

Fund in the amount of \$1,035,553.60 for work undertaken from August 1, 2014 through February 28, 2015; and (ii) non-taxable expenses for expert economic services chargeable to the Litigation Fund that were incurred from August 1, 2014 through February 28, 2015, but which are as yet unpaid, in the amount of \$683,170.02, for a total of \$1,718,723.62.¹

3. The requested expenses were reasonable and necessary to the ongoing prosecution of this litigation.

WHEREFORE, Plaintiffs respectfully request that the Court enter the proposed Order granting reimbursement.

Date: April 7, 2015

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¹ Although Plaintiffs are not seeking reimbursement of the costs of notice for the NuCal and Hillandale Settlements at this time (because notice is not yet complete), the Claims Administrator estimates notice will total approximately \$151,788.94. Plaintiffs will separately move for leave to disburse funds to pay the Claims Administrator once notice is complete, but wanted to apprise the Class and the Court.

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

IN RE: PROCESSED EGG PRODUCTS)
ANTITRUST LITIGATION)

MDL No. 2002

Case No. 08-md-02002

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

**DIRECT PURCHASER PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR REIMBURSEMENT OF EXPENSES**

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I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Direct Purchaser Plaintiff class representatives (“Plaintiffs”), through Bernstein Liebhard LLP, Hausfeld LLP, Susman Godfrey LLP, and Weinstein Kitchenoff & Asher LLC (“Interim Co-Lead Counsel”), respectfully move for reimbursement of litigation expenses from the settlements (“Settlements”) with defendants NuCal Foods, Inc. (“NuCal”) and Hillandale Farms of Pa., Inc. and Hillandale-Gettysburg, L.P. (“Hillandale”) (collectively, “Settling Defendants”).

Plaintiffs and members of the Class are direct purchasers of shell eggs and egg products in the United States, and bring this action on their own behalf and on behalf of a class of similarly situated entities (the “Class”).¹ Plaintiffs assert that Defendants, including Settling Defendants, violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by engaging in an unlawful combination and conspiracy to fix, raise, maintain, and/or stabilize prices for egg products in the United States. Plaintiffs allege that this conduct caused direct purchasers to suffer damages in the form of overcharges for their egg and egg product purchases.

The successes achieved to date in this litigation are the product of the initiative, investigation and hard work of skilled counsel over the course of over six years. The Settlements represent two of eight settlements achieved by Plaintiffs to date,² and confer a generous monetary benefit on Class members (in addition to the cooperation obtained as part of these settlements). The NuCal Settlement provides, *inter alia*, \$1.425 million to the Class; the

¹ The Class is more fully defined in Plaintiffs’ Motion for Class Certification (ECF 978-79).

² The Court finally approved Plaintiffs’ settlements with Defendants Sparboe Farms, Inc. (“Sparboe”), Moark, LLC, Norco Ranch, Inc., and Land O’ Lakes, Inc. (“Moark”), and Cal-Maine Foods, Inc. (ECF 698, 700, and 1081 respectively). The Court has preliminarily approved Plaintiffs’ settlements with Defendants National Food Corporation (“NFC”), Midwest Poultry Services, L.P. (“Midwest Poultry”) and United Egg Producers and United States Egg Marketers (“UEP/USEM”) (ECF 1027).

Hillandale Settlement provides, *inter alia*, \$3 million to the Class. The Court granted preliminary approval of the NuCal Settlement on October 3, 2014 (ECF 1073) and the Hillandale Settlement on December 22, 2014 (ECF 1108), at which time the Court also granted Plaintiffs leave to file a motion for an award of attorneys' fees and for reimbursement of litigation expenses (ECF 1108).³

In light of the substantial benefits conferred on members of the proposed Class through the diligent work of counsel, Plaintiffs and Plaintiffs' Counsel respectfully request reimbursement of (i) non-taxable litigation expenses paid from the Litigation Fund in the amount of \$1,035,553.60 for work undertaken from August 1, 2014 through February 28, 2015; and (ii) non-taxable expenses for expert economic services chargeable to the Litigation Fund that were incurred from August 1, 2014 through February 28, 2015 but which are as yet unpaid in the amount of \$683,170.02.⁴

II. BACKGROUND

A. Facts and Procedural History

This multi-district litigation concerns an alleged output-reduction conspiracy among the nation's largest egg producers. Plaintiffs allege that Defendants and other named and unnamed co-conspirators violated the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*, by engaging in an unlawful conspiracy to reduce output and thereby artificially fix, raise, maintain and/or stabilize the prices of shell eggs and egg products in the United States. As a result of Defendants' alleged

³ Plaintiffs' Counsel are not seeking an award of attorneys' fees from the Settlements at this time.

⁴ Although Plaintiffs are not seeking reimbursement of the costs of notice for the NuCal and Hillandale Settlements at this time (because notice is not yet complete), the Claims Administrator estimates notice will total approximately \$151,788.94. Plaintiffs will separately move for leave to disburse funds to pay the Claims Administrator once notice is complete, but wanted to apprise the Class and the Court.

conduct, Plaintiffs and members of the Class paid prices for shell eggs and egg products that were higher than they otherwise would have been absent the conspiracy. The lawsuit seeks treble damages, injunctive relief, and attorneys' fees and costs from Defendants.

