UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:	)	CHAPTER 11
	)	
ORECK CORPORATION, et al.	)	CASE NO. 3:13-bk-04006
	)	Jointly Administered
DEBTOR(S).	)	
	)	

THE DEADLINE FOR FILING A TIMELY RESPONSE IS: October 31, 2013.
IF A RESPONSE IS TIMELY FILED, A HEARING WILL BE: November 5, 2013, at 10:00 a.m., Courtroom 2, Customs House, 701 Broadway, Nashville, Tennessee 37203.

NOTICE OF MOTION OF THE LEAD PLAINTIFFS AND PUTATIVE CLASS FOR CLASS CERTIFICATION PURSUANT TO BANKRUPTCY RULE 7023

Linda Gonzalez, Gina Chenier, Gaya Yosri, Scott Stiepleman, Greg Rescitti, Teri Latta, and Edward Paragin (the "Lead Plaintiffs") on behalf of themselves and all others similarly situated, including without limitation, the class of persons and entitities (the "Putative Class") represented, or sought to be represented, in the consolidated class action entitled *In re: Oreck Corporation Halo Vacuum and Air Purifiers Marketing and Sales Practices Litigation*, filed in the United States District Court for the Central District of California, MDL Case No. 2:12-ML-02317-CAS-JEM (the "MDL Class Action"), all through undersigned counsel, have asked the court for the following relief: entry of an Order Authorizing Class Certification Pursuant to Bankruptcy Rule 7023. A copy of the Motion for Class Certification Pursuant to Bankruptcy Rule 7023 and the proposed Order Authoriuthorizing Class Certification Pursuant to Bankruptcy Rule 7023 are attached hereto.

YOUR RIGHTS MAY BE AFFECTED. If you do not want the Court to grant the attached motion by entering the attached proposed order, or if you want the court to consider your views on the motion, then on or before **October 31, 2013**, you or your attorney must:

1. File with the court your response or objection, explaining your position. **PLEASE NOTE: THE BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF TENNESSEE REQUIRES ELECTRONIC FILING. ANY RESPONSE OR OBJECTION MUST BE SUBMITTED ELECTRONICALLY. TO FILE ELECTRONICALLY, YOU OR YOUR ATTORNEY MUST GO TO THE COURT WEBSITE AND FOLLOW THE INSTRUCTIONS AT:** <**https://ecf.tnmb.uscourts.gov**>.

2. If you need assistance with Electronic Filing, you may call the Bankruptcy Court at (615) 736-5584. You may also visit the Bankruptcy Court in person at: 701 Broadway, 1st Floor, Nashville, TN (Monday – Friday, 8:00 A.M. – 4:00 P.M.).

3. Your Response must state that the deadline for filing responses is **October 31, 2013,** the date of the scheduled hearing is **November 5, 2013,** and the motion to which you are responding is **Motion for Class Certification Pursuant to Bankruptcy Rule 7023.**

4. You must serve your response or objection by **electronic service through the Electronic Filing system** described above. You must also mail a copy of your response or objection to any party in interest required to received notice under the applicable rules of Court that does not receive electronic notice.

If a response is filed before the deadline stated above, the hearing will be held at the time and place indicated above. **THERE WILL BE NO FURTHER NOTICE OF THE HEARING DATE.** You may check whether a timely response has been filed by calling the Clerk's office at (615) 736-5584 or viewing the case on the Court's website at: <https://ecf.tnmb.uscourts.gov>.

If you or your attorney does not take these steps, the court may decide that you do not oppose the relief sought in the motion and may enter the attached proposed order granting that relief.

Dated: October 10, 2013.

Respectfully submitted,

Respectfully submitted,

/s/ Daniel I. Waxman

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COUNSEL FOR THE LEAD PLAINTIFFS AND THE PUTATIVE CLASS

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UNITED STATES BANKRUPTCY COURT
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IN RE:	)	CHAPTER 11
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ORECK CORPORATION, et al.	)	CASE NO. 13-04006
	)	Jointly Administered
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MOTION OF THE LEAD PLAINTIFFS AND PUTATIVE CLASS FOR CLASS CERTIFICATION PURSUANT TO BANKRUPTCY RULE 7023

Linda Gonzalez, Gina Chenier, Gaya Yosri, Scott Stiepleman, Greg Ruscitti, Teri Latta, and Edward Paragin (the "Lead Plaintiffs"), on behalf of themselves and all others similarly situated, including without limitation, the class of persons and entities (the "Putative Class") represented, or sought to be represented, in the consolidated class action entitled *In re: Oreck Corporation Halo Vacuum and Air Purifiers Marketing and Sales Practices Litigation*, filed in the United States District Court for the Central District of California, MDL Case No. 2:12-ML-02317-CAS-JEM (the "MDL Class Action"), and in order to comply with Local Bankruptcy Rule 4001-1(a), hereby separately move (the "Motion") the Court for an order authorizing the application of Bankruptcy Rule 7023 to the class proofs of claim filed by the Lead Plaintiffs in this case (the "Claims" or "Class Claims"). The Lead Plaintiffs further request that the Court hear this Motion on November 5, 2013, in conjunction with the hearing on the stay relief portion of the Combined Motion (as defined below) already scheduled for that date. In support of their Motion, the Lead Plaintiffs respectfully state as follows:

PRELIMINARY STATEMENT

1. On September 13, 2013, the Lead Plaintiffs filed their *Motion of the Lead Plaintiffs and Putative Class for Relief From the Automatic Stay Or, in the Alternative, for Class*

