

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**IN RE: PROCESSED EGG PRODUCTS
ANTITRUST LITIGATION**

**MDL No. 2002
08-md-02002**

**THIS DOCUMENT APPLIES TO:
ALL DIRECT PURCHASER PLAINTIFF ACTIONS**

ORDER

AND NOW, this 15th day of August, 2012, upon consideration of the Direct Purchaser Plaintiffs' proposed form of Order as directed by the Court's July 18, 2012 Order (Doc. No. 704), and their Brief In Support of Proposed Order (Doc. No. 709), the Court finds that the form of notice attached to this Order (the "Notice") and the procedures for the dissemination of the Notice as outlined in this Order (the "Notice Plan") provide class members with sufficient notice and opportunity to object to the Direct Purchaser Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Costs (Doc. No. 493) pursuant to Fed. R. Civ. P. 23(h)(1) and 23(h)(2).¹

Accordingly, it is **ORDERED**² as follows:

¹ The Court concludes that the notice, subject to the Court's directives herein, clearly and concisely states in plain, easily understood language the procedures and deadline for submitting objections to the Direct Purchaser Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Costs and the notice of the objections deadline is directed to the class members in a reasonable manner.

² "At the fee determination stage, the district judge must protect the class's interest by acting as a fiduciary for the class." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005); *cf.* Fed. R. Civ. P. 23(h), 2003 Advisory Committee Note ("In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. *Even in the absence of objections*, the court bears this responsibility." (emphasis added)). The Court recognizes that "[t]his role as fiduciary for the class members places the Court in the uncomfortable position of

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appearing to act as an adversary of plaintiffs' counsel for whom the Court has great respect and who undertook this case when there was no assurance that there would be any recovery." *Hallet v. Li & Fung, Ltd.*, No. 95 Civ. 8917, 1998 WL 698354, at *1 (S.D.N.Y. Oct. 6, 1998).

Adherence to this obligation in the context of a case where a proposed settlement in which a presumably accurate, but merely cursory, reference to proposed attorney fees has been made and not prompted any known resistance may be exasperating to counsel whose good faith is not questioned by the Court. Nonetheless, because the Court is required to act in a fiduciary capacity in examining a motion for attorneys' fees and nontaxable costs, the Court is constrained to follow the demands of Fed. R. Civ. P. 23(h). Rule 23(h) provides that "[n]otice of the motion [for the award of attorneys' fees and costs] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h)(1). Under the Rule, "[a] class member, or a party from whom payment is sought, may object to the motion." Fed. R. Civ. P. 23(h)(2).

It appears that the only court of appeals to have directly considered these provisions in circumstances close to those here is the Ninth Circuit Court of Appeals. In *In re Mercury Interactive Corp. Securities Litigation*, the Ninth Circuit Court of Appeals stated that "it is the obligation of the district court to ensure that the class has an adequate opportunity to review and object to its counsel's fee motion." 618 F.3d 988, 995 (9th Cir. 2010). The court held that "[t]he plain text of [Rule 23(h)] requires a district court to set the deadline for objections to counsel's fee request on a date *after* the motion and documents supporting it have been filed." *Id.* at 993. See also *McDonough v. Toys "R" Us, Inc.*, 834 F. Supp. 2d 329, 348 (E.D. Pa. 2011) (citing same); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004 (N.D. Cal. Dec. 27, 2011) (citing same). "[A] schedule that requires objections to be filed before the fee motion itself denies the class the full and fair opportunity to examine and oppose the motion that Rule 23(h) contemplates." 618 F.3d at 995. The court went so far as to warn that such a "practice borders on a denial of due process." *Id.* at 993.