On January 30, 2009, Plaintiffs filed their first consolidated amended complaint ("CAC") detailing these allegations. (ECF 41). Plaintiffs then entered into a settlement agreement with Defendant Sparboe Farms, pursuant to which Plaintiffs uncovered additional detail about the egg industry, the alleged conspiracy, and the specific actions taken by the remaining Defendants in furtherance of this conspiracy. Plaintiffs included these details in a second consolidated amended complaint ("2CAC"), filed on December 14, 2009. (ECF 221).

In February 2010, nine Defendants filed individual motions to dismiss the 2CAC, challenging the sufficiency of the allegations in the 2CAC as to their individual participation in the conspiracy. (*See, e.g.*, ECF 232-34, 236, 238-40). All remaining Defendants filed motions to dismiss the 2CAC to the extent its allegations were directed to egg products as opposed to shell eggs (ECF 235), and a motion to dismiss claims for damages incurred prior to September 22, 2004. (ECF 241). In March 2010, Plaintiffs filed their opposition to the motions to dismiss the 2CAC. (ECF 263-265).

In June 2010, Plaintiffs entered into a settlement agreement with the Moark Defendants, and moved the Court for preliminary approval of the Moark settlement in June 2010. (ECF 347, 349). The Court granted final approval of the Moark settlement in July 2012. (ECF 700).

In September 2011, the Court denied the motions to dismiss filed by most of the Defendants, but granted motions by the (then-named) Hillandale Defendants and United Egg Association ("UEA") without prejudice. (ECF 563). Plaintiffs subsequently obtained leave to

file a Third Amended Complaint (“TAC”). (ECF 772). The TAC is the operative pleading in the litigation. (ECF 779).

Discovery began in earnest following the rulings on the motions to dismiss the 2CAC. Fact discovery commenced in April 2012, and, as detailed below and in prior submissions, was an enormous undertaking. Depositions commenced in April 2013. In the midst of heated discovery, Plaintiffs concluded the Settlements with NFC (March 28, 2014), Midwest Poultry (March 31, 2014) and UEP/USEM (May 21, 2014).

Depositions continued until May 2014. Following the conclusion of fact discovery, Plaintiffs filed their motion for class certification on May 30, 2014. (ECF 978). The NuCal Settlement (August 1, 2014) and Hillandale Settlement (October 22, 2014) were reached after Plaintiffs’ motion for class certification was filed.

In early March 2015, the Court heard oral argument on Plaintiffs’ motion for class certification. The parties recently exchanged merits expert reports.

B. Plaintiffs’ Counsel Have Vigorously Prosecuted This Case

Plaintiffs’ Counsel obtained the NuCal and Hillandale Settlements through diligent and thorough work. Examples of just some of their efforts during the August 2014 through February 2015 time period that is the subject of this motion are highlighted below and discussed in the accompanying Declaration of Mindee J. Reuben (“Reuben Decl.”).⁵

⁵ Plaintiffs’ Counsel have skillfully and aggressively litigated this matter from the outset, and will continue doing so through trial. The examples set forth in this Motion generally reflect work undertaken during the period from August 1, 2014 through February 28, 2015. Examples of Plaintiffs’ Counsel’s other, earlier efforts on behalf of the Class during the course of this litigation are set forth in the April 14, 2011 Declaration of Steven A. Asher (ECF 493-2), the September 5, 2014 Amended Declaration of Mindee J. Reuben (ECF 1046), and the January 15, 2015 Declaration of Mindee J. Reuben (ECF 1118-2).

1. Motion Practice

a. Class Certification

Plaintiffs' Counsel prepared and filed their motion for class certification (ECF 978) on May 30, 2014 (before the time period covered by this motion). Thereafter, Plaintiffs deposed Defendants' expert, William Myslinski, Ph.D., who submitted a report in opposition to Plaintiffs' motion for class certification. On September 19, 2014, Plaintiffs' Counsel prepared a reply in further support of class certification (ECF 1060). The preparation of the reply required counsel to work closely with Plaintiffs' expert, Gordon Rausser, Ph.D., who submitted a 108-page declaration in support of Plaintiffs' reply. In addition, Plaintiffs' Counsel and Dr. Rausser also worked extensively together to prepare for the hearing on class certification held in early March. Reuben Decl. at ¶ 5.

b. *Daubert* Motion to Exclude Dr. Rausser

On August 6, 2014, Defendants moved to exclude the opinions and testimony Dr. Rausser (ECF 1031-1032). Plaintiffs filed their opposition to the *Daubert* motion on September 19, 2014 (ECF 1058), with additional briefing being filed by both parties, including a sur-reply by Plaintiffs on December 5, 2014 (ECF 1102). Plaintiffs' Counsel also participated in the deposition of a third party witness in connection with the *Daubert* motion on December 5, 2014. The *Daubert* hearing was held on December 9, 2014, and the motion was denied on January 26, 2015 (ECF 1124-1125). Reuben Decl. at ¶ 6.

c. Final Approval of Cal-Maine Settlement and First Amendment to the Sparboe Settlement

