UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

IN RE TURKEY ANTITRUST LITIGATION	Civil Action No. 19-cv-08318
This Document Relates To: *Direct Purchaser Plaintiffs and Direct Action Plaintiffs*	Honorable Sunil R. Harjani Honorable Keri L. Holleb Hotaling **ORAL ARGUMENT REQUESTED**

DIRECT ACTION PLAINTIFFS CARINA VENTURES LLC AND AMORY INVESTMENT LLC'S OPPOSITION TO DIRECT PURCHASER PLAINTIFFS' MOTION FOR A COMMON BENEFIT SET-ASIDE ORDER

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INTRODUCTION

Direct Action Plaintiffs ("DAPs") Amory Investments LLC ("Amory") and Carina Ventures LLC ("Carina") respectfully request that the Court deny Direct Purchaser Plaintiffs' ("DPPs") Motion for a Common Benefit Set-Aside Order. *See Turkey*, ECF 1138 ("Mem.").[1] A set-aside order is appropriate only where the Court charges class (or MDL) counsel with the responsibility for litigating on behalf of others. Those who benefit from that court-ordered relationship fairly can be called upon to set aside funds to pay for the work done on their behalf.

That is not this case. DPP counsel lead only the class. The Court never charged class counsel with litigating on behalf of DAPs that opted out of the DPP class. Consequently, DPP counsel have pursued their case exclusively for class goals – including by making litigation choices with the potential to limit DAP damages by many millions of dollars. Meanwhile, for years, Carina and Amory have borne independent responsibility for their cases. They are now litigating fact and expert discovery on their own and intend to request separate briefing for summary judgment and *Daubert* motions. Carina, moreover, vigorously opposed transfer to this District and consolidation with this case because it never wanted to litigate alongside the DPP class. The Court should not order a set aside for the supposed benefits of representation that Carina never wanted.

Carina and Amory had good reasons to separate themselves from DPPs and their counsel. These are the same lawyers that led their classes to failure in Track 1 of the *Broilers* case, with

[1] Citations to "*Turkey*" docket entries refer to the docket in *In re Turkey Antitrust Litigation*, No. 1:19-cv-08318 (N.D. Ill.). Citations to "*Carina*" docket entries refer to the docket in Carina's standalone case prior to consolidation. *See Carina Ventures LLC v. Agri Stats, Inc.*, No. 1:23-cv-16948 (N.D. Ill.). Citations to "*Amory*" docket entries refer to the docket in Amory's standalone case prior to consolidation. *See Amory Investments LLC v. Agri Stats, Inc.*, No. 1:21-cv-06600 (N.D. Ill.). Citations to "*Broilers*" docket entries refer to the docket in *In re Broiler Chicken Antitrust Litigation*, No. 1:16-cv-08637 (N.D. Ill.). Citations to "*Pork*" docket entries refer to *In re Pork Antitrust Litigation*, No. 0:18-cv-01776 (D. Minn.). Citations to "Goodnow Ex." refer to exhibits attached to the Declaration of Christopher C. Goodnow in Support of Carina and Amory's Opposition to Direct Purchaser Plaintiffs' Motion for a Common Benefit Set-Aside Order.

most DAPs now litigating on their own in Track 2. These are also the same counsel who went out of their way in the *Pork* MDL to try to prohibit the DAPs from litigating their claims in the way they see fit – going so far as to take the astonishing step of moving to strike DAPs' brief in opposition to defendants' motions for summary judgment. Predictably, that motion was denied. Far from acting to the common benefit so as to merit a set aside, DPP counsel repeatedly have impeded DAPs' litigation efforts, jealously guarding their own prerogatives and financial interests.

It is precisely because Carina and Amory were unwilling to put their fates in the hands of these unreliable counsel that they opted out of the *Turkey* class in the first place. It would be utterly perverse if DPP counsel were rewarded for their hostility with a share of the value of the claims that they have done nothing to try to advance – and indeed have sought to impede.