Certification Pursuant to Bankruptcy Rule 7023 [Docket No. 795] (the "Combined Motion"), seeking either relief from the automatic stay or, in the alternative, the same class certification relief now sought by way of this Motion. At a preliminary hearing on October 8, 2013, Judge Mashburn, *sua sponte*, raised the issue of whether the alternative request for class certification was properly before the Court due to Local Bankruptcy Rule 4001-1(a), and, with the consent of the parties, set only the stay relief portion of the Combined Motion for a final hearing on November 5, 2013 [Docket No. 938]. In order to fully comply with Local Bankruptcy Rule 4001-1(a), the Lead Plaintiffs have elected to file this independent Motion seeking class certification and, in order to limit the number of appearances for out of state counsel and to expedite the resolution of all pending matters, has requested that this matter also be heard at the currently scheduled November 5, 2013 hearing date.[1]

2. The Lead Plaintiffs seek to represent approximately two hundred thousand consumers who, on the basis of false and misleading advertising, purchased vacuum cleaners and / or air purifiers manufactured by the Debtors. The fundamental issue raised by this Motion is whether these innocent consumers will have a meaningful opportunity to pursue their claims and to share with other creditors in any recovery from the Debtors' bankruptcy estates. As shown below, the application of Rule 7023 to the Lead Plaintiffs' Class Proof of Claim is essential to uphold fundamental bankruptcy purposes, policies, needs and concerns. Absent the relief sought in this Motion, the vast majority (if not all) of the consumers injured by the Debtors' false

[1] Prior to filing this Motion, the Lead Plaintiffs requested that the Debtors and the Official Committee of Unsecured Creditors agree to argue the stay relief and class certification aspects of the Combined Motion at a single hearing already scheduled for November 5, 2013. Based upon their belief that a ruling on stay relief could potentially moot the class certification issues, both the Debtors and the Committee declined the Lead Plaintiffs' request.

advertising will be unable to pursue their claims and will be wholly disenfranchised by the Debtors' bankruptcy filing. The relief sought by the Lead Plaintiffs is the only way to ensure that all of the Debtors' creditors receive adequate notice and a fair opportunity to present their claims in this proceeding.

JURISDICTION

3. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

4. Venue is proper in this District and before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The statutory predicates for the relief requested herein are sections 105 and 502 of Title 11 of the United States Code (the "Bankruptcy Code") and Rules 7023, 9013 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

BACKGROUND

6. On May 6, 2013 (the "Petition Date"), Oreck Corporation and certain other affiliated companies (the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors are serving as debtors-in-possession pursuant to sections 1107 and 1108(a) of the Bankruptcy Code.

7. Prior to the Petition Date, the Debtors manufactured, marketed and sold certain products, including Oreck Halo upright vacuum cleaners (the "Vacuums"), and the Oreck XL Professional, Oreck ProShield and Oreck ProShield Plus air purifiers (the "Purifiers"), which, according to the Debtors and their representatives, were scientifically proven to kill airborne and surface bacteria, viruses (including cold and flu viruses), germs, mold, and allergens (collectively, the "Oreck Products").

8. In early 2011, the Federal Trade Commission (the "FTC") issued a complaint against Oreck Corporation alleging that its advertising of the Oreck Products was false, misleading and deceptive and violated sections 5(a) and 12 of the FTC Act. On May 31, 2011, the FTC issued an order approving a settlement with Oreck Corporation, whereby Oreck Corporation agreed, among other things, to pay a fine of $750,000.00 and to cease all representations that the Oreck Products killed bacteria, viruses and other pathogens (the "FTC Decision"). A copy of the FTC Decision is attached as Exhibit "A" to the Combined Motion and incorporated herein by reference.

9. Beginning on May 10, 2011, various purchasers of the Oreck Products, filed lawsuits against Oreck Corporation, Oreck Direct, LLC, Oreck Homecare, LLC (collectively, the "Debtor Defendants"), David Oreck ("Mr. Oreck"), and Does 1-10 (collectively with the Debtor Defendants and Mr. Oreck, the "Defendants") seeking (i) damages based upon the Defendants' false and misleading advertising, and (ii) class certification (the "Individual Lawsuits").[2]

10. On February 3, 2012, the United States Judicial Panel on Multidistrict Litigation (the "Panel") consolidated the Individual Lawsuits for pretrial proceedings including class certification (the "MDL Class Action"). In its ruling (the "Consolidation Order"), the Panel stated that "[t]he subject actions share factual issues arising from allegations that Oreck falsely and deceptively marketed the subject products – both the Halo and the air purifiers – as highly

[2] The Individual Lawsuits are as follows: (i) *Stiepleman v. Oreck Corp.*, CACD Case No. 2:12-cv-00949-CAS-JEM (originally filed in the Southern District of Florida); (ii) *Ruscitti v. Oreck Corp.*, CACD Case No. 2:11-cv-05321-CAS-JEM (originally filed in the Northern District of Illinois); (iii) *Chenier v. Oreck Corp.*, CACD Case No. 2:11-cv-05321-CAS-JEM (originally filed in the Central District of California); (iv) *Latta v. Oreck Corp.*, CACD Case No. 5:11-cv-01082-CAS-JEM (originally filed in the Central District of California); (v) *Paragin v. Oreck Corp.*, CACD Case No. 2:11-cv-00951-CAS-JEM (originally filed in the Southern District of Ohio).

effective in eliminating common viruses, germs and allergens . . . ." A copy of the Consolidation Order as Exhibit "B" to the Combined Motion and incorporated herein by reference.[3]

11. On April 17, 2012, the District Court appointed Kirkland & Packard LLP as Lead Interim Class Counsel [MDL Class Action, Docket No. 33].