On August 15, 2014, Plaintiffs moved for final approval of their \$28 million settlement with Cal-Maine (ECF 1036) and the First Amendment to the Sparboe settlement (ECF No. 1035). There were no objections to either the Cal-Maine settlement or the First Amendment to

the Sparboe settlement. A hearing on both motions was held on September 18, 2014; both the Cal-Maine (ECF 1081-1082) and Sparboe (ECF 1080) motions were granted on October 14, 2014. Reuben Decl. at ¶ 7.

d. Final Approval of NFC, Midwest Poultry and UEP/USEM Settlements and Second Amendment to the Sparboe Settlement

On March 20, 2015, Plaintiffs moved for final approval of the NFC, Midwest Poultry and UEP/USEM settlements. (ECF 1144). Plaintiffs also moved for final approval of the Second Amendment to the Sparboe settlement that same day. (ECF 1145). There have been no objections to any of the three settlements or the Second Sparboe Amendment. A fairness hearing is scheduled for May 6, 2015. Reuben Decl. at ¶ 8.

2. Settlement-Related Activities

a. NuCal

In January 2014, Plaintiffs' Counsel began substantive settlement negotiations with NuCal Foods, Inc. The parties were far apart, and talks initially seemed unlikely to be successful. After the NFC and Midwest Poultry settlements were reached, however, the parties began to discuss settlement again in earnest. NuCal shared financial information with Plaintiffs' Counsel in April 2014, after which several rounds of telephone calls and email exchanges ensued. The parties reached an agreement in principle in May 2014, although substantive negotiations regarding the terms of the settlement agreement took another two months. The settlement agreement was fully executed on August 1, 2014. *See generally* August 28, 2014 Declaration of James Pizzirusso filed in support of motion for preliminary approval of NuCal settlement. (ECF 1041-2). Reuben Decl. at ¶ 9.

Plaintiff moved for preliminary approval of the \$1.425 million NuCal Settlement on August 28, 2014 (ECF 1041), and a hearing was held on October 2, 2014. Preliminary approval was granted on October 3, 2014. (ECF 1073). Reuben Decl. at ¶ 10.

b. Hillandale

Plaintiffs first discussed a potential resolution of this action with Hillandale soon after the litigation began, and again after the Court issued its Opinion on the motions to dismiss the complaint. Those initial discussions did not result in a settlement and there were no additional, meaningful discussions for some time. *See generally* November 21, 2014 Declaration of Ronald Aranoff filed in support of motion for preliminary approval of Hillandale Settlement (ECF 1093-2). Reuben Decl. at ¶ 11.

In September 2013, the parties sought a stay of the litigation to pursue a global mediation session. While the global mediation was unsuccessful, Interim Co-Lead Counsel soon decided to approach Hillandale individually about trying to resolve the case. In the summer and fall of 2014, Interim Co-Lead Counsel again began substantive settlement negotiations with Hillandale. The parties were initially far apart, but over time they began to make slow and steady progress. After settlements were reached with some of the other Defendants, the parties' settlement discussions moved forward in earnest. In late August and September 2014, after several rounds of telephone calls and communications, the parties agreed to a \$3,000,000 cash settlement. The broad terms of the settlement were first memorialized in a binding term sheet dated September 19, 2014; a formal Settlement Agreement was executed on October 22, 2014. *See generally* November 21, 2014 Aranoff Decl. (ECF 1093-2). Reuben Decl. at ¶ 12.

Plaintiff moved for preliminary approval of the Hillandale Settlement on November 21, 2014, and a hearing was held on December 18, 2014. Preliminary approval was granted on December 22, 2014 (ECF 1108). Reuben Decl. at ¶ 13.

3. Merits Expert Reports

Pursuant to Case Management Order No. 22, which was negotiated in December 2014, Plaintiffs served their 178-page merits expert report by Dr. Rausser on January 22, 2015. Plaintiffs' Counsel worked tirelessly with Dr. Rausser during the period covered by this motion to ensure the timely submission of their merits expert report. Reuben Decl. at ¶ 14.

III. PLAINTIFFS' COUNSEL'S APPLICATION FOR REIMBURSEMENT AND RECOVERY OF EXPENSES WARRANTS APPROVAL

Plaintiffs' Counsel seek Court approval of \$1,718,723.62 in reimbursement and recovery of expenses incurred in connection with their work on behalf of the Class Members in this litigation. Plaintiffs' Counsel have provided Class Members with reasonable notice of their intention to make this request, and Class Members will have an adequate opportunity to object to this Motion after its filing.

A. Reasonable Notice of the Requested Litigation Expenses and Opportunity to Object Has Been Given to the Class

Federal Rule of Civil Procedure 23(h) provides that “[n]otice of the motion [for an 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). Plaintiffs’ Counsel has provided reasonable notice of this motion, and has afforded Class Members an opportunity to object to such motion.

1. Summary of the Notice Provided

The Garden City Group, Inc. (“GCG”), the Court-appointed Claims Administrator, effectuated a notice program that ensured Settlement Class members are apprised of their rights.

Pursuant to the December 19, 2014 Order (ECF 1108) approving the plan for notice of the NuCal and Hillandale Settlements, on February 11, 2015, GCG mailed 17,585 Notice Packets to Class members whose addresses GCG had compiled from Defendants' sales data. Affidavit of Jennifer M. Keough Regarding Notice Dissemination and Claims Administration ("Keough Aff.") at ¶ 8. (ECF 1152). Notice was published in *The Wall Street Journal* on February 24, 2015, and in a variety of trade magazines that specifically cater to the restaurant and food industries. Keough Aff. At ¶ 11. Further details regarding the notice program and its effectiveness can be found in the Keough Affidavit. (ECF 1152). Reuben Decl. at ¶ 16.