BACKGROUND

I. Carina and Amory Are Litigating Their Own Claims

For years, Amory and Carina have litigated separately from the DPPs. Amory and Carina are assignees of claims from Maines Paper & Food Service, Inc. and Sysco Corporation.[2] Amory and Carina allege that Defendants violated Section 1 of the Sherman Act by conspiring to fix prices and exchange competitively sensitive information through Agri Stats and its subsidiary. Amory filed its direct-action complaint more than three years ago in 2021. *See Amory*, ECF 1.

Sysco likewise opted out of the DPP settlement class more than three years ago, when DPPs settled with Tyson in February 2022. *See Turkey*, ECF 406. Carina later filed its direct action as Sysco's assignee in the Southern District of Texas in July 2023. *See Carina*, ECF 1. Carina's complaint differed from that of the DPPs in several ways that now are the subject of

[2] Carina is Amory's wholly owned subsidiary. Both entities, in turn, are subsidiaries of Burford Capital LLC. Carina and Amory are represented by the same counsel and have retained the same expert team. *See Amory*, ECF 1 at 14 (explaining Amory acquired Maines's claims); *Carina*, ECF 1 at 9 (Carina's complaint explaining it acquired the claims by assignment).

separate discovery – including different conspiracy periods, different definitions of turkey, and different Defendants. *See Carina*, ECF 191 at 1-3, ECF 205. Further, unlike the DPPs, Carina alleges one Sherman Act violation that can be analyzed under either a *per se* or rule-of-reason legal standard. *See Carina*, ECF 112 (Am. Compl.) at § VI. DPPs, by contrast, plead two separate antitrust claims: a "rule-of-reason" information-sharing claim and a "*per se*" output-suppression claim. *Turkey*, ECF 713 at 221, 223. In DPPs' own words, there are "key differences" – even "fundamental conflicts" – "between DAPs' [and] DPPs' . . . claims." ECF 1144 at 11-12.

In the eighteen months since Carina filed its direct action, Carina has made every effort to litigate separately from the DPPs. Carina opposed transfer to this District because it sought to "pursue its rights apart from the Illinois direct purchaser plaintiffs." *Carina*, ECF 103 at 8. Carina later opposed consolidation with *Turkey*, again emphasizing its desire to "pursue its claim with counsel and strategy of its choosing" and avoid being "bound by discovery decisions that the *Turkey* plaintiffs made without its participation." *Carina*, ECF 191 at 1, 8-9. The Court recognized these concerns and held that "Carina [would] be given its opportunity to conduct [fact] discovery and will not be forced into other Plaintiffs' discovery decisions." *Carina*, ECF 205.

In the months since, Carina and Amory have continued to litigate these cases separately from the DPPs. Carina is pursuing its own fact discovery during a court-ordered fact discovery period. *See*, *e.g.*, *Turkey*, ECF 1040 at 3-6, ECF 1092 at 2-3, ECF 1109 (setting schedule for Carina's separate discovery). Meanwhile, Carina and Amory are preparing expert reports and intend to request separate briefing on summary judgment and *Daubert* motions. DPPs recently rejected Carina's and Amory's proposals to work together constructively during expert discovery and subsequent briefing – dismissing Carina and Amory as "relatively small opt out[s]" not entitled to "equal status on briefing or depositions." Goodnow Ex. 1 at 1.

II. DPPs Make Repeated Failures and Purposefully Undermine Carina and Amory

Carina and Amory opted out of the DPP class for a reason: class counsel have made repeated blunders across proteins cases that substantially have eroded the value of DAPs' claims.

When DPP counsel (led by the Lockridge firm) litigated *Broilers*, the court dismissed seven defendants at summary judgment, including Agri Stats. *See Broilers*, ECF 6641. Thereafter, DPPs retreated and settled for "mutual waivers of costs and attorneys' fees" – *i.e.*, for no money and an agreement not to pay *defendants'* fees. *Broilers*, ECF 7172 at 4. EUCP counsel (led by the Hagens firm) likewise settled with four defendants on identical terms, *see Broilers*, ECF 7495 at 1, and with Sanderson Farms for a token amount of $750,000, *see id*. DPPs took Sanderson to trial and did yet worse. They lost. *See Broilers*, ECF 7014, ECF 7015. The *Broilers* court, moreover, lamented at trial that DPP counsel presented the jury with several "exhibits now that were never brought to [the court's] attention during the summary judgment briefing" – many of which incriminated defendants the court previously had dismissed. ECF 7382 at 1081-82. The court chastised DPPs for their litigation mismanagement, noting it had accorded them "every opportunity" to "identify further relevant documents" to keep those defendants in the case. *Id.*

In *Pork*, several DAPs – including Sysco and Amory – filed their own opposition to summary judgment, as permitted by the court's scheduling order. *See Pork*, ECF 2205 at 6-7. DAPs filed their own brief because there, as here, they disagree with DPPs' assertion of separate *per se* and "rule of reason" claims. Those are simply different legal standards a jury might be instructed to use to evaluate a single Sherman Act §1 conspiracy. *See Pork*, ECF 2490 at 1. But DPPs and the EUCPs were not content to let the DAPs file their own brief regarding the proper legal standard. Remarkably, they moved to strike DAPs' opposition brief. *Pork*, ECF 2581. Class counsel took the inconceivable position that they were entitled to silence the DAPs and thereby assist the defendants. *See id*. The court promptly denied their request. *See Pork*, ECF 2596.

In *Turkey*, DPPs have remained ineffective. Three years ago, they settled with Tyson for a nuisance value of roughly $4 million. *See Turkey*, ECF 262-1 at 7. DPPs' narrow definition of "turkey," which excludes all cooked turkey (*e.g.*, deli meat), eliminated virtually all of Tyson's turkey products. *See Turkey*, ECF 770-3 ("Stiroh Rep."), App. 1, ¶ 157. More recently, DPPs settled with Cargill – a Defendant that represents roughly a third of class purchases – for only 0.66% of class purchase volume. *See Turkey*, ECF 1100-1. DPPs also have settled with Cooper Farms and Farbest for as-yet undisclosed amounts. *See Turkey*, ECF 1147, ECF 1149.

III. DPPs Demand a Set Aside

After the Court consolidated Carina's case with *Turkey* and ordered Carina "to avoid redundant discovery," *Carina*, ECF 205, Carina sought access to filings on the *Turkey* docket. Expecting that DPPs would work cooperatively with DAPs in good faith, Carina asked DPPs to send class-certification and related briefs that were filed under seal before Carina was consolidated in the case.[3] After ignoring these requests for several days, DPPs demanded that Carina agree to a 5% set aside before providing these filings. *See* Mem., Ex. A at 2. Because this proposal was unserious, Carina requested (and received) the docket filings from Defendants instead.

Carina did not hear from DPPs for four months. In January, after the Court granted class certification, DPPs again sent Carina a draft motion for a 5% set aside and asked Carina to meet and confer. *See* Goodnow Ex. 2 at 1. When the parties conferred days later, DPPs informed Carina that they had doubled their demand and intended to file a motion requesting a 10% set aside. *See* Mem., Ex. B at 1. DPPs offered no reason for doubling the set aside percentage.

[3] Carina also requested a list of hot documents, which DPPs never provided, and which Carina never has received. DPPs admit (at 9) that they never shared this material with Carina. They also concede (at 9) that they identified the relevant documents in their public ECF filings.

During the meet and confer, counsel for Carina and Amory asked DPPs to identify the "common benefit work" they performed. The class lawyers asserted that "common benefit work" includes "everything [DAPs] have access to," whether from the docket or otherwise. Mem., Ex. B at 3. This included briefs DPPs filed resisting production of pre-complaint investigative materials. *See id.* Carina never has asked for nor received that pre-complaint work product. DPPs also demanded a set aside for their motion-to-dismiss briefing and the Court's myriad orders in the case. *See id.* Finally, DPPs insisted that Carina and Amory escrow funds to pay for DPPs' *future* work in connection with their merits expert reports and summary judgment briefing. *See id.* at 3.