12. On September 7, 2012, the Lead Plaintiffs filed their Amended Consolidated Class Action Complaint in the MDL Class Action (the "Class Action Complaint"). A copy of the Class Action Complaint is as Exhibit "C" to the Combined Motion and incorporated herein by reference.

13. The Class Action Complaint alleges violations of one federal and various state laws related to warranties, consumer protection, false advertising and unfair competition, and seeks certification of a single nationwide class and six (6) state-based subclasses. The Class Action Complaint requests damages in the approximate amounts of $100 to $400 (depending on the product purchased and damage formula utilized) for each member of the Putative Class (for a total of approximately $32,400,000), plus attorneys' fees and expenses.[4]

14. On October 5, 2012, the Debtor Defendants and Mr. Oreck filed motions to dismiss the Class Action Complaint [MDL Class Action, Docket Nos. 47, 48]. On December 3, 2012, the District Court entered its order denying the majority of the motions to dismiss, but dismissing Counts XI and XV against the Debtor Defendants with prejudice and portions of

[3] The Lead Plaintiffs respectfully request that this Court take judicial notice of the Class Action Complaint and all other documents filed in the MDL Class Action and this bankruptcy case. *See In re Nicole Energy Services, Inc.*, 385 B.R. 201, 213, n. 7 (Bankr. S.D. Ohio 2008) (citing cases for the proposition that bankruptcy courts may take judicial notice of proceedings in other courts in the federal system).

[4] These figures are merely preliminary estimates and the Lead Plaintiffs expressly reserve the right to revise these figures as more information is obtained.

Counts XIV and XVII without prejudice (the "Dismissal Order") [MDL Class Action, Docket No. 55].

15. On December 19, 2012, the Debtor Defendants filed their respective answers and on January 24, 2013, the Lead Plaintiffs and the Defendants filed their Joint Rule 26(f) Discovery Plan [MDL Class Action, Docket No. 58]. The deadlines set forth therein were held in abeyance when the Defendants filed their Notice of Bankruptcy Filing on May 7, 2013 [MDL Class Action, Docket No. 64]. A copy of the docket in the MDL Class Action is attached as Exhibit "D" to the Combined Motion and incorporated herein by reference.

16. On May 23, 2013, the Bankruptcy Court entered its Order Fixing Bar Date for Filing of Proofs of Claim [Docket No. 193], setting the general claims bar date for each Debtor on September 13, 2013 (the "Bar Date"). According to the Affidavit of Service [Docket No. 212], notice of the Bar Date was provided to counsel for the Lead Plaintiffs, but no actual notice was provided to the members of the Putative Class.

17. On September 13 2013, the Lead Plaintiffs, on behalf of themselves and the Putative Class filed proofs of claim against the Debtor Defendants (the "Class Proofs of Claim") asserting the claims set forth in the Class Action Complaint (the "Claims" or "Class Claims"). A copy of the Class Proofs of Claim are attached as Exhibit "E" to the Combined Motion and incorporated herein by reference.

RELIEF REQUESTED

18. Pursuant to the Motion, the Lead Plaintiffs request, pursuant to Bankruptcy Rules 9014 and 7023, that the Court apply Bankruptcy Rule 7023 to the Class Proof of Claim and, after establishment of an appropriate briefing schedule, grant class certification for purposes of the filing of the Class Proofs of Claim.

BASIS FOR RELIEF REQUESTED

I. MOTION FOR CLASS CERTIFICATION PURSUANT TO BANKRUPTCY RULE 7023

A. LEGAL STANDARD

19. The vast majority of courts, including the Sixth Circuit Court of Appeals, have concluded that class proofs of claim are permissible in bankruptcy proceedings, pursuant to Bankruptcy Rules 7023 and 9014. *See e.g. Reid v. White Motor Corp.*, 886 F.2d 1462, 1469 (6th Cir. 1989); *Gentry v. Siegel*, 668 F.3d 83, 90-91 (4th Cir. 2012); *In re American Reserve Corp.*, 840 F.2d 487, 493 (7th Cir. 1988); *In re Charter Co.*, 876 F.2d 886, 873 (11th Cir. 1989); *In re Chateaugay Corp.*, 104 B.R. 626, 632 (S.D.N.Y. 1989); *In re United Companies Fin. Corp.*, 276 B.R. 368, 371-372 (Bankr. D. Del. 2002); *In re Commonpoint Mortgage Co.*, 283 B.R. 469, 475-476 (Bankr. W.D. Mich. 2002). These courts have recognized that the class action device is wholly consistent with the fundamental goals and objectives of the bankruptcy process:

> The bankruptcy statute has the goal of facilitating creditor compensation. It would be incongruous for this bedrock policy to be thwarted by reading a procedural limitation into the Code. Bankruptcy also seeks to achieve equitable distribution of the estate. Persons holding small claims, who absent class procedures might not prosecute them, are no less creditors under the Code than someone with a large easily filed claim. Applying Rule 23 to filing procedures will bring all claims forward, as contemplated by the Bankruptcy Code.

In re Charter Co., 876 F.2d at 871.