In *Mercury Interactive*, the class notice of the settlement agreement provided class members with summary information about the attorneys' fees that class counsel intended to request, such as that class counsel would "request . . . attorneys' fees in the amount of 25% (29.375 million)." *Id.* at 990. The notice instructed that class members "could object to the settlement or application for attorneys' fees by 'appear[ing] . . . at the Settlement Fairness Hearing' if they 'submit[ted] a written notice of objection, received or postmarked on or before September 4, 2008.'" *Id.* at 990-91. The Ninth Circuit Court of Appeals deemed this language to constitute "notice of the motion" to the class, but because the objection deadline passed *before* class counsel filed their application and supporting documentation for an award of attorneys' fees, the court determined that "class members were deprived of an adequate opportunity to object to the motion itself because, by the time they were served with the motion, the time within which they were required to file their objections had already expired." *Id.* at 994.

The court observed that "[a]llowing class members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported is essential for the protection of the rights of class members." *Id.* at 994. Because the deadline for objections to the fee request permitted class

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1. By September 14, 2012, Garden City Group (“GCG”), which the Court approves to administer this Notice Plan, shall post Direct Purchaser Plaintiffs’ supplemental

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members to raise only generalized arguments that the fees were unreasonable based upon the summary information provided in the notice, class members “could not provide the court with critiques of the specific work done by counsel when they were furnished with no information of what that work was, how much time it consumed, and whether and how it contributed to the benefit of the class.” *Id.*

There is much to recommend the rationale articulated in *Mercury Interactive*. Furthermore, despite the Direct Purchaser Plaintiffs’ arguments concerning *In re Veritas Software Corp. Securities Litigation*, 396 F. App’x 815 (3d Cir. 2010) (unpublished), the Court does not read that decision to be contradictory to this Court’s expectations of counsel here. In *Veritas*, the Third Circuit Court of Appeals did not squarely address any issues involving Fed. R. Civ. P. 23(h). Indeed, the *Veritas* decision makes no mention of the Rule whatsoever. It primarily focuses on the issue of whether the district court abused its discretion in ruling that an objection to the award of attorneys’ fees was untimely. *Id.* at 818. *Veritas* certainly did not address issues involving the necessity of scheduling deadlines for objections to fee motions under Fed. R. Civ. P. 23(h). Additionally, because *Veritas* is a non-precedential decision, it is not binding authority upon this Court.

Given the requirements of Rule 23(h), and pursuant to the Court’s fiduciary responsibilities to the class, the Court issues this Order setting forth a schedule with a deadline for objections to counsel’s fee request that falls *after* the filing of the application and the class notice of that deadline for objections and instructions for appropriate corresponding notice to class members, so that the class has an adequate opportunity to review and prepare objections, if any, to class counsel’s entire fee motion consistent with Fed. R. Civ. P. 23(h). *See also* Oct. 15, 2010 Order, *In re Mercury Interactive Corp. Secs. Litig.*, 05-cv-03395-JF (N.D. Cal.) (Doc. No. 392); Fed. R. Civ. P. 23(h), 2003 Advisory Committee Note (“In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.”); 2 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 6:24 (8th ed. 2011) (“The Rule’s mandate that class members be given sufficient notice of the motion and *sufficient opportunity to object to the motion* requires the district court to set the deadline for any objections to counsel’s fee request on a date after the fee application and documents supporting it have been filed by class counsel.” (emphasis added)); *Principles of the Law of Aggregate Litig.* § 3.03(a) (2010) (“Absent special circumstances, the schedule [for the submission of papers supporting the motion for attorneys’ fees] should provide a reasonable time for class members and objectors to respond *after* the submission of the moving papers.” (emphasis added)); *cf.* Dec. 15, 2008 Order, *In re Cotton Yarn Antitrust Litig.*, 04-md-1622 (M.D.N.C.) (Doc. No. 113); Dec. 30, 2008 Order, *In re Cotton Yarn Antitrust Litig.*, 04-md-1622 (M.D.N.C.) (Doc. No. 116).

brief (public version) in support of their Motion for Attorneys' Fees and Reimbursement of Costs, as well as a copy of this Order, on the settlement website, <http://www.eggproductssettlement.com>.

