves. In that event, an SDA will have a further option to decline to distribute the double-bagged products to the stores in question. If the SDA declines to do so, then Pepperidge Farm will have the right to distribute the double-bagged products itself, through other agents, notwithstanding the SDA's exclusive distribution rights. The SDA will continue to receive some compensation for distribution of the products despite not participating, but the percentage will be 5% rather than the otherwise applicable rate for products that the SDA distributes (typically 20%). The plaintiffs regard this issue as related to the misclassification dispute in part because under existing practices, Pepperidge Farm, not the SDAs, negotiates requests from chain accounts for delivery of double-bagged products on a chain-wide basis, and does not give a particular SDA who happens to have such a store in his/her territory the option to decline to provide double-bagged products. Apart from compensating SDAs separately for the double-bagging activity, which the plaintiffs regard as part of Pepperidge Farm's production responsibilities and not a distribution task, the proposed settlement provision also gives

each SDA the latitude to decide for him/herself how burdensome the double-bagging task is, and, for those who conclude it is too burdensome, offers an opportunity to avoid the task altogether, without losing all of the financial benefit of the distribution rights.

v. Rather than being required by Pepperidge Farm to distribute to every chain store in his/her territory that wishes to carry Pepperidge Farm products, an SDA will have the right to decline to distribute to stores that do not consistently produce a threshold sales volume. The threshold will increase over time with increases in the wholesale price of bread. This addresses a concern of the plaintiffs' that requiring distribution to every would-be customer has deprived them of the business discretion to determine what distribution activities are worth their effort and investment, and in particular has caused them to recurringly lose money distributing to chain pharmacies whose volumes of bread sales do not generate sufficient profits for SDAs to justify the cost and time of the additional delivery stops.

vi. While Pepperidge Farm may make available to an SDA onboarding assistance, sales and promotion information, recommended service frequency and day of the week standards, recommended sales goals, business planning guides and assistance, business consulting via "route rides," recommendations regarding possible route/territory splits, territory sales or truck additions, and/or other recommendations regarding the services, the revised Consignment Agreement reaffirms that the SDA has sole discretion, without suffering any adverse consequence, to use or not use any of the foregoing offerings as he or she or it sees fit.

vii. Pepperidge Farm will not make changes or rearrange products or tags (tags indicate the date after which an item is considered stale and must be removed from the shelf) after

products are delivered to a store, except in the event that the store "resets" its shelving. Where a customer requires that Pepperidge Farm products be arranged in the store according to a "planogram" (a shelving diagram), the revised Consignment Agreement reaffirms that Pepperidge Farm will not of its own accord seek to punish an SDA for not complying with the planogram, nor attempt to force the SDA to comply. A customer complaint will be required. And if the customer complains about noncompliance, Pepperidge Farm will take measures at least one time, if requested by the SDA, to try to obtain the customer's permission for varying from the planogram. These provisions address concerns expressed by the plaintiffs that Pepperidge Farm has attempted to control their shelving practices on the pretense of customer requirements when the attempted controls were at Pepperidge Farm's own prompting.

viii. The revised Consignment Agreement reaffirms that Pepperidge Farm will not, as a condition of a sale of all or any portion of an SDA's territory, require the SDA to split the territory or add a truck to the territory. This addresses a concern expressed by the plaintiffs that Pepperidge Farm's past insistence on splitting certain territories has improperly invaded their control of their ostensibly independently-owned businesses, and/or that Pepperidge Farm has improperly withheld its consent to sales and splits in order to obtain compliance with unrelated demands for control over their day-to-day work.

ix. Certain contractual requirements about the appearance and condition of an SDA's delivery truck, and about the SDA's deportment, will be modified or eliminated. This addresses a concern raised by plaintiffs that the level of control that Pepperidge Farm has

sought to maintain over their appearance is inconsistent with their status as independent businesspersons.

x. If an SDA fails to deliver to a particular store and Pepperidge Farm institutes substitute delivery of its own, (i) the SDA will not be compensated for the delivery only for the period of time that the SDA fails to make delivery him/her/itself, and (ii) the store will remain part of the SDA's territory for purposes of sale of the territory, even if the SDA does not resume delivery. This will reverse the previous arrangement, and it addresses a concern raised by the plaintiffs that SDAs have been unfairly penalized with forfeiture of portions of their purchased territories in situations where Pepperidge Farm has overreached in its attempted control of an SDA's business at a particular store and the SDA has ceased to deliver there as a result of that dispute.