Carina and Amory explained that a set aside was not warranted. *See* Mem., Ex. B at 1. Nonetheless, to avoid a dispute, Carina and Amory proposed a 7.5% set aside on up to $15.18 million, which represents the maximum recovery DPPs could have achieved for Carina and Amory had they remained in the class and obtained recoveries on the same terms as the Cargill settlement. *See id*. Any recovery beyond that amount necessarily would result from Carina's and Amory's sole effort. Carina and Amory also requested that DPPs cooperate with DAPs during expert discovery and summary judgment briefing, given DPPs' conduct in *Pork*. *See* Mem., Ex. B at 2.

DPPs rejected Carina's and Amory's proposal and instead insisted that Carina and Amory not just set aside future settlement funds, but agree upfront to pay them to DPPs' counsel. *See* Goodnow Ex. 1 at 1 (insisting that "neither Carina, Amory, nor their counsel will object to a request by DPPs for the full amount of [a] set-aside"). When Carina and Amory said they would not accede to that patently unreasonable request, DPPs filed the instant motion.

ARGUMENT

I. DPP Counsel Have Not Acted on Behalf of All Plaintiffs to Their Common Benefit

Ordinarily, no party – including co-plaintiffs in multi-party litigation – may enlist others to pay for its lawyers. *E.g.*, *Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 467 (7th Cir.

2006). There is no general principle that a party (or its counsel) can seek contribution from another party on the theory that they did work that benefited the other. Such a principle has no basis in law and would spawn endless collateral litigation. Doubtless parties and their lawyers could make innumerable arguments as to how their work benefited others. Disputes over whether and to what extent such benefits should result in set asides would inundate the courts.

That is why set asides are limited to circumstances where a court formally "designate[s]" a set of lawyers "with responsibilities for actions beyond those in which they are retained." *In re Zetia (Ezetimibe) Antitrust Litig.*, 2022 WL 18108387, at *3 (E.D. Va. Nov. 8, 2022). The point is to compensate lawyers who "work on behalf of all plaintiffs involved in consolidated litigation." *Smiley v. Sincoff*, 958 F.2d 498, 501 (2d Cir. 1992). Thus, when a court appoints counsel to "prepar[e] and prosecut[e] an action[] on behalf of all plaintiffs," it may order a set aside to compensate lead counsel for common work performed "beyond their responsibilities to their own clients." *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 549 F.2d 1006, 1011 (5th Cir. 1977); *see also In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 653 (E.D. Pa. 2003) (set asides are "corollary to court appointment of lead and liaison counsel"); *In re Roundup Prods. Liab. Litig.*, 544 F. Supp. 3d 950, 962 (N.D. Cal. 2021) ("a district court can order additional compensation for lead counsel" "appoint[ed]" by the court). A court will not enter a set aside where a party has not "expressly or impliedly accepted" – or been ordered to accept – "the attorneyship" of other counsel. *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345, 351 (5th Cir. 1966); *see also Nolte v. Hudson Nav. Co.*, 47 F.2d 166, 168 (2d Cir. 1931) (same).

There is no basis for a forced subsidy here. DPP counsel never have been granted any authority (or shouldered any responsibility) to act on behalf of others. DPPs fail to identify (at 10-15) a single case where a court established a common benefit fund for lawyers who were not

appointed to leadership. To the contrary, the case law (including DPPs' cited cases) permits common benefit funds only if the court has designated lead counsel to act on behalf of all plaintiffs. *See*, *e.g.*, *Linerboard*, 292 F. Supp. 2d at 669 (permitting lead counsel to seek common benefit compensation only for work undertaken *after* formal appointment to leadership); *Zetia*, 2022 WL 18108387, at *7 (setting fund for "designated counsel") (citation omitted); *In re Lidoderm Antitrust Litig.*, 2017 WL 3478810, at *1 (N.D. Cal. Aug. 14, 2017) (court may order a common benefit fund "to compensate leadership counsel"); *In re Packaged Seafood Prods. Antitrust Litig.*, 2021 WL 5326517, at *2 (S.D. Cal. Nov. 16, 2021) (court may "compensate designated lead counsel"); *In re Generic Pharms. Pricing Antitrust Litig.*, 2019 WL 6044308, at *1 (E.D. Pa. Oct. 7, 2019) (similar). DPPs offer no colorable basis to depart from this settled rule.

