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Class*

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

IN RE: PACKAGED SEAFOOD
PRODUCTS ANTITRUST
LITIGATION

This document relates to:

All Direct Purchaser Plaintiff
Actions

Case No. 3:15-md-02670-DMS-MSB
MDL No. 2670

**[CORRECTED] DIRECT
PURCHASER PLAINTIFFS'
MOTION FOR ORDER
PERMITTING AND CONFIRMING
UPDATED OPT-OUT REPORT ¹**

JUDGE: Hon. Dana M. Sabraw
CTRM: 13A

¹ For clarity, the Court should disregard the Motion filed at ECF No. 3093 and use the corrected motion and associated papers. The corrected motion resolves typographical errors.

1 The Direct Purchaser Plaintiffs (“DPPs”) request an order from the Court
 2 confirming the DPPs’ updated list of Class members who opted out of the DPPs’
 3 Litigation Class. *See* Decl. of Brittany L. Nyovanie (“Nyovanie Decl.”), Ex. A.
 4 Following the DPPs’ filing of its original opt-out list on June 26, 2023, *see* ECF No.
 5 3082-1, Ex. D, several Class members—including Performance Food Group, Inc.
 6 (“PFG”), Krasdale Foods, Inc. (“Krasdale”), and Wegmans Food Markets, Inc.
 7 (“Wegmans”)—have asserted that they inadvertently missed the deadline to opt out
 8 of the Class. Other Class members—ALDI, Big Lots, and Weis Markets (“Weis”)—
 9 assert that the DPPs’ notice administrator did not receive their opt-out requests, while
 10 two other Class members—Sysco Corporation (“Sysco”) and Target Corporation
 11 (“Target”)—failed to submit any opt-out requests to the notice administrator.

12 Counsel for StarKist Co. (“StarKist”) and Dongwon Industries, Inc. (“DWI” or
 13 “Dongwon”) asserts that each of these Class members has a prior settlement with
 14 StarKist and Dongwon that requires the Class members to opt out with respect to these
 15 two Defendants. Accordingly, most of the specified Class members have requested
 16 partial opt-outs, asking that they be permitted to opt out of the DPP’s Settlement with
 17 respect to StarKist and Dongwon but remain in the Class with respect to Lion Capital
 18 LLP (“Lion Capital”) and Lion (Americas), Inc. (“Lion Americas”). DPPs do not
 19 object to these requests and recommend that the Court permit and confirm the list and
 20 scope of opt-outs as set forth in the updated opt-out report. *See* Nyovanie Decl., Ex.
 21 A.

22 **I. BACKGROUND**

23 **A. PFG’s Delayed Exclusion Request**

24 On or about June 3, 2019, PFG asserts that it entered into a settlement
 25 agreement with StarKist and its parent company, DWI. *See* Nyovanie Decl., Ex. B
 26 (“PFG Decl.”). As part of the settlement’s terms, PFG is required to opt out of class
 27 action litigation regarding any covered claims, both on behalf of itself and all current
 28

1 or prior subsidiaries. *Id.*

2 PFG acquired the Reinhart entities after its execution of the StarKist Settlement
3 and did not know whether the Reinhart entities had a separate pre-acquisition
4 settlement agreement with StarKist also requiring opt-out. *Id.* PFG was advised by its
5 in-house counsel, upon learning of the notice of a litigation class, to contact the
6 attorney who represented the Reinhart entities prior to acquisition to obtain a clear
7 answer on how to proceed. *Id.* PFG received a response from the Reinhart entities'
8 former counsel regarding any separate settlement agreements on June 16, 2023,
9 several days after the DPPs' exclusion deadline. *Id.* Reinhart's former counsel
10 apparently confirmed that there was no evidence the Reinhart entities had entered into
11 any separate settlement with any of the relevant Defendants.