The Notice Packets expressly notified potential Class Members that Settlement Counsel would be seeking Court approval of, *inter alia*, reimbursement of litigation expenses.⁶ See Keough Aff., Exhibit 1 ("Long Form Notice") at § 8. In the section entitled "How will the lawyers be paid?" the notice provides:

These attorneys and their respective firms are referred to as Class Counsel. The Court will decide how much Class Counsel will be paid. Class Counsel, in compensation for their time and risk in prosecuting the litigation on a wholly contingent fee basis, intend to apply to the Court for an award, from the NuCal and Hillandale/Gettysburg Settlement Funds, of attorneys' fees in an amount not to exceed 33 1/3% of \$4,425,000, as well as costs and expenses incurred, including fees and costs expended while providing notice to the Class.

Class Counsel will file their Fee Petition on or before April 7, 2015. The Fee Petition, which will identify the specific amount of fees ... requested and the expenses to be reimbursed, will be available on the Settlement website, www.eggproductssettlement.com, on that date. Any attorneys' fees reimbursement of costs will be awarded only as approved by the Court in amounts it determines to be fair and reasonable.

Id. The notice also explains the process of, and sets deadlines for, opting out of the settlement as well as objecting to the settlement. See generally Long Form Notice; Reuben Decl. at ¶ 17.

⁶ Plaintiffs' Counsel are not seeking attorneys' fees at this time. Reuben Decl. at ¶ 17.

2. Timing of Motion for Reimbursement of Expenses, for Incentive Awards and Opportunity to Object

The schedule approved by the Court requires Plaintiffs to file their motion for reimbursement and recovery of expenses by April 7, 2015, in advance of the deadline for asserting objections consistent with Rule 23(f). *See, e.g.*, Long Form Notice at § 8. Objections to the Settlements, including this motion, are due no later than May 22, 2015. *See, e.g.*, Long Form Notice at § 13. Accordingly, Class members have approximately 6½ weeks after the filing of this motion to lodge their objections to Plaintiffs' proposed reimbursement of expenses. This motion will be available on the Settlement website. Reuben Decl. at ¶ 18.

Six and a half weeks is a sufficient amount of time for Class Members to object to a motion for fees and expenses. Indeed, courts have found far less time to be adequate. *See, e.g.*, *In re: Imprelis Herbicide Marketing, Sales Practices and Prods. Liability Litig.*, 296 F.R.D. 351 (E.D. Pa. 2013) (granting fee award where class members had two weeks to review motion); *Batmanghelich v. Sirius XM Radio, Inc.*, No. CV 09-9190, 2011 U.S. Dist. LEXIS 155710, at *5 (C.D. Cal. Sept. 13, 2011) ("Plaintiff's application for attorneys' fees and costs and a Class Representative service payment was filed with the Court and made available for Class Members to review on the settlement website two weeks prior to the deadline for Class Members to file objections to the Settlement, giving Class Members adequate time to review the application and object to the attorneys' fees, costs and/or service payment."). Accordingly, Class members have received reasonable notice of Plaintiffs' motion for reimbursement of expenses and for incentive awards and will have a sufficient opportunity to object.

B. The Request for Reimbursement and Recovery of Non-Taxable Litigation Expenses Is Reasonable

Attorneys "who create a common fund for the benefit of a class are entitled to reimbursement of reasonable litigation expenses from the fund." *Nichols v. SmithKline Beecham*

Corp., 2005 WL 950616, at *24 (E.D. Pa. April 22, 2005) (quoting *In re Aetna Inc.*, MDL No. 1219, 2001 WL 20928, at *13 (E.D. Pa. Jan. 4, 2001)); *see also Meijer, Inc. v. 3M*, No. 04-5871, 2006 WL 2382718, at *18 (E.D. Pa. Aug. 14, 2006) (granting plaintiffs' motion for approval of expenses "incurred in connection with the prosecution and settlement of the litigation"); *In re Corel Corp., Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 498 (E.D. Pa. 2003) ("There is no doubt that an attorney who has created a common fund for the benefit of the class is entitled to reimbursement of . . . reasonable litigation expenses from the fund.") (quoting *Ikon*, 194 F.R.D. 166, 192 (E.D. Pa. 2000)); *In re Unisys Corp. Sec. Litig.*, No. 99-5333, 2001 U.S. Dist. LEXIS 20160, at *12 (E.D. Pa. Dec. 6, 2001). Here, to date, a common fund of \$53 million has been created, with an additional \$8.925 million preliminarily approved.

As detailed below, Plaintiffs' Counsel respectfully request reimbursement of (i) non-taxable litigation expenses paid from the Litigation Fund in the amount of \$1,035,553.60 for work undertaken from August 1, 2014 through February 28, 2015, *see* Reuben Decl. at ¶ 19 and Exhibit A thereto (Analysis of Litigation Fund); and (ii) non-taxable expenses for expert economic services chargeable to the Litigation Fund that were incurred from August 1, 2014 through February 28, 2015 but which are as yet unpaid in the amount of \$683,170.02, *see* Reuben Decl. at ¶ 19.

Plaintiffs' Litigation Fund pays expenses (both taxable and non-taxable) which are incurred collectively by Plaintiffs' Counsel, rather than by individual firms.⁷ Thus, for example, the Litigation Fund will pay the costs of expert fees, electronic discovery costs (such as maintenance of the joint document depository) and deposition transcripts. *See* Reuben Decl. at ¶ 20. Here, Plaintiffs' Counsel are seeking reimbursement of non-taxable expenses paid from the

⁷ Plaintiffs are not presently seeking reimbursement of individual firm expenses incurred or assessments paid during the August 1, 2014 through February 28, 2015 time period.

Litigation Fund from August 1, 2014 through February 28, 2015, as well as recovery of non-taxable expenses for expert economic services chargeable to the Litigation Fund that were incurred from August 1, 2014 through February 28, 2015, but which are as yet unpaid. *See* Reuben Decl. at ¶ 21.

Non-taxable expenses paid by the Litigation Fund August 1, 2014 through February 28, 2015 total \$1,035,553.60. Reuben Decl. at ¶ 22 and Exhibit A. A significant portion of these expenses are expert fees related to class certification and preparation of the merits expert report, as well as costs of electronic database and discovery service providers. Reuben Decl. at ¶ 22 and Exhibit A. Interim Co-Lead Counsel reviewed the bills to ensure they were appropriate and accurate prior to payment out of the Litigation Fund.⁸ Reuben Decl. at ¶ 22. If awarded, this amount will be reimbursed to the Litigation Fund to pay other expenses incurred in this litigation. Reuben Decl. at ¶ 22.

Non-taxable expenses chargeable to the Litigation Fund for expert economic services that were incurred from August 1, 2014 through February 28, 2015, but which are as yet unpaid, total \$683,170.02. Reuben Decl. at ¶ 23. Like the expert expenses already paid from the Litigation Fund, these outstanding expenses relate to class certification and preparation of the merits expert report. If awarded, this amount will be used to pay Plaintiffs' economic expert, Dr. Rausser. Reuben Decl. at ¶ 23.

Plaintiffs' additionally note that the Claims Administrator, Garden City Group, has expended \$123,231.78 to date in connection with the dissemination of notice of the NuCal and Hillandale Settlements, and estimates that it will spend another \$28,557.16 to complete notice of

⁸ One of the expert bills may be subject to a modest downward adjustment. Counsel will advise the Court of any such adjustment in advance of any hearing on this motion.

the Settlements, for a total of \$151,788.94. Reuben Decl. at ¶ 24. Plaintiffs will separately file a motion for leave to disburse such funds once notice is complete. Reuben Decl. at ¶ 24.

IV. SUPPLEMENTAL INFORMATION FOR CONSIDERATION

This Court issued an Order dated July 18, 2012 (ECF 704) seeking supplemental information regarding Plaintiffs' motion for an award of fees and for reimbursement of expenses in connection with the Moark settlement. Because this motion does not implicate a request for fees or for reimbursement of individual firm litigation expenses, Plaintiffs' Counsel believe that the necessary information has been provided, and that no additional information is required pursuant to that Order.

V. CONCLUSION

For the reasons set herein, Plaintiffs' Counsel respectfully request that the Court grant their request for reimbursement of litigation expenses.

Date: April 7, 2015

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Interim Co-Lead Counsel for Direct Purchaser Plaintiffs and Settlement Class Counsel

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

_____)	MDL No. 2002
IN RE: PROCESSED EGG PRODUCTS)	
ANTITRUST LITIGATION)	Case No. 08-md-02002
_____)	
THIS DOCUMENT APPLIES TO:)	
ALL DIRECT PURCHASER PLAINTIFF)	
ACTIONS)	
_____)	

**DECLARATION OF MINDEE J. REUBEN IN SUPPORT OF DIRECT PURCHASER
PLAINTIFFS' MOTION FOR REIMBURSEMENT OF EXPENSES**

1. I am admitted to practice in the Commonwealth of Pennsylvania and the State of New Jersey, am a member of the Bar of this Court, and am a member of the law firm of Weinstein Kitchenoff & Asher LLC (“WKA”), one of the Interim Co-Lead Counsel and Liaison Counsel for the Direct Purchaser Plaintiffs (“Plaintiffs”) in the above-captioned matter. I submit this declaration in support of Plaintiffs’ Motion for Reimbursement of Expenses (“Plaintiffs’ Motion”).

2. Plaintiffs’ Motion seeks reimbursement of litigation expenses from the settlements (“Settlements”) with defendants NuCal Foods, Inc. (“NuCal”) and Hillandale Farms of Pa., Inc. and Hillandale-Gettysburg, L.P. (“Hillandale”) (collectively, “Settling Defendants”). Each of the Settlements calls for the creation of a settlement fund, and provides that each Class member “shall look solely to the Settlement Amount” for settlement satisfaction. *See, e.g.*, NuCal Settlement Agreement at ¶ 39 (ECF 1041-2 at Exhibit 1); Hillandale Settlement Agreement at ¶ 42 (ECF 1093-1 at Exhibit 1). The Settlements further provide that Plaintiffs’

Counsel may seek attorneys' fees, expenses, and incentive awards therefrom, subject to Court approval. *See, e.g.*, NuCal Settlement Agreement at ¶ 40; Hillandale Settlement Agreement at ¶ 43

3. Specifically, Plaintiffs request reimbursement of (i) non-taxable litigation expenses paid from the Litigation Fund in the amount of \$1,035,553.60 for work undertaken from August 1, 2014 through February 28, 2015; and (ii) non-taxable expenses for expert economic services chargeable to the Litigation Fund that were incurred from August 1, 2014 through February 28, 2015 but which are as yet unpaid in the amount of \$683,170.02.

Counsel's Prosecution of Case

4. Plaintiffs' Counsel obtained the NuCal and Hillandale Settlements through diligent and thorough work. Examples of just some of their efforts during the August 2014 through February 2015 time period that is the subject of this motion are highlighted below.

5. Plaintiffs' Counsel prepared and filed their motion for class certification (ECF 978) on May 30, 2014 (before the time period covered by this motion). Thereafter, Plaintiffs deposed Defendants' expert, William Myslinski, Ph.D., who submitted a report in opposition to Plaintiffs' motion for class certification. On September 19, 2014, Plaintiffs' Counsel prepared a reply in further support of class certification (ECF 1060). The preparation of the reply required counsel to work closely with Plaintiffs' expert, Gordon Rausser, Ph.D., who submitted a 108-page declaration in support of Plaintiffs' reply. In addition, Plaintiffs and Dr. Rausser also worked extensively together to prepare for the hearing on class certification held in early March.

6. On August 6, 2014, Defendants moved to exclude the opinions and testimony of Plaintiffs' class certification expert, Gordon Rausser, Ph.D. (ECF 1031-1032). Plaintiffs filed their opposition to the *Daubert* motion on September 19, 2014 (ECF 1058), with additional

briefing being filed by both parties, including a sur-reply by Plaintiffs on December 5, 2014 (ECF 1102). Plaintiffs also participated in the deposition of a third party witness in connection with the *Daubert* motion on December 5, 2014. The *Daubert* hearing was held on December 9, 2014, and the motion was denied on January 26, 2015 (ECF 1124-1125).

7. On August 15, 2014, Plaintiffs moved for final approval of their \$28 million settlement with Cal-Maine (ECF 1036) and the First Amendment to the Sparboe settlement (ECF No. 1035). There were no objections to either the Cal-Maine settlement or the First Amendment to the Sparboe settlement. A hearing on both motions was held on September 18, 2014; both the Cal-Maine (ECF 1081-1082) and Sparboe (ECF 1080) motions were granted on October 14, 2014.

8. On March 20, 2015, Plaintiffs moved for final approval of the NFC, Midwest Poultry and UEP/USEM settlements. (ECF 1144). Plaintiffs also moved for final approval of the Second Amendment to the Sparboe settlement that same day. (ECF 1145). A fairness hearing is scheduled for May 6, 2015.

9. In January 2014, Plaintiffs' Counsel began substantive settlement negotiations with NuCal Foods, Inc. The parties were far apart, and talks initially seemed unlikely to be successful. After the NFC and Midwest Poultry settlements were reached, however, the parties began to discuss settlement again in earnest. NuCal shared financial information with Plaintiffs' Counsel in April 2014, after which several rounds of telephone calls and email exchanges ensued. The parties reached an agreement in principle in May 2014, although substantive negotiations regarding the terms of the settlement agreement took another two months. The settlement agreement was fully executed on August 1, 2014. *See generally* August 28, 2014

Declaration of James Pizzirusso filed in support of motion for preliminary approval of NuCal settlement. (ECF 1041-2).

10. Plaintiff moved for preliminary approval of the \$1.425 million NuCal Settlement on August 28, 2014 (ECF 1041), and a hearing was held on October 2, 2014. Preliminary approval was granted on October 3, 2014. (ECF 1073).

11. Plaintiffs first discussed a potential resolution of this action with Hillandale soon after the litigation began, and again after the Court issued its Opinion on the motions to dismiss the complaint. Those initial discussions did not result in a settlement and there were no additional, meaningful discussions for some time. *See generally* November 21, 2014 Declaration of Ronald Aranoff filed in support of motion for preliminary approval of Hillandale Settlement (ECF 1093-2).

12. In September 2013, the parties sought a stay of the litigation to pursue a global mediation session. While the global mediation was unsuccessful, Interim Co-Lead Counsel soon decided to approach Hillandale individually about trying to resolve the case. In the summer and fall of 2014, Interim Co-Lead Counsel again began substantive settlement negotiations with Hillandale. The parties were initially far apart, but over time they began to make slow and steady progress. After settlements were reached with some of the other Defendants, the parties' settlement discussions moved forward in earnest. In late August and September 2014, after several rounds of telephone calls and communications, the parties agreed to a \$3,000,000 cash settlement. The broad terms of the settlement were first memorialized in a binding term sheet dated September 19, 2014; a formal Settlement Agreement was executed on October 22, 2014. *See generally* November 21, 2014 Aranoff Decl. (ECF 1093-2).

13. Plaintiff moved for preliminary approval of the Hillandale Settlement on November 21, 2014, and a hearing was held on December 18, 2014. Preliminary approval was granted on December 22, 2014 (ECF 1108).

14. Pursuant to Case Management Order No. 22, which was negotiated in December 2014, Plaintiffs served their 178-page merits expert report by Dr. Rausser on January 22, 2015. Plaintiffs' counsel worked tirelessly with Dr. Rausser during the period covered by this motion to ensure the timely submission of their merits expert report.

Notice of Expenses and Opportunity to Object

15. Reasonable notice of Plaintiffs' Motion and an opportunity to object to Plaintiffs' Motion has been given to the Class.

16. The Garden City Group, Inc. ("GCG"), the Court-appointed Claims Administrator, effectuated a notice program that ensured Settlement Class members are apprised of their rights. Pursuant to the December 19, 2014 Order (ECF 1108) approving the plan for notice of the NuCal and Hillandale Settlements, on February 11, 2015, GCG mailed 17,585 Notice Packets to Class members whose addresses GCG had compiled from Defendants' sales data. Affidavit of Jennifer M. Keough Regarding Notice Dissemination and Claims Administration ("Keough Aff.") at ¶ 8. (ECF 1152). Notice was published in *The Wall Street Journal* on February 24, 2015, and in a variety of trade magazines that specifically cater to the restaurant and food industries. Keough Aff. At ¶ 11. Further details regarding the notice program and its effectiveness can be found in the Keough Affidavit. (ECF 1152).

17. The Notice Packets expressly notified potential Class Members that Settlement Counsel would be seeking Court approval of, *inter alia*, reimbursement of litigation expenses (Plaintiffs' Counsel are not seeking attorneys' fees at this time). See Keough Aff., Exhibit 1

(“Long Form Notice”) at § 8. In the section entitled “How will the lawyers be paid?” the notice provides:

These attorneys and their respective firms are referred to as Class Counsel. The Court will decide how much Class Counsel will be paid. Class Counsel, in compensation for their time and risk in prosecuting the litigation on a wholly contingent fee basis, intend to apply to the Court for an award, from the NuCal and Hillandale/Gettysburg Settlement Funds, of attorneys’ fees in an amount not to exceed 33 1/3% of \$4,425,000, as well as costs and expenses incurred, including fees and costs expended while providing notice to the Class.

Class Counsel will file their Fee Petition on or before April 7, 2015. The Fee Petition, which will identify the specific amount of fees ... requested and the expenses to be reimbursed, will be available on the Settlement website, www.eggproductssettlement.com, on that date. Any attorneys’ fees reimbursement of costs will be awarded only as approved by the Court in amounts it determines to be fair and reasonable.

Id. The notice also explains the process of, and sets deadlines for, opting out of the settlement as well as objecting to the settlement.

18. The schedule approved by the Court requires Plaintiffs to file their motion for reimbursement and recovery of expenses by April 7, 2015, in advance of the deadline for asserting objections consistent with Rule 23(f). *See, e.g.*, Long Form Notice at § 8. Objections to the Settlements, including this motion, are due no later than May 22, 2015. *See, e.g.*, Long Form Notice at § 13. Accordingly, Class members have approximately 6½ weeks after the filing of this motion to lodge their objections to Plaintiffs’ proposed reimbursement of expenses. This motion will be available on the Settlement website.

Request for Reimbursement

19. Plaintiffs’ Counsel respectfully request reimbursement of (i) non-taxable litigation expenses paid from the Litigation Fund in the amount of \$1,035,553.60 for work undertaken from August 1, 2014 through February 28, 2015, *see* Exhibit A hereto (Analysis of Litigation Fund); and (ii) non-taxable expenses for expert economic services chargeable to the Litigation

Fund that were incurred from August 1, 2014 through February 28, 2015 but which are as yet unpaid in the amount of \$683,170.02.

20. Plaintiffs' Litigation Fund pays expenses (both taxable and non-taxable) which are incurred collectively by Plaintiffs' Counsel, rather than by individual firms.¹ Thus, for example, the Litigation Fund will pay the costs of expert fees, electronic discovery costs (such as maintenance of the joint document depository) and deposition transcripts.

21. Here, Plaintiffs' Counsel are seeking reimbursement of non-taxable expenses paid from the Litigation Fund from August 1, 2014 through February 28, 2015, as well as recovery of non-taxable expenses for expert economic services chargeable to the Litigation Fund that were incurred from August 1, 2014 through February 28, 2015, but which are as yet unpaid.

22. Non-taxable expenses paid by the Litigation Fund August 1, 2014 through February 28, 2015 total \$1,035,553.60. *See* Exhibit A. A significant portion of these expenses are expert fees related to class certification and preparation of the merits expert report, as well as costs of electronic database and discovery service providers. *See* Exhibit A. Interim Co-Lead Counsel reviewed the bills to ensure they were appropriate and accurate prior to payment out of the Litigation Fund.² If awarded, this amount will be reimbursed to the Litigation Fund to pay other expenses incurred in this litigation.

23. Non-taxable expenses chargeable to the Litigation Fund for expert economic services that were incurred from August 1, 2014 through February 28, 2015 but which are as yet unpaid total \$683,170.02. Like the expert expenses already paid from the Litigation Fund, these

¹ Plaintiffs are not presently seeking reimbursement of individual firm expenses incurred or assessments paid during the August 1, 2014 through February 28, 2015 time period.