The law permits common benefit funds only for designated lead counsel because court-mandated leadership matters. Appointed counsel have obligations to all plaintiffs – including to manage discovery to pursue all plaintiffs' interests. *See*, *e.g.*, *Air Crash*, 549 F.2d at 1011 ("appointed counsel had to completely disassociate themselves from any responsibilities to other clients"); Ann. Manual Complex Lit. § 10.22 (4th ed.) ("Counsel designated by the court [] assume . . . an obligation to act . . . in the interests of all parties"). Class lawyers have no such obligations and do not act on behalf of opt outs. *See In re Vitamins Antitrust Litig.*, 1999 WL 1335318, at *2 (D.D.C. Nov. 23, 1999) ("Class counsel's obligations do not extend to opt-out plaintiffs").[4] Given the requirement to pursue "common" issues, Fed. R. Civ. P. 23(a)(2), (b)(3), class discovery is also more limited than DAP discovery. For example, DPPs seek damages for a narrow set of

[4] The logic runs in the other direction, too. Opt-out plaintiffs ordinarily cannot seek common-benefit fees from class counsel. *See In re Worldcom, Inc. Sec. Litig.*, 2004 WL 2549682, at *2 (S.D.N.Y. Nov. 10, 2004) ("there is no reason to compensate plaintiffs that elect to [opt out] by requiring members of the class action to subsidize the administrative costs and extra expenses associated with pursuing Individual Actions") (citation omitted).

turkey purchases that excludes (among other things) deli meat. *See* Stiroh Rep., ¶ 7. DPPs presumably have narrowed their product definition because otherwise they could not demonstrate common impact. That litigation choice reduces DAPs' purchase volumes – and damages – by millions of dollars. *See Turkey*, Oct. 10, 2024 Tr. at 337:13-23 (excluded turkey sales are "fairly substantial").[5]

Carina and Amory opted out of the DPP class precisely because class lawyers make self-interested litigation choices that reduce the value of direct-action claims. That is true here and in many other cases – hence opt outs are common and DAPs regularly secure better settlements. *See Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 582 U.S. 497, 512 (2017) (opt-out plaintiffs "obtain outsized recoveries" compared to classes). DPPs are not entitled to a set aside from Carina and Amory when they singularly have pursued their own financial interest at the expense of DAPs.

II. DPP Counsel Have Not Performed Any Common-Benefit Work

As to be expected from class lawyers with no court-mandated responsibility for other plaintiffs, DPP counsel have failed to perform any common-benefit work chargeable to DAPs. DPPs propose a set aside to charge DAPs for (1) ECF dockets filings and this Court's decisions; (2) class certification expert reports; and (3) future expert work and summary judgment briefing. DPPs have no plausible basis to demand a multimillion-dollar escrow for these materials.

First, DPP counsel demand a set aside for "unredacted" pleadings, "class certification briefs, [and] *Daubert* briefs." Mem., Ex. A at 1 n.1. They also insist (at 4-5) that DAPs escrow funds to pay for the Court's motion-to-dismiss and other rulings. But Carina and Amory are parties entitled to filings on the docket – including court orders, legal briefs, and any filings identifying

[5] *See also* Stiroh Rep., App. 1 at ¶¶ 1, 23, 41, 64, 101, 116, 138, 157 (class turkey products made up roughly half of turkey sales for four Defendants – and much less for three other Defendants).

Bates-numbered documents. *See* Fed. R. Civ. P. 5(a)(1)(C)-(D) ("discovery paper[s]" and "written motion[s]" "must be served on every party"); 4B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1143 (3d ed. 2012) ("every party . . . is entitled to receive notice of each step taken in the action"). Carina and Amory are also entitled to obtain filings made under seal. *See* ECF 201 at 5 (permitting all parties to obtain "Confidential" and "Highly Confidential" information).[6] DPPs cannot hold these docket filings for ransom. It is "not [] appropriate to take money from anyone's recovery based on access to that information" "rightly placed on the docket." *Roundup*, 544 F. Supp. 3d at 972. Favorable court rulings likewise do not warrant a set aside. *See* 20 Am. Jur. 2d Costs § 65. DPP counsel lack "a legally protected interest" in this Court's docket for which they can demand payment from other plaintiffs. Restatement (Third) of Restitution & Unjust Enrichment § 2, cmt. b (Am. L. Inst. 2011); *see also* Ann. Manual Complex Lit. § 14.121 (4th ed.) ("[t]he common-fund exception . . . is grounded in . . . unjust enrichment").

Second, DPP counsel insist (at 6) that DAPs set aside funds to pay for DPPs' class certification expert reports because DAPs' experts "will piggy-back off of the work already done in the case." That is flatly incorrect. "[E]conometric report[s]" offered during "class certification hearing[s]" do not confer "any specific benefit" on DAPs. *Packaged Seafood*, 2021 WL 5326517, at *3. That is because class certification addresses common impact and other class-specific issues irrelevant to DAPs. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465-66 (2013);

[6] Sealing orders regularly permit counsel for all parties to view the sealed material. *See*, *e.g.*, Order, *Burks v. Soto*, No. 1:15-cv-00055 (N.D. Ill. Dec. 12, 2016), ECF 128 ("[T]he transcript from today will be placed under seal. Only the parties and Court staff shall have access."); Order, *Fed. Deposit Ins. Corp. v. Chi. Title Ins. Co.*, No. 1:12-cv-05198 (N.D. Ill. June 16, 2016), ECF 230 ("Only the parties, counsel, and Court staff shall have access to the sealed settlement agreement."); Order, *Nance v. Manheim Remarketing, Inc.*, No. 1:15-cv-10794 (N.D. Ill. Feb. 29, 2016), ECF 17 ("Only the parties, counsel for the parties, and Court staff shall have access to the [sealed] document.").

Fed R. Civ. P. 23(c)(1) advisory committee's note to 2003 amendment ("an evaluation of the probable outcome on the merits is not properly part of the certification decision"). Class certification "does not mean that any of these points have been proven [on the merits], of course," *Turkey*, ECF 1107 at 33, so DPPs are incorrect (at 13) that the Court has placed its "imprimatur" on their theory of the case. Carina and Amory still must prove their market definition, theory of liability, and damages – each of which is different from what DPPs have pursued. *See supra* p. 4. Carina and Amory *always* intended to prove these points without the DPPs, which is why they opted out years ago and committed to litigating their cases long before class certification.

Third, DPP counsel demand a set aside for their *forthcoming* work during expert discovery and summary judgment briefing. *See* Mem., Ex. B at 3. That request is absurd. The Court cannot impose such a set aside when DAPs are independently litigating expert discovery and summary judgment. *See Packaged Seafood*, 2021 WL 5326517, at *3 n.6 (denying set aside when DAPs were "retaining and defending their own expert" and "draft[ing] and argu[ing] key motions"). DAPs already must pay for their own case; they should not be ordered to foot the bill for DPPs' case, too. DPPs do not even expect that their expert and summary-judgment work will benefit DAPs. They contend that "the DAP cases have no bearing on resolution of the Class cases," and that the parties' "claims have fundamental conflicts." ECF 1144 at 7, 11. Class work in "fundamental conflict[]" with DAP work does not warrant a set aside.

III. Carina and Amory Are Litigating Their Own Cases

Even when lead counsel (which are not present here) perform common-benefit work (which has not occurred here), courts decline to impose a set aside where a party's counsel "continue[s] to be active" in the litigation. *Air Crash*, 549 F.2d at 1019; *see also* Federal Judicial Center, *Awarding Attorneys' Fees and Managing Fee Litigation* 80 (3d ed. 2015) ("[s]everal appellate courts have held that when [purported] beneficiaries of the common fund are represented

by counsel," they should " not be [made] to defray the plaintiff's legal costs"); 20 Am. Jur. 2d Costs § 64 ("that the other parties interested in a common fund were represented by their own counsel has been held to be a strong or fatal objection to the allowance of counsel fees"). That is this case: Carina and Amory have retained their own lawyers and experts, will vigorously contest summary judgment, and are preparing to try their cases. Carina also is pursuing substantial, court-ordered fact discovery. *See Turkey*, ECF 1109. Further, the Court has indicated it will require the DPPs and DAPs to try their cases together. *See* ECF 1148 at 1. Thus, by the Court's design, "the cases are moving forward as the result of the efforts of many different Plaintiff groups." *Generic Pharms.*, 2019 WL 6044308, at *1 (denying set aside). The Court should not permit DPPs to demand a financial windfall at DAPs' expense while DAPs continue to pursue their own cases.

DPP counsel's "free-rider" smear (at 10) is particularly inappropriate for Carina. Where a DAP "would rather forgo use of the class counsel's work," it "will have no obligation to pay class counsel." *Zetia*, 2022 WL 18108387, at *5. For years, Carina endeavored to separate itself from the DPPs. In July 2023, Carina filed its case in a different court and opposed transfer to avoid being "forced to conform its case to the contours of the class proceedings." *Carina*, ECF 103 at 12. After transfer to this District, Carina opposed consolidation because it desired to "pursue its claim with counsel and strategy of its choosing," and to avoid being "bound by discovery decisions that the *Turkey* plaintiffs made without its participation." *Carina*, ECF 191 at 1, 8-14. Now consolidated, however, Carina's discovery is largely limited by the DPP-negotiated record. *See Turkey*, ECF 1109, at 1. That Carina must use that record should not trigger a set aside. If that were so, the law would incentivize every plaintiff to insist on its own discovery, eviscerating efficiencies from consolidation.

Carina is basically where it did not want to be: litigating its case alongside the DPP class. Carina will work with DPPs in good faith, but it should not be made to pay for DPP work product it never wanted and repeatedly rejected. Doing so would contravene not only the common benefit doctrine, but also due process, which entitles Carina "to meaningful control over litigation strategy and goals, including choice of legal representative." *Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop.*, 2020 WL 5211035, at *9 (E.D. Pa. Sept. 1, 2020). The Court should not impose a multimillion-dollar set aside at the additional cost of a constitutional right.

IV. Common Benefit Funds are Improper for Class Action Lawyers in Antitrust Cases

Courts also decline to order a set aside where "the traditional mechanisms of class actions may appropriately compensate . . . class counsel" for common-benefit work. *Generic Pharms.*, 2019 WL 6044308, at *1; *see Packaged Seafood*, 2021 WL 5326517, at *3 (denying set aside because "[t]he traditional mechanisms for recovery of fees and costs by class counsel are readily available under Rule 23(h)"). In particular, class action lawyers in antitrust cases are not entitled to a set aside because the Clayton Act already permits class counsel to recover "the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a); *see Packaged Seafood*, 2021 WL 5326517, at *2 (denying set aside because "DPPs Class Counsel can recover attorneys' fees and costs under . . . the Clayton Act"); *Gottesman v. Gen. Motors Corp.*, 430 F. Supp. 1047, 1050 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 1290 (2d Cir. 1978) (denying common-benefit award because "statutory recovery is governed by Section 4 of the Clayton Act"). Contrary to DPPs' speculation (at 10), there is no risk that "high-quality legal work" from class lawyers will "be under-incentivized" if the Court declines to conscript Carina and Amory as unwilling class funders. *In re Gen. Motors LLC Ignition Switch Litig.*, 2019 WL 5865112, at *1 (S.D.N.Y. Nov. 8, 2019).

This case proves the point. DPPs purport (at 6) to have spent $4.5 million litigating *Turkey*. At present, they have settled with Tyson and Cargill for $37,125,000, *see* ECF 262-1, ECF 1100-

1, and Farbest and Cooper Farms for as-yet undisclosed sums, *see* ECF 1147, ECF 1149. If DPP counsel eventually are awarded 30% of settlements (after expenses) – consistent with their recoveries in other proteins cases, *see*, *e.g.*, *In re Broiler Chicken Antitrust Litig.*, 2024 WL 3292794, at *6 (N.D. Ill. July 3, 2024) – they already are likely to collect more than double their cost of suit. More settlements undoubtedly will follow. DPPs therefore incorrectly argue (at 11) that this case resembles *Zetia*, as the class lawyers there had not yet secured any settlements. *See Zetia*, 2022 WL 18108387, at *5. DPPs' present and future recoveries provide ample "incentiv[e]" for class counsel to litigate this case. *Gen. Motors LLC Ignition Switch Litig.*, 2019 WL 5865112, at *1. DPP counsel do not need DAPs to bankroll their litigation – nor do they deserve it.