xi. Certain contractual provisions that previously allowed Pepperidge Farm to terminate an SDAs right to distribute specific individual bakery products, in response to noncompliance with the agreement with respect to those produces, will be modified or eliminated. Again, this addresses a concern raised by the plaintiffs that SDAs have been unfairly penalized with forfeiture of portions of their purchased distribution rights in situations where Pepperidge Farm has overreached in its attempted control of an SDA's business.

xii. Clarifying contractual language will be added to the Consignment Agreements to reaffirm that Pepperidge Farm does not have the right to interview, approve, or disapprove any employee or independent contractor whom an SDA wishes to engage in the SDA's business. This addresses a concern raised by the plaintiffs that Pepperidge

Farm has in the past attempted to compel SDAs to personally carry out their distribution activities rather than doing so through agents.

xiii. Certain contractual provisions providing Pepperidge Farm discretion to withhold its approval of a sale of an SDA's distribution rights based on Pepperidge Farm's assessment of the character, financial responsibility, or business acumen of the buyer will be modified or eliminated. Clarifying language will be added confirming that Pepperidge Farm may not seek to prevent a purchaser from obtaining third-party financing of the purchase, so long as the third party's lien on the business is junior to any lien held by Pepperidge Farm. And language will be added setting specific deadlines for Pepperidge Farm to respond to inquiries from prospective buyers of territories and to approve or disapprove of proposed sales. Collectively, these changes are intended to address a concern expressed by the plaintiffs that Pepperidge Farm has used the approval process to obtain compliance with unrelated polices and/or to evaluate potential purchasers as it would *de facto* employees.

xiv. A new dispute-resolution system will be created for future disputes between covered SDAs and Pepperidge Farm. When such a dispute arises, the parties will have the ability to require one another to meet and confer, within 14 days, in an attempt to resolve the dispute. If they cannot resolve their differences, the system will enable (and require) the parties to bring any legal claims for resolution before an arbitrator from Judicial Arbitration and Mediation Services ("JAMS") rather than to a court. Pepperidge Farm will bear all of the arbitration fees for arbitration demands that it files, and all but a small portion for arbitration demands that SDAs file. This system is intended to be less expensive and time-consuming for SDAs than court litigation, and thereby to address the

plaintiffs' concern that SDAs have in the past been unable to cost-effectively pursue disputes with Pepperidge Farm, or to defend themselves from contractual forced sales of their territories in response to supposed noncompliance, because of the disproportionate expense of litigation relative to the value of the matters or conduct in dispute. In exchange for the adoption of this system, the agreement would waive SDA's class or collective action rights in most situations.

xv. In addition to the contractual changes listed above, Pepperidge Farm will make a payment to the class of $835,000 (eight hundred thirty-five thousand dollars), inclusive of all payments to individual class members, incentive payments to named plaintiffs, settlement administration expenses, attorneys' fees, and costs. The portion of that payment to be directed to class members would be allocated according to the amount of time that each member has served as an SDA during the period from March 7, 2012 (the beginning of the limitation period) to the date of preliminary approval.

xvi. The named plaintiffs and the absent class members will provide certain releases to Pepperidge Farm as more fully set out in the memorandum of understanding and the proposed class notice.

Orleans Aff., ¶ 15; Mocciolo Aff., ¶ 15.

II. LEGAL STANDARD

Connecticut law requires any settlement on a class basis to be approved by the court, which the court may do only "after a hearing, and on a finding that the settlement … is fair, reasonable, and adequate." Practice Book § 9-9(c)(1)(C). *See Bushansky v. Phoenix Companies, Inc.*, No. X08-FST-CV-15-6027891-S, 2017 WL 1194768, at *5 (Conn. Super. Feb. 23, 2017). As our Supreme Court has noted, Connecticut "class action jurisprudence is sparse, as most class

actions are brought in federal court. Our class action requirements, however, are similar to those applied in the federal courts," and Connecticut courts therefore "look to federal case law for guidance" in class procedure. *Rivera v. Veterans Mem'l Med. Ctr.*, 262 Conn. 730, 737–38, 818 A.2d 731, 736–37 (2003).