2. By September 17, 2012, GCG shall send notice, in substantially the form attached hereto, of the Direct Purchaser Plaintiffs' Motion for Attorneys' Fees and Reimbursement of Costs, the supplemental brief in support of that Motion, and the deadline to submit objections to the Motion, by email or by U.S. First Class mail, postage prepaid, to the Class Members of the Settlement Agreement Between Direct Purchaser Plaintiffs and Defendants Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. (the "Moark Settlement") as defined by the Court's Order Granting Final Approval of the Class Action Settlement Between Direct Purchaser Plaintiffs and Defendants Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. (Doc. No. 700). The end of the notice form shall not include a signature line for the Court. Additionally, the notice form shall be revised to address *all* members of the Class to give notice of the objection deadline as it pertains to each class member, and not only those parties who submitted claims by January 7, 2011.³ A copy of the notice shall also be posted on the settlement website.
3. Objections to Direct Purchaser Plaintiffs' motion for attorneys' fees and costs shall be submitted to the Court and Liaison Counsel for Direct Purchaser

³ See Fed. R. Civ. P. 23(h), 2003 Advisory Committee Note ("Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances."); *id.* ("A class member and any party from whom payment is sought may object to the fee motion. Other parties—for example, nonsettling defendants—may not object because they lack a sufficient interest in the amount the court awards."); *cf. In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 728 (3d Cir. 2001) (recognizing that a class member's standing to appeal an award of attorneys' fees implicates two principles: "1) the nature of the relationship between class plaintiffs, class counsel, and defendants in class actions requires that the 'aggrieved' requirement be construed broadly in class action cases; and 2) the judiciary's independent authority over the appointment of class counsel, the grant of attorneys' fees, and the review of attorneys' fee awards in class actions").

Plaintiffs by November 1, 2012, which is forty-five (45) calendar days from September 17, 2012.

IT IS FURTHER ORDERED as follows:

4. Direct Purchaser Plaintiffs (and Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. with respect to Paragraph 23 of Moark Settlement) shall file a motion for entry of a proposed allocation order and proposed entry of judgment in connection with the Moark Settlement by September 21, 2012. This motion shall set forth the appurtenant information and legal authority required for evaluating whether the plan of allocation is fair, reasonable, and adequate to class members. *See generally, e.g., 2 Joseph M. McLaughlin, McLaughlin on Class Actions: Law and Practice* § 6:23 (8th ed. 2011).
5. Direct Purchaser Plaintiffs (and Sparboe Farms, Inc. with respect to Paragraph 15 of the Settlement Agreement Between Direct Purchaser Plaintiffs and Sparboe Farms, Inc.) must also file a motion for entry of proposed entry of judgment in connection with the Settlement Agreement Between Plaintiffs and Sparboe Farms, Inc. by September 21, 2012.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

If you submitted a Claim Form to recover from the settlement with Defendants Moark, LLC, Norco Ranch, Inc., and Land O'Lakes, Inc. (collectively, the "Moark Defendants") by January 7, 2011, you could be a class member affected by interim class counsel's request for attorneys' fees and reimbursement of costs from a proposed class action settlement.

**YOUR LEGAL RIGHTS ARE AFFECTED WHETHER OR NOT YOU ACT.
PLEASE READ THIS NOTICE CAREFULLY.**

The purpose of this notice is to inform you that interim class counsel for Direct Purchaser Plaintiffs in this class action filed a Motion for an Award of Attorneys' Fees and for Reimbursement of Expenses (the "Fee Petition") from the funds obtained from the settlement with the Moark Defendants. This notice is also to inform you of the nature of the request and of your rights in connection with it.

A federal court authorized this Notice. This is not a solicitation from a lawyer.

This notice is not an expression by the Court of any opinion as to the merits of any of the claims or defenses asserted by either side in this case. This notice is intended merely to advise you of the Fee Petition and of your rights with respect to it, including, but not limited to, the right to object to the Fee Petition.

Your rights and options, and the deadlines to exercise them, are explained in this notice.