V. The Vastly Disproportionate Amount of the Set-Aside Further Supports Denial

Finally, DPPs' proposed 10% set aside is obviously disproportionate to any reasonable calculation of DAPs' share of costs – whatever those costs may be. "[T]he normal mass tort set-aside range . . . is around 3% to 6%." *Zetia*, 2022 WL 18108387, at *7; *see also*, *e.g.*, *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 2006 WL 471782, at *2 (N.D. Cal. Feb. 28, 2006) (4% set aside); *In re Zyprexa Prods. Liab. Litig.*, 2007 WL 2340790, at *1 (E.D.N.Y. Aug. 17, 2007) (3% set aside). DPPs cite outliers (at 12-13), which are inapposite in all events because they involved designated lead counsel with responsibility to manage hundreds or even thousands of individual cases.[7] DPPs' other cited case, *Zetia*, ordered a 5% set aside in an MDL that was more procedurally developed than *Turkey*: merits expert discovery and "*Daubert* rulings [were] complete," plaintiffs had "obtained partial summary judgment on the relevant market," "Defendants' motion for summary judgment ha[d] been fully briefed and argued," and trial was

[7] Even a sample of DPPs' cited cases proves the point. *See In re Bard IVC Filters Prods. Liab. Litig.*, 603 F. Supp. 3d 822, 825 (D. Ariz. 2022) (8,000 cases); *Roundup*, 544 F. Supp. 3d at 953 ("a few thousand cases"); *In re NuvaRing Prods. Liab. Litig.*, 2014 WL 7271959, at *3 n.3 (E.D. Mo. Dec. 18, 2014) (over 3,600 plaintiffs).

"only five months" away. 2022 WL 18108387, at *6-7. *None* of these case milestones has occurred in this case. Carina and Amory will litigate these issues without any DPP work.

DPPs do not defend their 10% proposal. Instead, they contend (at 14 n.7) that "[d]etermining what constitutes fair and adequate compensation for DPP Counsel can be determined at a later date." But "[i]mposing too large a set-aside is not without consequence even if the actual amount of compensation is determined later." *Zetia*, 2022 WL 18108387, at *8. Depriving Carina and Amory of access to several million dollars imposes a very substantial financial burden. That is particularly true where, as here, a 10% set aside bears no rational relationship even to the most generous allocation of "common" costs. Assuming (incorrectly) that *all* $4.5 million of DPPs' purported *Turkey* work is "common," Carina and Amory could owe no more than 15% of that amount ($675,000) – *i.e.*, the share of costs corresponding to their share of class purchase volume. *See* Mem., Ex. B at 1-2; *cf. Zetia*, 2022 WL 18108387, at *7 (setting 5% set aside because opt-out plaintiffs "represent[ed] a small fraction of" entities in class and had a small "proportionate share of the potential damages in the case"). The Court should decline DPPs' invitation to impose an inflated set aside untethered to this case. No set aside is warranted.[8]

CONCLUSION

For the foregoing reasons, the Court should deny DPPs' request to establish a common benefit fund.

[8] If the Court concludes otherwise, it should order a set aside of no more than 7.5% on the first $15.18 million of Carina's and Amory's recoveries, which is what Carina and Amory would have recovered had they remained in the class and received settlements on the same terms as the Cargill settlement. *See* Mem., Ex. B at 1. If Carina and Amory can secure a better settlement or judgment, that is necessarily the result of Carina's and Amory's work and could not be attributed to the work of DPP counsel. Such a set aside – well over $1 million – still would far exceed any plausible calculation of Carina's and Amory's share of common costs. Additionally, any distributions from a common benefit fund should be calculated on a DAP-by-DAP basis because various DAPs will have litigated their cases to greater and lesser degrees.

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Respectfully submitted,

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