A. Class certification

Federal case law holds that

> courts have long favored the voluntary settlement of complex class action litigation, and putative class plaintiffs may pursue settlement negotiations without having first formally established that the action satisfies the certification requirements of Rule 23. *See McReynolds v. Richards–Cantave*, 588 F.3d 790, 803 (2d Cir.2009); *Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir.2005); *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir.1998); *Weinberger v. Kendrick*, 698 F.2d 61, 72–73 (2d Cir.1982). Where pre-certification negotiations successfully culminate in an agreement, plaintiffs typically seek certification for the limited purpose of giving effect to the settlement reached. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) ("Among current applications of Rule 23(b)(3), the 'settlement only' class has become a stock device," (i.e., commonplace)).

Menkes v. Stolt-Nielsen S.A., 270 F.R.D. 80, 88 (D. Conn. 2010).

"One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Practice Book § 9-7.

"An action may be maintained as a class action if the prerequisites of Section 9-7 are satisfied, and in addition … (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the

controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of class action." Practice Book § 9-8.

"Courts have frequently certified settlement classes on a preliminary basis, at the same time as the preliminary approval of the fairness of the settlement, and solely for the purposes of settlement." *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 347 (S.D.N.Y. 2005).

B. Preliminary approval

"Preliminary approval is a two-step process." *Bourlas v. Davis Law Associates*, 237 F.R.D. 345, 355 (E.D.N.Y. 2006). "First, the court makes a preliminary evaluation of the fairness of the settlement. Thus, where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representative[s] or segments of the class and falls within the reasonable range of approval, preliminary approval is granted. Upon preliminary approval, the court must direct the preparation of notice of the certification of the settlement class, the proposed settlement and the date of the final fairness hearing." *Id.*

"Courts 'presume that a proposed class action settlement is fair when certain factors are present particularly evidence that the settlement is the product of arms'-length negotiation, untainted by collusion.'" *Kemp-Delisser v. Saint Francis Hosp. & Med. Ctr.*, No. 3:15-CV-1113 (VAB), 2016 WL 10033380, at *4 (D. Conn. July 12, 2016) (quoting Newberg & Conte, Newberg On Class Actions § 13.45 (5th ed. 2014)); *see also Menkes v. Stolt-Neilsen S.A.*, 270 F.R.D. 80, 101 (D.

Conn. 2010) ("the Second Circuit has recognized a presumption of fairness, reasonableness, and adequacy as to proposed settlements" where settlement resulted from arm's-length negotiations and plaintiffs' counsel possessed requisite experience and ability).

III. ARGUMENT

A. The class should be certified for settlement purposes[3]

The proposed class contains approximately 55 persons. Orleans Aff., ¶ 26; Mocciolo Aff. ¶ 26. Therefore joinder of all of them is impractical. There are indisputably questions of law or fact common to the class, including, most obviously, whether certain business practices and policies of Pepperidge Farm that it has directed to SDAs in Connecticut generally constitute a level of control over the means and manner of class members' work so as to require that the class members be classified as employees rather than independent contractors. *Id.*, ¶ 25. For the same reason, the claims of the named plaintiffs who seek to represent the class are typical of the claims of the class. And the zealous, years-long involvement of the named plaintiffs in this litigation demonstrates that they have and will continue to fairly and adequately protect the interests of the class. *Id.*, ¶¶ 6, 10 & 12.

Plaintiffs contend that all or very nearly all of the questions of law and fact in the case are common questions, not questions affecting only individual members, and therefore the former predominate over the latter. This is because the policies and business practices that the plaintiffs challenge have been undertaken by Pepperidge Farm generally, with respect to SDAs in Connecticut as a group, rather than having been directed specifically to the named plaintiffs. *Id.*, ¶¶ 24-25. Similarly, the programmatic changes in the proposed settlement agreement designed

[3] Pepperidge Farm does not dispute that class certification is appropriate ***for settlement purposes only*.** The parties agree (and the proposed order being submitted herewith states) that this motion will not prejudice Pepperidge Farm's opposition to any motion for class certification.

to relieve Pepperidge Farm's attempted excessive control of the plaintiffs' ostensibly independent businesses would affect all members of the class who are current distributors equally. *Id.* For similar reasons, individual members of the class would not have any apparent interest in controlling the prosecution of separate actions over these issues. Indeed, the lack of coordination in business practices that might result would apparently be detrimental to class members' interests.

There is no other litigation concerning the matters at issue here that has been commenced by or against members of the class. *Id.*, ¶ 27. As all of the distribution territories at issue are located within the State of Connecticut and Pepperidge Farm is located in Connecticut, it is desirable that the claims be concentrated in this court. *Id.*, ¶ 28. And undersigned counsel have no cause to anticipate difficulty by this court in managing the class action. *Id.*, ¶ 29.

Thus class certification for settlement purposes is appropriate.

B. The settlement should be preliminarily approved as fair, reasonable, and adequate

This settlement is the product of extremely difficult, intricate, years-long, negotiations. *Id.*, ¶¶ 9-13.

Counsel are experienced both in this substantive area of law and in complex class action procedure generally. *Id.*, ¶¶ 2-5. The named plaintiffs have participated actively and persistently in all aspects of the negotiations, clearly expressing their preferences on difficult tradeoffs necessary to reach agreement – most importantly, their overarching preference for a settlement that prioritizes contractual guaranties of their business independence over monetary relief. *Id,*, ¶¶ 6, 8, 10, & 12. Both sides at various times during the negotiations expressed that they had reached the limits of their negotiating flexibility and that it seemed a negotiated resolution would not be reached. *Id.*, ¶ 12. The discussions were facilitated by a nationally-prominent mediator

with extensive experience with employee / independent contractor misclassification claims. *Id.*, ¶ 9. All of those facts establish that the agreement has been reached at arm's length and in a serious and informed manner. Therefore it is entitled to a presumption of fairness, reasonableness, and adequacy

The proposed settlement is elaborate and thorough, with no obvious deficiencies in terms or unaddressed points in dispute, and it does not grant preferential treatment to parts of the class. Indeed, it treats every class member the same but for the proposed incentive payments to the class representatives, which, as will be set out in more detail in the application for the incentive awards, are grounded in established long-term contributions the representatives have made to the resolution of this action, including years of recurring meetings with counsel, direct involvement in the negotiations, and personally undertaking the burden of responding to Pepperidge Farm's discovery.

Most importantly, the proposed settlement is fair, reasonable, and adequate because it balances risk and compromise as finely as counsel and the class representatives have been able to achieve after long effort. In counsel's judgment and experience, there is no part of the settlement that could be disturbed without significant offsetting concessions or without scuttling the entire agreement. Nearly every issue within it has entailed significant compromise from both sides, and each such compromise is premised on the complete set of other compromises from the opposing side. Counsel do not deem it possible, in the present posture of the case, to reach a negotiated settlement that is more favorable, in its totality, to the plaintiffs or to the absent members of the class. *Id.*, ¶ 13.

If the plaintiffs or the class were to forego this settlement and continue to litigate, they would be at meaningful risk of receiving no relief whatsoever. While counsel and the class

representatives believe in the soundness of the claims, the law is not overwhelmingly on their side. Significant misclassification class actions with similarities to this one have both failed and succeeded in the years that this action has been pending, and there is significant litigation risk ina dispositive motion or in a jury verdict at trial. *Id.*, ¶¶ 20-21. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 38-39 (E.D.N.Y. 2019) (uncertain risks from legal developments over the course of a long-running class action weigh in favor of settlement approval). There is also significant risk in a contested class certification motion. *Id.* at 39-40 ("risk of maintaining a class through trial … weighs in favor of settlement where it is likely that defendants would oppose class certification if the case were to be litigated") (internal punctuation and citations omitted).

In contrast, the overwhelming majority of the relief that the proposed settlement would afford to the putative class would not be available at trial even if the plaintiffs succeeded totally on their claims. In that event, they would receive money damages, and a declaration making them employees of Pepperidge Farm, but no changes to the underlying business practices as contemplated in the settlement agreement. While better than the present situation that led the plaintiffs to sue, this is not their preference. *Id.*, ¶ 22. Accordingly the proposed settlement is prudent and in the plaintiffs' and the class's best interest. *Id.*, ¶ 23. *Ingles v. Toro*, 438 F. Supp. 2d 203, 214 (S.D.N.Y. 2006) (approving settlement where policy changes defendant would implement "as a result of the Agreement are more comprehensive than any relief the Court would award after trial"); *accord*, *George v. Parry*, 77 F.R.D. 421, 424 (S.D.N.Y.), aff'd, 578 F.2d 1367 (2d Cir. 1978).

Because the settlement is fair, reasonable, and adequate, it should be preliminarily approved.

IV. CONCLUSION

For all of the foregoing reasons, the motion should be granted.

DOUGLAS BRETT, TERRENCE FOX, STEVEN PULFORD, and MARK RYAN, on behalf of themselves and all others similarly situated,

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CERTIFICATION

Pursuant to Practice Book § 10-14, I hereby certify that a copy of the above was mailed and/or electronically delivered on the date of filing to all counsel and pro se parties of record, as follows.

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