² One of the expert bills may be subject to a modest downward adjustment. Counsel will advise the Court of any such adjustment in advance of any hearing on this motion.

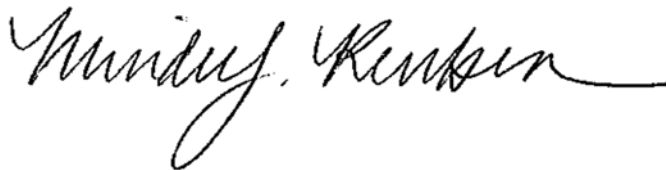
outstanding expenses relate to class certification and preparation of the merits expert report. If awarded, this amount will be used to pay Plaintiffs' economic expert, Dr. Rausser.

24. Plaintiffs' additionally note that the Claims Administrator, Garden City Group, has expended \$123,231.78 to date in connection with the dissemination of notice of the NuCal and Hillandale Settlements, and estimates that it will spend another \$28,557.16 to complete notice of the Settlements, for a total of \$151,788.94. Plaintiffs will separately file a motion for leave to disburse such funds once notice is complete.

I declare under penalty of perjury that the foregoing is true and correct.

Date: April 7, 2015

BY:

A handwritten signature in black ink, appearing to read "Mindy Reuben", written in a cursive style.

MINDEE J. REUBEN

EXHIBIT A

APRIL 2015 EGGS LITIGATION FUND ANALYSIS

August 1, 2014 through December 31, 2014

		Notes
Opening Balance	\$ 263,957.69	
Deposits	\$ 1,043,593.76	Reimbursement of certain expenses from Cal-Maine Settlement Fund
Interest	\$ 12.30	
Subtotal	<u>\$ 1,307,563.75</u>	
Reduced By Taxable Expenses	\$ 14,959.68	Deposition transcripts, hearing transcripts, and outside copy services. Not recoverable in this petition.
Reduced by Non-Taxable Expenses	\$ 32,729.90	Database and discovery provider services. Recoverable in this petition.
Reduced by Non-Taxable Expenses	\$ 251,423.75	Expert economic services (incl. wire transfer fee). Recoverable in this petition.
Subtotal	<u>\$ 299,113.33</u>	
Ending Balance	<u>\$ 1,008,450.42</u>	
Total Non-Taxable Litigation Expenses For Which Plaintiffs Seek Reimbursement:		
	\$ 284,153.65	

APRIL 2015 EGGS LITIGATION FUND ANALYSIS

January 1, 2015 - February 28, 2015

		Notes
Opening Balance	\$ 1,008,450.42	
Deposits	\$ -	
Interest	\$ 9.55	
Subtotal	\$ 1,008,459.97	
Reduced By Taxable Expenses	\$ 1,701.30	Deposition transcripts, hearing transcripts, and outside copy services. Not recoverable in this petition.
Reduced by Non-Taxable Expenses	\$ 1,399.95	Database and discovery provider services. Recoverable in this petition.
Reduced by Non-Taxable Expenses	\$ 750,000.00	Expert economic services (incl. wire transfer fee). Recoverable in this petition.
Reduced by Sparboe Notice Payment	\$ 202,171.87	Payment to Claims Administrator. Part of prior expense reimbursement. Not recoverable in this petition.
Subtotal	\$ 955,273.12	
Ending Balance	\$ 53,186.85	
Total Non-Taxable Litigation Expenses For Which Plaintiffs Seek Reimbursement:		
	\$ 751,399.95	

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

_____)	MDL No. 2002
IN RE: PROCESSED EGG PRODUCTS)	
ANTITRUST LITIGATION)	Case No. 08-md-02002
_____)	
THIS DOCUMENT APPLIES TO:)	
ALL DIRECT PURCHASER PLAINTIFF)	
ACTIONS)	
_____)	

**[PROPOSED] ORDER GRANTING REIMBURSEMENT OF LITIGATION EXPENSES
TO DIRECT PURCHASER PLAINTIFS**

AND NOW, this ____ day of _____, 2015, upon consideration of the Direct Purchaser Plaintiffs’ Motion for Reimbursement of Expenses filed on April 7, 2015, as well as the supporting Memorandum and Declaration of Mindee J. Reuben with exhibits, and following the _____, 2015 hearing on the motion, the Court hereby **ORDERS** that Direct Purchaser Plaintiffs are awarded reimbursement of expenses in the amount of \$1,718,723.62.

BY THE COURT:

GENE E.K. PRATTER
United States District Court

UNITED STATES DISTRICT COURT
IN 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 Class Actions :

CERTIFICATE OF SERVICE

I hereby certify that Direct Purchaser Plaintiffs’ Motion for Reimbursement of Expenses, Declaration of Mindee J. Reuben and Memorandum of Law were served upon the below-listed Liaison Counsel for Defendants, Indirect Purchaser Plaintiffs, and Direct Action Plaintiffs via electronic mail and this Court’s ECF service:

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Direct Action Plaintiffs’ Liaison Counsel

Date: April 7, 2015

BY: /s/ Mindee J. Reuben
Mindee J. Reuben