20. Upon the timely filing of a motion to apply Bankruptcy Rule 7023, a court may exercise its discretion to authorize a class proof of claim where: (i) the benefits derived from the filing of a class claim are consistent with the goals of bankruptcy and / or superior to the typical claims procedure; and (ii) the class claim proponent has shown compliance with each of the requirements of Federal Rule of Civil Procedure ("Civil Rule") 23. *See e.g. Gentry v. Siegel*, 668

F.3d 83, 92-94 (4th Cir. 2012); *In re Motors Liquidation Co.*, 447 B.R. 150, 157 (Bankr. S.D.N.Y. 2011). The Lead Plaintiffs respectfully submit that both of these requirements are satisfied in this case. By way of this Motion, however, the Lead Plaintiffs merely request that the Court rule that the application of Bankruptcy Rules 9014 and 7023 is appropriate in this case and set a briefing schedule for the parties to further address the propriety of class certification under Civil Rule 23. *See e.g. Gentry v. Siegel*, 668 F.3d at 93 ("For the most part, Civil Rule 23 factors do not become an issue until the bankruptcy court determines that Rule 7023 applies by granting a Rule 9014 motion.").

B. AUTHORIZING THE LEAD PLAINTIFFS TO FILE THE CLASS PROOF OF CLAIM IS CONSISTENT WITH THE GOALS OF BANKRUPTCY AND WILL BE SUPERIOR TO THE TYPICAL BANKRUPTCY CLAIMS PROCEDURE

21. In the event that this Court elects not to grant the Lead Plaintiffs' request for stay relief, the Lead Plaintiffs respectfully submit that application of Rule 7023 to the Lead Plaintiffs' Class Proof of Claim is the sole remaining mechanism by which the Putative Class can seek redress from these Debtors. As stated by Judge Easterbrook in his forerunning *American Reserve* decision:

> The compensatory function is as important inside bankruptcy as outside. Under § 101(4)(A) there may be "claims" of uncertain value, and holders of contingent claims . . . may not recognize their entitlement to file unless some champion appears. The representative (presumably) has done substantial investigation to identify and shape the claim. Even though there is no fee to file claims in bankruptcy, the opportunity costs of the time need to investigate and decide whether to file may be substantial. . . . The combination of contingent claims (which many people may not identify as something they are entitled to pursue) and the effort needed to decide whether to pursue an identified claim means that for many small claims, it is class actions or nothing.

American Reserve Corp., 840 F.2d at 489 (emphasis added). It is with this policy background in mind that the Court must decide whether it will authorize the Lead Plaintiffs to file their Class Proofs of Claim. For all practical purposes, this Court's decision will determine whether any of the thousands of consumers who were misled by the Debtors will have any meaningful opportunity to present their claims and to participate in the Debtors' bankruptcy cases.

(a) Application of Rule 7023 is the Only Mechanism to Ensure that the Putative Class Receives Proper Notice of the Bar Date

22. Constitutional due process requires that notice of any claims bar date "be fundamentally fair and reasonably calculated to apprise interested parties." *In re ATD Corp.*, 278 B.R. 758, 763 (Bankr. N.D. Ohio 2002) (citing cases). In the case of "known" creditors of a debtor's estate, only actual notice of a bar date complies with due process of law. *See e.g. In re Drexel Burnham Lambert Group Inc.*, 151 B.R. 674, 680 (Bankr. S.D.N.Y. 1993). A creditor is "known" to a debtor if that creditor's identity is "reasonably ascertainable" after a diligent search of the debtor's own books and records. *See e.g. In re Ritchie Risk-Linked Strategies Trading (Ireland), Ltd.*, 471 B.R. 331, 339 (Bankr. S.D.N.Y. 2012) (citing cases). A number of courts have determined that claimants in a pre-petition class action can be "known" creditors of a debtor's bankruptcy estate, even if the class is not certified as of the petition date. *See e.g. In re Spring Ford Indus., Inc.*, 2003 WL 21785960 (Bankr. E.D. Pa. July 25, 2003) (uncertified class claimants were known creditors where: the debtor listed litigation in its statement of financial affairs, filed a notice of automatic stay in the litigation, and provided notices to class counsel); *In re DDI Corp.*, 304 B.R. 626, 629 (Bankr. S.D.N.Y. 2004) (citing *Spring Ford* with approval and stating that "if . . . the class action was commenced against the debtor prior to the petition date, the class may be a 'known creditor.'"). *See also In re Amdura Corp.*, 170 B.R. 445, 450-452 (D.

Col. 1994) (holding that if Rule 7023 is not applied, actual notice of the bar date must be provided to all members of the class); *In re Mortgage & Realty Trust*, 125 B.R. 575, 581 (Bankr. C.D. Cal. 1991).

23. In this case, the Debtors listed the Individual Lawsuits in their Statement of Financial Affairs [Docket No. 286, pg. 62-63]; filed a notice of automatic stay in the MDL Class Action [MDL Class Action, Docket No. 64]; provided notices to interim class counsel and individual counsel for certain of the Lead Plaintiffs [Docket No. 212], and sought this Court's approval of its employment of litigation counsel in the MDL Class Action [Docket No. 604]. Furthermore, on a pre-petition basis, the Debtors were required to compile, and to provide to the FTC, a searchable electronic file containing the name and contact information of each person who purchased the Oreck Products. [*See* Combined Motion, Exhibit A, art. V]. As such, there is no question that the Debtor's own books and records clearly identify each of the potential members of the Putative Class. Notwithstanding their knowledge of the MDL Class Action and the potential members of that class, the Debtor did not list the individual members of the Putative Class as creditors and did not provide them with actual notice of the Bar Date. At a bare minimum, the Debtor's decision to treat the Putative Class as a "class" when it was convenient for them to do so (i.e. in providing notice of relevant deadlines, including the Bar Date), supports the Lead Plaintiff's request to permit them to file their claims in the very same manner. It defies credulity for the Debtors to expect the members of the Putative Class to file individual proofs of claim prior to the Bar Date, when the Debtors failed to provide these same consumers with notice of their obligation to file any claim at all, let alone by a date certain. As such, the application of Rule 7023 will remedy the infirmities in the Debtors' prior notice of the Bar Date and will prevent the Debtors from having to serve all subsequent notices (including those related to any plan and

disclosure statement) on each of the approximately two hundred thousand members of the Putative Class.

(b) Application of Rule 7023 Promotes Equal Distribution and Ensures that All Valid Claims are Administered

24. Two of the primary goals of the Bankruptcy Code are to ensure creditor compensation and to promote equality of distribution. *See e.g. In re Charter Co.*, 876 F.2d 886, 871 (11th Cir. 1989); *In re American Reserve Corp.*, 840 F.2d 487, 489 (7th Cir. 1988). These goals can only be achieved, however, if procedures are put in place that give all of a debtor's claimants a meaningful opportunity to submit and present their claims. Where claimants are unaware of the existence or validity of their claims, do not have the means (or economic justification) to investigate or argue such claims, and / or there are multiple claimants with similar claims in 'relatively' small amounts, the application of Rule 7023 is the best (and absent stay relief) the only procedure which guarantees the achievement of these critical bankruptcy goals. *See American Reserve*, 840 F.2d at 490; *In re Kaiser Group Int'l, Inc.*, 278 B.R. 58, 67 (Bankr. D. Del. 2002);; *In re Commonpoint Mortgage Co.*, 283 B.R. 469, 480-481 (Bankr. W.D. Mich. 2002); *In re Zenith Labs, Inc.*, 104 B.R. 659, 662-663 (D.N.J. 1989); *In re BGI, Inc.*, 465 B.R. 365, 377 (Bankr. S.D.N.Y. 2012). This fact has been recognized by the numerous courts, cited above, who have approved the application of Rule 7023 to class proofs of claim, and was aptly summarized by Judge Walrath in her decision in *United Companies*:

> Here, the Claimants allege that there is no better method to adjudicate the claims aside from a class action. We agree. First, it is probable that most members of the proposed class are unaware of their rights under West Virginia law; thus it is unlikely that individuals will file separate claims to protect their rights. Second, the amount of damages to be recovered by each class member is relatively small in light of the likely recovery for creditors under the

> confirmed bankruptcy plan, thereby rendering prosecution of an individual claim cost-prohibitive.

United Companies, 276 B.R. at 376.

25. The above rationale is directly applicable to the facts of this case. The majority of the Putative Class members are likely to be unaware of their claim against the Debtors. The Class Complaint alleges that, contrary to the Debtors' representations, the Oreck Products do not, in fact, kills certain germs and viruses that are invisible to the naked eye. Thus, unless these consumers are specifically informed of this deficiency (or own an electron microscope), they will necessarily be unaware that they have a claim against the Debtors.[5] Each individual Claim, although certainly significant from the perspective of the average consumer (approximately $100 to $400), is not large in the context of this case and, in and of itself, would not justify the expense of employing separate counsel to prepare and litigate an individual proof of claim. The Claims of the Putative Class, therefore, are precisely the type of claims that Rule 7023 was designed to address.

(c) Application of Rule 7023 Will Not Interfere With the Bankruptcy Case and Will Promote Efficiency

26. The typical rejoinder of a debtor faced with a motion for the application of Rule 7023 is to claim that the class action process will delay or otherwise interfere with the administration of its bankruptcy case. While this may be true in some instances, it is not the case when, as in this matter, the class proof of claim and Rule 7023 motion are filed prior to the claims bar date, after liquidation of the debtor's assets, and in advance of confirmation or distributions under the debtor's plan. *See e.g. Woodward & Lothrop Holdings, Inc.*, 205 B.R. 365, 370

[5] Even if a Putative Class member was aware of the existence of his or her claim, he or she did not receive actual notice of the Bar Date and, therefore, cannot be expected to file a timely claim absent use of the class action device.

(Bankr. S.D.N.Y. 1997) (motion to certify not filed until plan confirmed and distributions made); *In re Ephedra Pds. Liab. Litig.*, 329 B.R. 1, 4 (S.D.N.Y. 2005) (motion to certify not filed until after bar date and plan confirmation). As noted by Judge Gregg in his *Commonpoint* decision, any administrative inconvenience resulting from class procedures must be balanced against the "interests of justice" and the policies of the Bankruptcy Code. *Commonpoint Mortgage*, 283 B.R. at 480-481. The fact that it is simply easier not to deal with the claims of the Putative Class is not a legitimate basis to deprive these innocent consumers of the right to assert their claims like all other creditors and, if proven, to recover their fair share from the Debtors' bankruptcy estates. *See In re Chateaugay Corp.*, 104 B.R. 626, 632 (S.D.N.Y. 1989) ("any potential marginal increase in delay or difficulty of valuation of claims would be justified in order to protect the rights of small claimants . . . to be represented by the filing of a class proof of claim.").

27. In fact, as noted in paragraph 23 above, the treatment of the Putative Class as a "class" for claims purposes will serve to streamline both the Debtor's noticing obligations and its claims objection process. *See United Companies*, 276 B.R. at 376 (comparing a class proof of claim to an omnibus claims objection and stating that they both promote expediency). Additionally, section 502 of the Bankruptcy Code is designed to deal with precisely the type of unliquidated claims asserted by the Lead Plaintiffs. *See e.g. Chateaugay*, 104 B.R. at 633 ("Given that § 502(c)(1) specifically provides for the expeditious estimation of unliquidated contingent claims such as the class claims made in the case at hand and the bankruptcy courts are experienced in this procedure, there is no reason to think that permitting the filing of class claims will cause special delay or uncertainty in settling the debtor's estate."). The Debtors in this case have not filed a plan, have no ongoing operations, and still need to address the critical claims issue of substantive consolidation [Docket No. 641]. If the application of Rule 7023 is deemed "unduly

disruptive" under the facts of this particular case, then there is simply no bankruptcy case in which it could ever be appropriate.

28. The Lead Plaintiffs respectfully submit, for the reasons set forth above, that the application of Rule 7023 to their Class Proofs of Claim promotes bankruptcy policies, needs, and concerns and is the sole method by which the Putative Class can obtain relief from these Debtors. This is truly a case in which, "[i]f the class proof of claim process is not utilized, justice may be denied." *Commonpoint Mortgage*, 283 B.R. at 480.

C. THE LEAD PLAINTIFFS CAN, OR WILL BE ABLE TO, SATISFY THE ELEMENTS OF CIVIL RULE 23.

29. The Lead Plaintiffs request that the Court set a briefing schedule to permit the parties to fully address application of the Civil Rule 23 factors and to make all necessary evidentiary showings. The analysis set forth below is for illustrative purposes only, but clearly establishes that the Lead Plaintiffs can make a *prima facie* showing of their ability to obtain class certification. *See In re United Companies Fin. Corp.*, 276 B.R. 368, 372 (Bankr. D. Del. 2002) (holding that claimants need not prove satisfaction of the Rule 23 elements in order for the court to apply Rule 7023, but that they "must provide more than bare allegations."). To obtain class certification, the Lead Plaintiffs must satisfy the four requirements of Civil Rule 23(a) and one of the alternative requirements of Civil Rule 23(b). *See e.g. In re Whirlpool Corp. Front-Loading Washer Products Liab. Litigation*, 722 F.3d 838, 850 (6th Cir.2013). The Lead Plaintiffs respectfully submit that, upon completion the requested briefing schedule, they will satisfy each of the elements necessary for class certification.

(a) Civil Rule 23(a)(1) – Numerosity

30. The first requirement for maintaining a class action is that the class be "so numerous that joinder of all members would be "impracticable." Fed. R. Civ. P. 23(a)(1).

"[T]here is no strict numerical test, [but] 'substantial' numbers usually satisfy the numerosity requirement." *Daffin v. Ford Motor Co.,* 458 F.3d 549, 552 (6th Cir.2006). *See also McKenzie v. Fed. Exp. Corp.*, 275 F.R.D. 290, 296 (C.D. Cal. 2011)(citations omitted) (noting that a class comprised of thirty-nine members may satisfy the numerosity requirement). Sales volume, in and of itself, may also support a finding of numerosity. *See e.g. Delarosa v. Boiron, Inc.*, 275 F.R.D. 582, 588 (C.D. Cal. 2011) (numerosity found where class consisted of all Coldcalm purchasers in California).

31. The Putative Class in this case is made up of all residents of the United States who purchased the Oreck Products within the relevant statute of limitations. Based upon preliminary sales data, it is estimated that approximately two hundred and three thousand consumers purchased the Oreck Products during this period. This is certainly a "substantial" figure and the joinder of these 203,000 consumers would be wholly impracticable.

(b) Civil Rule 23(a)(2) - Commonality

32. The commonality requirement of Civil Rule 23 requires a plaintiff to identify questions of law and fact that are common to the class showing that "the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). In other words, the class members' claims:

> must depend on a common contention . . . [which] must be of such a nature that it is capable of classwide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Id. Commonality exists as long as class members have at least one issue in common. *See City of Goodlettsville v. Priceline.com, Inc.*, 267 F.R.D. 523, 529 (M.D.Tenn. 2010); *In re Whirlpool Corp.*, 722 F.3d 838 (6th Cir.2013); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012) (there need be only one common question to certify a class).

33. The District Court, in its ruling on consolidation, has already determined that "the gravamen of each action is that Oreck misled consumers into purchasing products that did not perform as advertised" and that, therefore, these actions "involve common questions of law and fact." [MDL Class Action, Docket No. 33, pg. 5-6]. As recognized by Judge Snyder, the one question that must be answered as to all of the Putative Class members' claims is whether the Defendants' advertising of the Oreck Products was false and misleading.

34. More specifically, the Lead Plaintiffs have alleged that the following advertising claims made by the Defendants are false:

- The Vacuums substantially reduces the risk of or prevents the flu;
- The Vacuums substantially reduces the risk of or prevents other illnesses or ailments caused by bacteria, viruses, molds, and allergens, such as the common cold, diarrhea, upset stomachs, asthma, and allergy symptoms;
- The Vacuums will eliminate all or virtually all common germs, viruses and allergens found on the floors in users' homes;
- The Vacuums' UV-C light is effective against germs, bacteria, dust mites, mold and viruses embedded in carpets;
- The Purifiers substantially reduce the risk of or prevent the flu;
- The Purifiers substantially reduce the risk of or prevent other illnesses or ailments caused by bacteria, viruses, molds, and allergens, such as the common cold, asthma, and allergy symptoms; and
- The Purifiers will eliminate all or virtually all airborne particles, including bacteria and viruses, from a typical household room under normal living conditions.

These common questions of law and fact are capable of class-wide resolution and easily satisfy the "commonality" requirement of Civil Rule 23(a)(2).

(c) Civil Rule 23(a)(3) - Typicality

35. Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Together with Rule 23(a)(4)'s adequacy requirement, the typicality requirement focuses on the characteristics of the proposed class representative(s). *See* Newberg, Herbert B., NEWBERG ON CLASS ACTIONS (3rd Ed.) § 3:13 (1992). "Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Id.* A class representative's claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Systems, Inc.*, 75 F.3d 1069, 1082 (6th Cir.1996). A representative's claim may be considered typical, despite the fact that evidence relevant to his or her claim varies from other class members, some class members would be subject to different defenses, and the members may have suffered varying levels of injury. *See e.g. Winnett v. Caterpillar, Inc.*, 2007 WL 2044098, at *7-8 (M.D. Tenn., July 12, 2007) (citing cases).

36. In this case, the Lead Plaintiffs' claims are typical of those of the Putative Class because each of the claims against the Defendants is based upon misrepresentations made by the Defendants in the context of its extensive nationwide advertising campaign for the Oreck Products. The Defendants' conduct was not unique or specifically targeted to the Lead Plaintiffs, but, as part of a general marketing plan, was experienced in substantially the same manner by the Lead Plaintiffs and the Putative Class. [*See* Combined Motion, Exhibit B, ¶¶ 29-58 and exhibits referenced therein]. The injury suffered by all members of the Putative Class was a direct result of the misrepresentations contained in Defendants' wide-spread advertising of the Oreck Products

and was not dependent upon any individual experiences of the Putative Class members with the products themselves. The Lead Plaintiffs' claims arise "from the same . . . course of conduct that g[ave] rise to the claims of other class members," and, therefore, the "typicality" requirement is satisfied in this case.

(d) Civil Rule 23(a)(4) – Adequacy of Representation

37. Civil Rule 23(a)(4) requires that the court determine whether "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement calls for a two pronged inquiry: "(1) the representatives must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter v. General Motors Corp.,* 532 F.2d 511, 525 (6th Cir.1976). Civil Rule 23(a)(4) tests "the experience and ability of counsel for plaintiffs and whether there is any antagonism between the interests of the plaintiffs and other members of the class they seek to represent." *Swigart v. Fifth Third Bank*, 288 F.R.D. 177, 185-86 (S.D.Ohio 2012) (*quoting Cross v. Nat'l Trust Life Ins. Co.,* 553 F.2d 1026, 1031 (6th Cir.1977)). To evaluate this requirement, courts "review the adequacy of class representation to determine whether class counsel are qualified, experienced and generally able to conduct the litigation, and to consider whether the class members have interests that are not antagonistic to one another." *Arlington Video Productions, Inc. v. Fifth Third Bancorp*, 515 Fed.Appx. 426, 442-43 (6th Cir.2013) (quoting *Stout v. J.D. Byrider,* 228 F.3d 709, 717 (6th Cir.2000)).

38. As recognized by Judge Snyder in her consolidation order, although the Lead Plaintiffs purchased two categories of products from the Debtor Defendants, each of their claims is substantially similar, and will not result in any disqualifying conflict, because "they uniformly involve alleged misrepresentations Oreck made in advertising that the Halo vacuum cleaners and

air purifiers could kill certain bacteria and viruses." [MDL Class Action, Docket No. 33, pg. 5-6]. As set forth in the Class Action Complaint, and as will be further proven through declarations of the Lead Plaintiffs, each of the Lead Plaintiffs purchased the Oreck Products after viewing the Defendant's advertising and relied upon the Defendants' false representations regarding the germ and virus killing capabilities of the Oreck Products. [Combined Motion, Exhibit B, ¶¶ 60-74]. As such, the Lead Plaintiffs share common claims with the members of the Putative Class, and the members of their respective state-based subclasses, and will serve as adequate representatives of these classes.

39. Lead Plaintiffs' counsel have and will continue to, competently and vigorously advance the Putative Class's Claims. Lead Plaintiffs have retained counsel that are experienced in this type of litigation and well-qualified to represent the Putative Class. Indeed, the Central District of California has already determined that Lead Plaintiffs' counsel was adequate and qualified to act on behalf of the Putative Class in the MDL Class Action [MDL Class Action, Docket No. 33, pg. 9]. The Central District appointed Behram V. Parekh as Lead Interim Class Counsel and appointed the following attorneys to serve on the Plaintiffs' Executive Committee in the MDL Class Action: Ben Bingham of Bingham & Lea, P.C., representing the *Ruscitti* case; Roger Mandel of Lackey Hershman, LLP, representing the *Chenier* case; Frank Piscitelli, Jr. of the Piscitelli Law Firm representing the *Paragin* case; and Antonio Vozzolo of Faruqi & Faruqi LLP representing the *Stiepleman* case.

40. Given Lead Plaintiffs' counsel's experience, zeal in pursing this matter, and competence to date, the adequacy of Lead Plaintiffs' counsel cannot reasonably be questioned Furthermore, Lead Plaintiffs' counsel remain committed to representing the Putative Class in this

matter, as indicated by their employment of separate bankruptcy counsel to file the Class Proofs of Claim and to seek the relief set forth in this Motion.

41. Lead Plaintiffs' counsel have no conflicts of interest with the members of the classes they seek to represent and will adequately protect the interests of the Putative Class. The Lead Plaintiffs and the other class members have a common interest in establishing liability pursuant to each of the claims brought against the Defendants based upon the same misrepresentations and other standardized conduct by the Defendants. By pursuing this litigation and participating in the Debtors' bankruptcy cases on behalf of all similarly situated parties, the Lead Plaintiffs advance the common interests of the Putative Class. As such, the adequacy requirement is clearly met in this case.

(e) Civil Rule 23(b)(3) - Predominance / Superiority

42. Rule 23(b)(3), requires a court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members" and that the class action is "superior to other available methods" to adjudicate the controversy fairly and efficiently. *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litigation*, 722 F.3d 838 (6th Cir.2013).

43. As noted herein, and as previously recognized by the District Court, there are numerous questions of fact and law common to the Putative Class that predominate over any questions affecting only individual members. These common questions include:

- Whether Oreck expressly warranted in writing that the Oreck Products could kill up to 99.9% of potentially illness-causing bacteria, mold and viruses;
- Whether Oreck breached express written warranties that the Oreck Products could kill potentially illness-causing bacteria, mold and viruses;

- Whether Oreck breached the implied warranty of merchantability for a particular purpose and/or for its ordinary purpose;
- Whether Oreck's breaches of warranties damaged Lead Plaintiffs and the Putative Class; and
- The appropriate measure of damages to be received by Lead Plaintiffs and the Putative Class.

In addition, as set forth in detail in the Class Action Complaint, common questions of law and fact predominate in each of the state law claims asserted on behalf of the state-based subclasses. [Combined Motion, Exhibit B, ¶¶ 77 - 92]

44. Civil Rule 23(b)(3) further mandates that a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Use of the class method is frequently superior where class members are not likely to file individual actions because the potential recovery is far less than the cost of litigation. *See Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S.Ct. 1184, 1202, 185 L.Ed.2d 308 (2013); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 2246, 138 L.Ed.2d 689 (1997) (finding that in drafting Rule 23(b)(3), "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all' "); *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir. 2004) (noting that "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits" because of litigation costs).

45. In this case, the average claim for a member of the Putative Class is approximately $100 to $400. Without certifying a class, individual class members are not likely to make or litigate a claim because the cost of the litigation would necessarily exceed the potential recovery. It is simply not realistic to assume that this group of claimants will make individual claims and, as

such, a class action is both the superior and only method available for these claimants to seek redress on account of their injuries.

CONCLUSION

46. Although this Motion involves complicated legal and procedural notions, the critical issue before the Court is exceptionally simple: whether the thousands of consumers who were misled by the Debtors will have a meaningful opportunity to present their claims and, once proven, to recover their pro-rata share from the Debtors' estates. The relief sought in this Motion is the only way to ensure that these claimants are adequately represented in this case and to prevent the bankruptcy process from stripping these claimants of the very rights that the bankruptcy system was designed to protect.

WHEREFORE, the Lead Plaintiffs respectfully request that the Court enter an order applying Bankruptcy Rule 7023 to the Class Proofs of Claim and establishing a briefing schedule related to class certification pursuant to Civil Rule 23.

Respectfully submitted,

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COUNSEL FOR THE LEAD PLAINTIFFS AND THE PUTATIVE CLASS

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 2013, I electronically filed the foregoing Motion with the clerk of the court by using the CM/ECF system. I further certify that, on the 10th day of October, 2013, I mailed the foregoing document and the notice of electronic filing by first-class, postage prepaid U.S. mail and electronic mail to the following non-CM/ECF participants:

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60550624.3

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In re:	)	
	)	Chapter 11
ORECK CORPORATION, et al	)	Case No. 13-04006
	)	Judge Lundin
565 Marriott Dr., Suite 300	)	
Nashville, TN 37214	)	(Jointly Administered)
Debtors.	)	

ORDER GRANTING MOTION OF THE LEAD PLAINTIFFS AND PUTATIVE CLASS FOR CLASS CERTIFICATION PURSUANT TO BANKRUPTCY RULE 7023

Upon consideration of the *Motion of the Lead Plaintiffs and Putative Class for Class Certification Pursuant to Bankruptcy Rule 7023* (the "Motion"),[1] the Court having jurisdiction over this matter; and after having given due deliberation upon the Motion and all of the proceedings had before the Court in connection with the Motion, it is hereby

ORDERED that the Motion is **GRANTED**. It is further

ORDERED that the Court shall approve the application of Bankruptcy Rule 7023 to the Class Proof of Claims. It is further

ORDERED that, by separate order, the Court shall set a briefing and hearing schedule for the parties to address class certification pursuant to Civil Rule 23 as made applicable by Bankruptcy Rule 7023.

[1] Capitalized terms used, but not defined herein, shall have the meaning given to them in the Motion.

This Order Was Signed And Entered Electronically As Indicated At The Top Of The First Page

APPROVED FOR ENTRY:

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