12 Pursuant to the Court's Order, Class members were required to submit opt-out
13 requests to DPPs' notice administrator, JND Legal Administration LLC ("JND"), by
14 June 12, 2023. *See* ECF No. 3024. On June 21, 2023, upon realizing the DPPs'
15 exclusion deadline had passed, PFG's counsel immediately reached out to JND and
16 submitted an opt-out letter. Nyovanie Decl., Ex. C. After conferring with both counsel
17 for StarKist at Latham & Watkins and counsel for the DPPs at Hausfeld, PFG revised
18 its opt-out letter for greater clarity and submitted an updated letter to JND on June 26,
19 2023. Nyovanie Decl., Ex. D. The opt-out letter seeks to opt the PFG entities out of
20 the class, but only as follows:

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22 [T]o the extent of any judgment and/or settlement that the
23 class achieves with Starkist Co. and/or Dongwon
24 Industries, Inc[.], in light of PFG's prior settlement with
25 these parties. For clarity, the [listed] PFG entities seek to
26 remain in the class in order to pursue their claims against
27 Lion Capital, LLP and Lion Capital (Americas), Inc. To
28 be clear, the PFG opt-out relates only to the settlement
with the Starkist entities but not to the settlement with the
Lion entities.

1 *Id.* DPPs do not object to PFG’s request.

2 **B. Krasdale and Wegmans’ Delayed Exclusion Request**

3 Krasdale and Wegmans filed Notices of Voluntary Dismissal following their
4 purported settlements with StarKist and Dongwon on June 10, 2019. *See* Nyovanie
5 Decl., Ex. E (“Krasdale Declaration”) ¶ 7; Ex. F (“Wegmans Declaration”) ¶ 8.
6 According to counsel, on April 12, 2022, Krasdale and Wegmans executed and mailed
7 a letter to JND requesting exclusion from the Class. Nyovanie Decl., Ex. E ¶ 9; Ex.
8 F ¶ 10. The individual tasked with handling the submissions assumed the opt-out letter
9 sent in April 2022, and the dismissals filed for Krasdale and Wegmans in June and
10 July 2022, were sufficient to put all parties on notice of the opt-outs, Nyovanie Decl.,
11 Ex. E ¶¶ 10-11; Ex. F ¶¶ 11-12, and thus did not submit an opt-out request ahead of
12 the deadline set in the Court’s Order. *See* ECF No. 3012. Counsel for Krasdale and
13 Wegmans submitted a request for both Class members on June 29, 2023, recognizing
14 the missed deadline and inadvertent delay therein. Nyovanie Decl., Ex. E ¶11; Ex.
15 F ¶ 12; *see* Nyovanie Decl., Ex. G. The request noted that Krasdale and Wegmans
16 seek to be excluded from the Class specifically with respect to StarKist and DWI, as
17 Krasdale and Wegmans have already “entered into settlement agreements with
18 StarKist and DWI that require Krasdale and Wegmans to opt out of the Direct
19 Purchaser Litigation Class.” Nyovanie Decl., Ex. G. DPPs do not object to Krasdale
20 and Wegmans’ request.

21 **C. Purported Mailing Issues**

22 Class members including ALDI, Big Lots, and Weis assert that they submitted
23 timely opt-out requests that are not reflected on the DPPs’ original opt-out list. *See*
24 ECF No. 3082-1, Ex. D. On July 10, 2023, counsel for StarKist and Dongwon
25 forwarded the respective letters to the DPPs. Nyovanie Decl., Ex. H. According to the
26 forwarded letters, ALDI and Weis both request exclusion as to StarKist and
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1 Dongwon, specifically, Nyovanie Decl., Exs. I and J, whereas Big Lots requests
2 exclusion as to all Defendants, Nyovanie Decl., Ex. K.

3 Counsel for DPPs reached out to JND regarding the asserted omissions, after
4 which JND double-checked its mail room and confirmed that it had not received
5 letters from ALDI or Big Lots. Nyovanie Decl. ¶¶ 7, 13. JND also noted that it had
6 received a letter from Weis on the date purported, but that the letter had not explicitly
7 requested exclusion and thus was not included in the original opt-out report. *Id.* ¶14.

8 Counsel for StarKist and Dongwon informed DPPs that ALDI, Big Lots, and
9 Weis—like PFG, Krasdale, and Wegmans—have existing settlement agreements with
10 StarKist and Dongwon that require specific exclusions. Nyovanie Decl., Ex. H. Given
11 this, DPPs do not object to ALDI’s, Big Lots’, and Weis’s requests.

12 **D. Target’s and Sysco’s Failure to Send Opt-Out Requests**

13 JND did not receive opt-out requests from Target or Sysco, nor has either Class
14 member asserted any issues with respect to mailing or otherwise. On July 10, 2023,
15 counsel for StarKist and Dongwon emailed counsel for DPPs, asserting that both
16 Target and Sysco have existing settlement agreements with StarKist and Dongwon
17 that prevent these Class members from remaining in the DPP Class with respect to
18 these two Defendants. Nyovanie Decl. ¶¶ 11-12; Ex. H. Counsel for StarKist and
19 Dongwon included in the email Orders from the Court, granting joint motions to
20 dismiss Target and Sysco’s respective claims against StarKist and Dongwon with
21 prejudice. *See* ECF Nos. 1884, 1886. On July 20, 2023, StarKist’s counsel e-mailed
22 DPPs an exclusion request from Target, dated July 18, 2023. Nyovanie Decl. Ex. L.
23 The letter additionally attested to Target entering into a settlement agreement with
24 StarKist and Dongwon in 2019. *Id.* Given the prior Orders and purported settlement
25 agreements, DPPs do not object to counsel’s request to exclude Target and Sysco from
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1 the DPP Class with respect to StarKist and Dongwon.²

2 **E. Exclusions Specific to StarKist and Dongwon**

3 PFG, Krasdale, Wegmans, ALDI, Weis, Costco Wholesale Corp. (“Costco”),
4 and other Class members seek to opt out of the Class only as to StarKist and DWI—
5 in compliance with their purported settlement agreements with these two entities—
6 and wish to remain in the Class in order to pursue their claims against the Lion
7 Entities.³ *See, e.g.*, ECF 3082-1, Ex. E at 52 (requesting that Costco entities be
8 excluded from the settlement “solely as to StarKist Co. and Dongwon Industries, Co.,
9 Ltd.”), *id.* at 111 (specifying that PFG’s request “relates only to the settlement with
10 the Starkist entities but not with the Lion entities”).

11 DPPs have no objection to these limited requests.

12 **II. LEGAL STANDARD**

13 A court may, in cases of “excusable neglect,” extend the time in which a class
14 member may opt out of a settlement. *See* Fed. R. Civ. P. 6(b), 60(b)(1). The standard
15 allows courts, “where appropriate, to accept late filings caused by inadvertence,
16 mistake, or carelessness, as well as by intervening circumstances beyond the party’s
17 control.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 388
18 (1993). In determining whether a party has shown excusable neglect, courts consider

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20 ² Counsel for StarKist and Dongwon additionally listed Ingles Markets, Inc. (“Ingles”) as another Class member that entered into an existing settlement agreement with StarKist and Dongwon that prevents inclusion in the DPP Class with respect to these Defendants. *See* Nyovanie Decl. ¶¶ 11-12, 15; Ex. H. However, unlike the other Class members listed by StarKist and Dongwon’s counsel, Ingles presents no evidence of any opt-out request, delayed or otherwise, or any related Order of the Court. Absent any supporting evidence, DPPs have not included Ingles on the updated opt-out list. To the extent that StarKist and Dongwon contend that Ingles is in breach of any agreements reached amongst them, they are free to resolve the issue in an appropriate forum.

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27 ³ The updated opt-out list, Nyovanie Decl., Ex. A, specifies each of the limited opt-out requests and which parties the opt-out request applies to.

1 four factors (the “*Pioneer* factors”): (1) the danger of prejudice to the nonmoving
 2 parties, (2) the length of delay, (3) the reason for the delay, and (4) whether the movant
 3 acted in good faith. *Id.* at 395; *see, e.g., Norton v. LVNV Funding, LLC*, No. 18-CV-
 4 05051-DMR, 2022 WL 562831, at *7 (N.D. Cal. Feb. 24, 2022).

5 III. ARGUMENT

6 A. The Delayed Requests for Exclusion Are Sufficiently Excusable

7 PFG, Wegmans, and Krasdale all satisfy each of the *Pioneer* factors and can
 8 sufficiently demonstrate excusable neglect pursuant to Fed. R. Civ. P. 6(b)(1)(B).

9 *Firstly*, none of the parties in this litigation will suffer prejudice if PFG’s,
 10 Wegmans’, and Krasdale’s requests are granted. Both DPPs and StarKist have
 11 confirmed that neither party is prejudiced by the minimal delay posed by the Class
 12 members’ missed deadline and neither party objects to the requests. There would
 13 additionally be no prejudice to the Settling Defendants as PFG reached out to JND in
 14 time to accurately appear on the DPPs’ original opt-outs list, filed on June 26, 2023,
 15 ECF No. 3082; *see Ridgeway v. Wal-Mart Stores, Inc.*, No. 08-CV-05221, 2016 WL
 16 4529430, at *4 (N.D. Cal. Aug. 30, 2016) (permitting late opt-out where plaintiffs
 17 “would be in the same position as if [the class member] had timely opted out”), *aff’d*
 18 *sub nom. Ridgeway v. Walmart Inc.*, 946 F.3d 1066 (9th Cir. 2020), and Krasdale and
 19 Wegmans provided other forms of notice ahead of the deadline, *see Nyovanie Decl.*,
 20 Ex. E ¶ 7; *Nyovanie Decl.*, Ex. F ¶ 8 (explaining that Wegmans and Krasdale each
 21 filed a Notice of Voluntary Dismissal following their respective settlements with
 22 StarKist on June 10, 2019).

23 *Second*, the delay for all Class members was minimal. PFG’s opt-out request
 24 was postmarked and received June 22, 2023—only seven business days after the
 25 exclusion deadline and within the necessary window to be included in DPPs’ initial
 26 submission to the Court—and Krasdale and Wegmans’ request was received on June
 27 29, 2023, only 14 business days after the deadline. *Cf. In re Charles Schwab Corp.*
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1 *Sec. Litig.*, No. C 08-01510, 2010 WL 1445451, at *2 (N.D. Cal. Apr. 9, 2010)
2 (denying motion where counsel missed opt-out deadline by more than two months).
3 None of these requests pose any risk of delay to this litigation’s proceedings.

4 *Third*, each Class member provides a justification for delay. PFG purports that
5 it missed the exclusion deadline due to its attempted diligence in ensuring it met the
6 requirements of all relevant settlement agreements. At the time PFG missed the DPPs’
7 exclusion deadline, PFG was actively working with in-house counsel to determine
8 whether its subsidiary—which had also purchased relevant products during the
9 applicable timeframe—had a separate pre-acquisition settlement agreement with
10 StarKist. *See* Nyovanie Decl., Ex. B. Counsel’s intention was to ensure PFG opted
11 out of the DPPs’ Class correctly, without violating any existing agreements. *Id.* By
12 the time PFG received confirmation from its subsidiary’s former counsel as to
13 whether the subsidiary had a pre-acquisition settlement agreement of its own, the
14 exclusion deadline had passed. *Id.* As soon as PFG’s counsel learned of the missed
15 deadline, counsel immediately reached out to the relevant parties and the
16 administrator to correct the error.

17 Counsel for Krasdale and Wegmans executed and mailed a letter requesting
18 exclusion from the Class on April 12, 2022 and assumed the 2022 opt-out letter, in
19 conjunction with the dismissals filed in June and July 2022, would suffice to put the
20 parties on notice. Nyovanie Decl., Ex. E ¶¶ 9-10; Nyovanie Decl., Ex. F ¶¶ 10-11.
21 Once counsel learned that the earlier letter was inadequate, a proper opt-out request
22 was submitted to JND shortly after, acknowledging the missed deadline and
23 recognizing the inadvertent delay. Nyovanie Decl., Ex. E ¶¶ 11-12; Nyovanie Decl.,
24 Ex. F ¶¶ 12-13.

25 *Finally*, PFG, Wegmans, and Krasdale all assert in their respective declarations
26 that they acted in good faith. PFG claims that from when it first learned of class
27 certification in May 2023, its actions were intended to ensure PFG did not violate its
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1 existing agreement’s terms. Nyovanie Decl., Ex. B. Likewise, Wegmans and Krasdale
2 assert that they erroneously assumed their prior forms of notice were sufficient,
3 having also intended to follow the proper procedures. Nyovanie Decl., Ex. E ¶ 10;
4 Nyovanie Decl., Ex. F ¶ 11. None of the Class members gained any tactical advantage
5 from the delay. PFG, Wegmans, and Krasdale all remain in the Class with respect to
6 their claims against Lion Capital and Lion Americas, and solely request exclusion
7 with respect to any judgment and/or settlement with StarKist and DWI—as required
8 by their agreements. Their inadvertent delays have not prejudiced any of the parties
9 and were the unfortunate result of each Class member’s efforts to proceed correctly.

10 **B. DPPs Do Not Object to the Other Exclusion Requests**

11 ALDI, Big Lots, and Weis each purport that they submitted timely exclusion
12 requests that JND did not receive. *See* Nyovanie Decl., Ex. H. On July 10, 2023,
13 counsel for StarKist and Dongwon e-mailed DPPs the purported opt-out request
14 letters for ALDI, Big Lots, and Weis. *See* Nyovanie Decl., Exs. H, I, J, K.⁴ DPPs do
15 not object to these requests.

16 Unlike ALDI, Big Lots, or Weis, neither Target nor Sysco claim to have
17 submitted an opt-out request to JND.⁵ However, given each Class member’s
18 purported settlement agreement with StarKist and Dongwon, as well as the Court’s
19 Orders granting Target and Sysco’s motions to dismiss claims against StarKist and
20 Dongwon with prejudice, *see* ECF No. 1884, 1886, DPPs do not object to their
21 specified exclusions.

22 _____
23 ⁴ JND received a letter from Weis on the date purported by Weis’s counsel, but did
24 not include Weis in the opt-out report because the letter failed to specifically request
25 exclusion from the class. *See* Nyovanie Decl. ¶ 14. Given Weis’s existing settlement
26 agreement with StarKist, DPPs do not object to excluding Weis from the Class in the
27 updated opt-out report.

28 ⁵ On July 20, 2023, StarKist’s counsel e-mailed DPPs an exclusion request from
Target, dated July 18, 2023. Nyovanie Decl. Ex. L. If postmarked to JND on July 18,
2023, it is possible JND will receive the letter after this filing.

1 **C. The Updated Opt-out List Should be Permitted and Confirmed**

2 The DPPs’ updated opt-out list, Nyovanie Decl., Ex. A, includes the exclusion
3 requests for PFG, Krasdale, Wegmans, ALDI, Big Lots, Sysco, Target, and Weis, and
4 reflects the specifications made by several of these Class members and others to limit
5 their opt-out requests as to claims against StarKist and Dongwon, while permitting
6 inclusion for claims against Lion Capital and Lion Americas. Given PFG, Wegmans,
7 and Krasdale’s excusable delay, and the purported settlement agreements between
8 StarKist and Dongwon and the other listed parties, the DPPs ask the Court for an order
9 confirming the updated opt-out list, as reflected in Nyovanie Decl., Ex. A, and the
10 limited exclusions provided for therein.

11 **IV. CONCLUSION**

12 For these reasons, the motion should be granted and the Court should order that
13 the DPPs’ updated opt-outs list (Nyovanie Decl., Ex. A) is confirmed.

14
15 Dated: July 25, 2023

Respectfully submitted,

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