1. Why did I receive this notice?

This legal notice is to inform you that interim class counsel for Direct Purchaser Plaintiffs filed a Fee Petition from the funds obtained through the Moark Settlement that has been reached in the class action lawsuit, *In re Processed Egg Products Antitrust Litigation*, Case No. 08-md-02001, pending in the United States District Court for the Eastern District of Pennsylvania. You are being sent this notice because you previously submitted a Claim Form to recover from the Moark Settlement.

2. What is this Fee Petition about?

Interim Class Counsel, in compensation for their time and risk in prosecuting the litigation on a wholly contingent fee basis, applied to the Court on April 14, 2011, for an award of attorneys' fees in an amount of thirty percent of the \$25 million Settlement Fund as well as reimbursement of litigation costs and expenses incurred. The costs and expenses incurred include fees and costs expended while providing Notice to the Class and while administering the Settlement Fund (including the plan of allocation).

To date, Interim Class Counsel have not been paid any attorneys' fees. Any attorneys' fees and reimbursement of costs will be awarded only as approved by the Court in amounts determined to be fair and reasonable.

3. What is the effect of the Court's approval of the Fee Petition?

If the Court grants Interim Class Counsel's Fee Petition, then Interim Class Counsel will be paid thirty percent of the \$25 Settlement Fund as well as litigation costs and expenses, or such other amount as the Court may deem appropriate. The remaining amount in the Settlement Fund will then be distributed to Class Members.

4. Who represents the Settlement Class?

Steven A. Asher WEINSTEIN KITCHENOFF & ASHER LLC 1845 Walnut Street, Suite 1100 Philadelphia, PA 19103	Michael D. Hausfeld HAUSFELD LLP 1700 K Street NW, Suite 650 Washington, DC 20006
Stanley D. Bernstein BERNSTEIN LIEBHARD LLP 10 East 40th Street, 22nd Floor New York, NY 10016	Stephen D. Susman SUSMAN GODFREY LLP 654 Madison Avenue, 5th Floor New York, NY 10065

5. How do I object?

If you are a Settlement Class member who submitted a Claim Form by January 7, 2011, and you wish to object to the Fee Petition, then you may file with the Court an objection in writing. In order for the Court to consider your objection, your objection must be sent by first-class mail postmarked by, or pre-paid delivery service to be hand-delivered by, October 15, 2012, to each of the following:

The Court:

United States District Court
James A. Byrne Federal Courthouse
601 Market Street
Office of the Clerk of the Court, Room 2609
Philadelphia, PA 19106-1797

Counsel for Direct Purchaser Plaintiffs:

Steven A. Asher
WEINSTEIN KITCHENOFF & ASHER LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103

Your objection must be in writing and must provide evidence of your membership in the Settlement Class. The written objection should state the precise reason or reasons for the objection, including any legal support you wish to bring to the Court's attention and any evidence you wish to introduce in support of the objection. You may file the objection through an attorney. You are responsible for any costs incurred in objecting through an attorney.

6. Where do I get additional information?

For more detailed information concerning matters related to the Fee Petition, you may wish to review the "Motion for an Award of Attorneys' Fees and for Reimbursement of Expenses" (filed April 14, 2011) or the "Supplement in Support of the Motion for an Award of Attorneys' Fees and for Reimbursement of Expenses" (filed on August 15, 2012). These documents are available on the settlement website, www.eggproductssettlement.com, which also contains answers to "Frequently Asked Questions," as well as more information about the case. These documents and other more detailed information concerning the matters discussed in this notice may be obtained from the pleadings, orders, transcripts and other proceedings, and other documents filed in these actions, all of which may be inspected free of charge during regular business hours at the Office of the Clerk of the Court, located at the address set forth in Question No. 5. You may also obtain more information by calling the toll-free helpline at (866) 881-8306.

PLEASE DO NOT CONTACT THE COURT FOR INFORMATION REGARDING THIS LAWSUIT

Dated: _____, 2012

**HONORABLE GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE**