UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE TURKEY ANTITRUST LITIGATION	Civil Action No. 19-cv-08318
This Document Relates To: *Direct Purchaser Plaintiff Actions and Direct Action Plaintiff Actions*	Hon. Sunil R. Harjani Hon. Keri L. Holleb Hotaling

MEMORANDUM OF LAW IN SUPPORT OF DIRECT PURCHASER PLAINTIFFS' MOTION FOR A COMMON BENEFIT SET-ASIDE ORDER

For more than five years, Co-Lead Counsel for the Direct Purchaser Plaintiffs ("DPPs") have successfully litigated the Turkey litigation. DPPs and their counsel have invested over $4.5 million dollars and over 50,000 hours of time to investigate, launch, and lead a strong case with a successfully certified litigation class of direct purchasers of Turkey. Working on contingency, DPP Counsel assumed significant expense and risk of nonpayment. Certain direct purchasers of turkey then decided to file their own related complaints.[1] However, as discussed in more detail below, these Direct Action Plaintiffs ("DAPs") have contributed nothing to the success of this case, instead relying on DPP Counsel's valuable work product.[2] Despite expending little to no effort in

[1] The four existing direct action plaintiff complaints that would be subject to a set-aside order are Winn-Dixie Stores, Inc. & Bi-Lo Holdings, Inc. (filed Aug. 3, 2021, Case No. 1:21-cv-04131); Amory Investments LLC (filed Dec. 19, 2021, Case No. 1:21-cv-06600); Aramark Food and Support Services Group, Inc. (filed Jul. 21, 2023, Case No. 1:23-cv-4404); and Carina Ventures LLC (filed Dec. 20, 2023, Case No. 1:23-cv-16948). *See* Declaration of Brian D. Clark in Support of DPPs' Motion For a Common Benefit Set-Aside Order ("Clark Decl.") ¶¶ 5-6, 12-13.

[2] *See, e.g.*, DPP Counsel's Letter to DAP Counsel dated Sept. 30, 2023 at 1, Exhibit A to Clark Decl. ("You have obviously recognized the value of our work product in this case, as in the past week you have contacted at least 3 members of [the DPP Counsel] team requesting unredacted copies of our expert reports, class certification briefs, *Daubert* briefs, and hot documents lists.")

this litigation to date, all DAPs, including Carina Ventures LLC, have had full access to the complete discovery record in this case since July 31, 2024. *See* Hr'g. Tr. 7:19-23, Jan. 22, 2025. Given that fact discovery is closed, DAPs will now use the complete discovery record in this case, including all DPP counsel's work product on behalf of all direct purchasers of Turkey, to pursue their own direct-action claims. Thus, it is only fair, as well as consistent with the common benefit doctrine, that DAPs contribute to the expense of creating common benefit work product in such a significantly advanced litigation.

Therefore, DPPs respectfully request that this Court enter a set-aside order that sequesters 10% of the monetary value of any settlement or judgment obtained by any DAPs and provides DPP Counsel with a framework to seek fair and adequate compensation from the sequestered funds for the extensive work they have performed and the common benefit they created for DAPs and all direct purchasers of Turkey. In meet and confers regarding this motion, DAP counsel proposed a 7.5% set-aside with an overall cap on settlement recoveries to which the set-aside would apply, but also included conditions requiring DPP Counsel to compromise their duties to the DPP Class.[3] DPPs believe that issues relating to any caps on common benefit recoveries can be addressed in the second step of the set-aside process, that is, when parties apply to the Court for common benefit funds. The first step, as requested in this Motion, is to set-aside the funds so they are available later to for such an application.

[3] DPP Counsel met and conferred with counsel for Direct Action Plaintiffs Winn-Dixie, Bi-Lo Holdings, Aramark, and Amory about these issues on January 31, 2025. *See* Clark Decl. ¶ 17. DPP Counsel met and conferred with various counsel for Direct Action Plaintiff Carina Ventures and Amory about these issues on February 3, 4, 6, 7, 10, & 11, 2025. *Id.*, ¶¶ 18-19. DPP Counsel and counsel for the Direct Action Plaintiffs were unable to resolve the issues raised in this brief absent intervention by the Court. DPPs conferred with Defendants who stated they reserve the right to oppose the motion once they have had the opportunity to review it. *Id.*, ¶ 18.

I. BACKGROUND

A. DPP Counsel's initiation and leadership of this case.

DPP Counsel filed the first case in these consolidated proceedings on December 19, 2019. *See* ECF No. 1. DPP Counsel generated this case; there were no existing related civil or criminal governmental investigations or prosecutions. Instead, DPP Counsel brought this direct purchaser case after extensively investigating the turkey industry—retaining economists, interviewing industry participants who provided valuable information for the complaint, and reviewing scores of public statements by the Defendants. Further, DPP Counsel brought this case after spending even more years originating, investigating, and developing two related protein cases, *In re Broiler Chicken Antitrust Litigation*, Case No. 1:16-cv-08637 (N.D. Ill.) and *In re Pork Antitrust Litigation*, Case No. 0:18-cv-01776 (D. Minn.). Rather than DPPs following on the heels of a government investigation, here it was the government that followed DPPs: on September 28, 2023, the United States Department of Justice filed *U.S. et al. v. Agri Stats, Inc.*, Case No. 0:23-cv-03009 (D. Minn.), alleging that Agri Stats allowed chicken, pork, and turkey producers to exchange competitively sensitive information in violation of the antitrust laws. Many of the allegations in the DOJ's complaint mirror the earlier civil actions.

Lockridge Grindal Nauen PLLP ("LGN") and Hagens Berman Sobol Shapiro LLP ("Hagens Berman") have acted as official interim co-lead counsel for the DPP class since June 2020. *See* Minute Entry (ECF No. 143); Order (ECF No. 1107) at 71. These firms have undertaken significant work on behalf of all class members (including those that have opted out of the DPP class) over the past five years. This case started because of DPP Counsel's investigation into the turkey industry, including months of work prior to the filing of the complaint, retaining economists and interviewing witnesses, all of which resulted in the robust complaint eventually upheld by Judge Kendall (ECF No. 173).

And from the beginning of the case, DPPs engaged in negotiations and motion practice that benefited not only the classes, but also the follow-on DAPs. DPPs negotiated an ESI protocol (ECF No. 202), a Protective Order (ECF No. 201), and litigated a contested Deposition Protocol and expert discovery order, which took rounds of contested motion practice (ECF Nos. 307, 396, 397, 496, 661). DPPs also fought to protect their pre-filing investigation work product from disclosure. ECF Nos. 493, 494, 495. Defendants moved for a "protective order barring discovery beyond the scope of the claim at issue in this case," trying to prevent discovery of their meetings, phone calls, direct communications and use of benchmarking services beyond Agri Stats. ECF No. 205 (motion); 305 (order largely denying Defendants' motion). Defendants moved for a protective order regarding phone record subpoenas (and lost). ECF Nos. 316, 336. The Tyson Defendants moved for judgement on the pleadings under Federal Rule of Civil Procedure 12(c), arguing that they did not sell whole turkeys. ECF No. 219. This motion also failed. ECF No. 248. All this early motion practice set the stage for the scope of this litigation and the contours of discovery.

DPP Counsel then served and negotiated 569 requests for production of documents on the 11 Defendant families, eventually negotiating production of more than ***1.7 million documents***. Clark Decl., ¶ 4. DPPs served 26 subpoenas on non-parties and negotiated responses to each of these. *Id.* DPP Counsel also served 111 interrogatories on the Defendants to develop the factual record. *Id.* After receiving a portion of these documents, the DPPs amended their complaint to add a *per se* claim (ECF No. 380) which resulted in a second round of motions to dismiss (ECF No. 500). Again, Judge Kendall ruled in favor of the DPPs, upholding the *per se* claim. (ECF No. 639.)

Defendants affirmatively filed motions to compel the DPP named representatives to produce information concerning their sales and pricing of turkey (pass-on discovery). ECF No. 242. Magistrate Judge Fuentes denied this motion. ECF No. 341. This ruling benefited *all* direct

purchasers, including the DAPs, given that evidence of pass-on is prohibited under *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and is a common legal issue all direct purchasers face. DPPs' defeat of this motion was critical to keeping the case correctly focused.

The Defendants aggressively moved to compel the attorney work product and investigative materials underlying the initial complaint and class counsel's investigation (ECF No. 275). Magistrate Judge Fuentes also denied this motion, concluding that the investigator's notes were protected by the attorney work-product doctrine and should not be produced in the litigation. ECF No. 494. DPPs and Defendants fought numerous other discovery skirmishes on search terms and custodians (ECF No. 454), phone records (ECF Nos. 452, 579), and the production of text messages (ECF No. 458). *See* Order, ECF No. 507. Defendant Hormel moved to preclude the deposition of executive Robert Tegt. ECF No. 587. DPPs opposed (ECF No. 591) and were able to depose him (ECF No. 634). The joint defense group subpoenaed testimony against Plaintiffs from settled defendant Tyson. The DPPs moved to quash the subpoena (ECF No. 631) and won (ECF No. 651). DPP Counsel coordinated and led argument at every Court hearing touching the DPP claims, including case management conferences and oral argument of these motions.

And from the first moment of discovery, the DPPs have been preparing for trial, negotiating evidentiary stipulations and discovery from the Defendants, readying all plaintiffs for trial. ECF Nos. 604, 659, 685, 742, 791, 817, 842, 856, 976, 1121. DPP's counsel prepared for and took more than 75 depositions of Defendant and non-party fact witnesses, a task that involves extensive teams of attorneys to review, catalogue, and prepare witness binders, and then a senior attorney to prepare and take each fact deposition. Clark Decl., ¶ 4.

Of course, this Court is aware of the DPP Counsel's extensive efforts regarding class certification, including the robust class certification motion, *Daubert* opposition, and expert work

which culminated in four-day class certification proceedings. The class certification proceedings focused on the use of common evidence to show all or nearly all direct purchasers of Turkey (including the DAPs) suffered antitrust injury as a result of Defendants' conduct. ECF No. 1107. All direct purchasers, including DAPs, generally conduct the same analysis to establish an antitrust claim, including cleaning of the sales and cost data Defendants and third parties produced, preparation of regression analyses to prove antitrust damages, and opinion on various aspects of the turkey market. DAPs eagerly sought out DPPs' class certification work product for this exact reason—any expert DAPs hire will piggy-back off of the work already done in the case.

To accomplish the common benefits for direct purchasers described above, DPP Co-Lead Counsel invested over 50,000 hours of time and more than $4.5 million. Clark Decl., ¶ 3 (describing categories of costs incurred as a common benefit to all direct purchasers).

B. DAPs' late entry into this case and lack of any common benefit work.

The story is starkly different for DAP counsel and their contribution to the common benefit of direct purchasers, as explained below.

1. Winn-Dixie Stores, Inc., Bi-Lo Holdings, Inc., and Amory Investments LLC.

By the time the Court closed fact discovery for all parties on November 1, 2022, only three DAPs had filed their own complaints: Winn-Dixie Stores, Inc. ("Winn-Dixie"), and Bi-Lo Holdings, Inc. ("Bi-Lo Holdings") (filed Aug. 3, 2021, Case No. 1:21-cv-04131), and Amory Investments LLC ("Amory") (filed Dec. 19, 2021, Case No. 1:21-cv-06600). Counsel for these three DAPs did nothing to organize and coordinate discovery efforts among the plaintiffs, did not contribute to briefing, and did not take a single deposition in this case. *See* Clark Decl, ¶ 10. Remarkably, counsel for Winn-Dixie, Bi-Lo Holdings, and Amory appeared on the record ***at only a single deposition*** of a Defendant or third-party in this matter. *Id*.

When DPPs moved for leave to amend their complaint to add a *per se* claim on January 10, 2022, DPP Counsel filed that complaint under seal. *See* ECF No. 380. Winn- Dixie and Bi-Lo Holdings filed a notice of joinder to DPPs' motion along with a copy of an unfinished draft of DPPs' second amended complaint. *See* ECF Nos. 375 and 375-1; *see also* Clark Decl., ¶ 7.

Moreover, on February 22, 2022, counsel for Winn-Dixie, Bi-Lo Holdings, and Amory approached a member of DPP Counsel's team to request a copy of DPPs' substantive responses to All Defendants' Second Set Interrogatories to All Plaintiffs, Interrogatories Nos. 5-21 ("Defendants' Contention Interrogatories") dated December 15, 2022. *Id*. at ¶ 8. DPPs' substantive responses to Defendants' Contention Interrogatories set out the basis for the direct purchasers' claims in this case with extensive citations to the case record that DPP Counsel had developed. *Id.*

On May 2, 2022, DPPs opposed Defendants' motion to dismiss DPPs' second amended complaint under seal. *See* ECF Nos. 526, 528. After the deadline to oppose Defendants' motion to dismiss had passed, on May 9, counsel for Winn-Dixie and Bi-Lo Holdings contacted a member of the DPP Counsel team to request a copy of DPPs' opposition brief. *See* Clark Decl., ¶ 9. DPP Counsel declined to provide Winn-Dixie and Bi-Lo Holdings a copy of their unredacted opposition brief. *Id*. On May 31, counsel for Winn-Dixie and Bi-Lo Holdings did nothing more than file a one-sentence notice of joinder to the public version of DPPs' opposition brief. *See* ECF No. 544.

In short, during this entire case, counsel for Winn-Dixie, Bi-Lo Holdings, and Amory has done little more than try to appropriate DPP Counsel's work product, while contributing neither attorney time nor money for the common benefit of direct purchasers, and being the subject of repeated motions for untimely production of its own limited discovery requested by Defendants. *See, e.g.*, ECF Nos. 531, 536, 564, 716, 720 (detailing repeated motions and issues with Winn-Dixie and Bi-Lo Holdings meeting their discovery obligations).

2. Aramark Food and Support Services Group, Inc. ("Aramark").

After the close of fact discovery for all parties, DAP Aramark filed a case on July 21, 2023. *See* Case No. 1:23-cv-4404.[4] The first ECF entry where Aramark appears in this consolidated matter is ECF No. 847, out of 1134 entries to date. Aramark never moved the Court for additional discovery, as it had closed two months before Aramark filed its complaint. *See* Clark Decl., ¶ 15. In its first stipulation, Aramark adopted DPP Counsel's prior work, including the Protective Order, ESI protocol, Deposition Protocol, and the order concerning expert discovery. ECF No. 847, ¶ 3-4. Aramark agreed to coordinate "all future discovery" with the class plaintiffs "so as to avoid unnecessary duplication and/or delay." *Id.*, ¶ 5. All written discovery responses and document productions made in the DPP case were "deemed served on Aramark." *Id.*, ¶ 10.

3. Carina Ventures LLC.

Carina originally filed its case in July 2023 (two months after the close of fact discovery in this case) in the Southern District of Texas, but that court transferred it to the Northern District of Illinois because it substantially overlapped with DPPs' case. *Carina Ventures LLC v. Agri Stats, Inc.*, No. 4:23-CV-2685, ECF No. 115 (S.D. Tex. Dec. 19, 2023). For most of the time since that transfer on December 20, 2023, Carina has been exclusively focused on issues unique to its status as a litigation fund entity that is a non-purchaser, assignee of Sysco's claims related to turkey purchases. *See* ECF No. 1124 (noting focus of Carina's case to date on jurisdictional discovery and a summary judgment motion to be filed against Carina on this topic).

Carina's counsel gained full access to the complete discovery record in this case on July 31, 2024. *See* Hr'g. Tr. 7:19-23, Jan. 22, 2025. Carina's counsel recently told the Court that it understands that DPP Counsel have done the heavy lifting for them already. *See, e.g.*, Hr'g Tr.

[4] Plaintiffs Aramark Food and Support Services Group, Inc., Winn-Dixie, Bi-Lo Holdings, and Amory are all represented by common counsel, though Amory has additional counsel as well.

5:24-6:4, Jan. 22, 2025 ("So we want to be clear that we totally appreciate all the discovery that's been done and we want to (unintelligible) about it."). Nevertheless, Carina's counsel has also strategically sought out from DPPs "unredacted copies of [DPPs'] expert reports, class certification briefs, *Daubert* briefs, and hot documents lists." *See* Exhibit A to Clark Decl. at 1. DPPs expressed their willingness to share such fruits of their work in this matter, but asked Carina to join in a proposed joint motion to the Court asking for entry of a set-aside order in recognition of DPPs' common benefit work embedded within such materials. *Id.* Carina never responded. *Id.* DPPs' understanding is Carina subsequently obtained such information via Defendants (other than the "hot documents lists," which of course are already embedded in the briefs and expert work that DPPs submitted for class certification).

In the past few weeks, Carina received permission from the Court to take a limited number of depositions that, absent good cause, are "not to be duplicative of the topics that were addressed during the prior discovery period in Turkey." Hr'g Tr. 21:5-17, Jan. 22, 2025. These non-duplicative depositions shall not last more than five hours, and Carina may not take more than one deposition of any Defendant. *Id*. at 20:20-22. Neither DPPs, nor any plaintiff other than Carina, will receive any benefit from such work because fact discovery closed in May 2023.

In short, the dynamic in this litigation is clear: DPP Counsel did the work on behalf of all direct purchasers of Turkey, and DAPs came in after-the-fact to benefit from that work without contributing time and resources to its creation. While DPPs are willing to help DAPs make use of the work that DPP Counsel performed for DAPs' benefit over the past five years (including providing the "lists of hot documents" that Carina seeks), it is only fair that DPP Counsel should have the opportunity to seek fair compensation for their efforts.

II. ARGUMENT

A. Case law supports entry of a set-aside order to compensate DPP Co-Lead Counsel for common benefit work.

Complex multi-party litigation, where numerous plaintiffs bring claims against the same defendants arising from the same conduct and based on the same legal theories, presents a classic free-rider problem. *See In re Zyprexa Prods. Liab. Litig.*, 594 F.3d 113, 129 (2d Cir. 2010) (Kaplan, J., concurring). In such matters, "[a] subset of plaintiffs' lawyers do the lion's share of the work, but that work accrues to the benefit of all plaintiffs. If those other plaintiffs were not required to pay any costs of that work, 'high-quality legal work would be under-incentivized and, ultimately, under-produced.'" *In re Gen. Motors LLC Ignition Switch Litig.*, 477 F. Supp. 3d 170, 174 (S.D.N.Y. 2020) (quoting *In re Gen. Motors LLC Ignition Switch Litig.*, 2019 WL 5865112, at *1 (S.D.N.Y. Nov. 8, 2019)).

Courts have recognized that complex aggregate litigation is "difficult enough to manage and adjudicate when the common benefit work is being done by good lawyers; the cases would be impossible to manage if good lawyers lacked sufficient incentive to step up." *In re Roundup Prods. Liab. Litig.*, 544 F. Supp. 3d 950, 962 (N.D. Cal. 2021). Therefore, where lead counsel's work on behalf of a group of plaintiffs confers a benefit on others outside the represented group, a portion of the beneficiaries' recoveries should fairly be allocated to compensate lead counsel. *See Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977) ("[T]he [common fund] doctrine is designed to spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone and the 'stranger' beneficiaries' do not receive their benefits at no cost to themselves."). If DPP Counsel's efforts "helped pave the way for substantial settlements for [DAPs], and thus for substantial contingency fee recoveries by the lawyers representing them," it is at least "worth double checking to make sure that the lawyers

who performed common benefit work are adequately compensated in relation to the lawyers who did not." *Roundup*, 544 F. Supp. 3d at 970.[5]

Set-asides have been used to ensure that tag-along, late-filed direct action antitrust plaintiffs contribute to common benefit work. The facts and timing in this case are similar to those in the *Zetia*, *Lidoderm*, and *Linerboard* antitrust cases in which courts ordered set-asides from the recoveries of tag-along plaintiffs as potential compensation for the extensive efforts of lead counsel from which the tag-along plaintiffs benefitted. *See In re Zetia (Ezetimibe) Antitrust Litig.*, MDL No, 2:18-md-2836, 2022 WL 18108387, at *5 (E.D. Va. Nov. 8, 2022) ("Lead Counsel, at this stage, has demonstrated extensive effort and resulting work product which is highly likely to benefit the Tag-Along Plaintiffs litigating identical claims."); *In re Lidoderm Antitrust Litig.*, No. 14-md-02521, 2017 WL 3478810, at *3 (N.D. Cal. Aug. 14, 2017) (ordering 10% set-aside before summary judgment briefing commenced based upon "the amount of discovery, motion practice, and expert work required to get the case to this juncture"); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 661 (E.D. Pa. 2003) (ordering set-asides from "major entities and their counsel" where they "awaited the development of the case by designated counsel and only filed suit on the eve of the conclusion of discovery").

[5] The legal basis underlying set-aside orders is the equitable common fund doctrine, under which a court may set aside settlement funds to compensate for work that creates a common benefit for other plaintiffs in a litigation. The doctrine allows "federal courts, in the exercise of their equitable powers, [to] award attorneys' fees when the interests of justice so require." *Hall v. Cole*, 412 U.S. 1, 4–5 (1973) (quoting *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166 (1939)); *see also First Impressions Salon, Inc. v. Nat'l Milk Producers Fed'n.*, 2019 WL 13180924, at *2 (S.D. Ill. Apr. 5, 2019) ("In accordance with the common benefit doctrine, courts have the discretion to order defendants to sequester and place into an escrow account a portion of a settlement or judgment secured from defendants by opt-out plaintiffs; *Turner v. Murphy Oil USA, Inc.*, 422 F. Supp. 2d 676, 680 (E.D. La. 2006); *accord Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970) ("To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.").

As the *Zetia*, *Lidoderm*, and *Linerboard* courts recognized, where class counsel carry the burden of pretrial litigation for DAPs, after many of the risks have been overcome and much of the relevant evidence discovered and organized, a set-aside order is fair, equitable, and appropriate. *See Zetia*, 2022 WL 18108387, at *4-6 (finding it "beyond dispute that all the Tag-Along Plaintiffs enjoyed a significant head start framing and litigating their claims as a result of more than two years of work Lead Counsel completed before their consolidation" and,"[w]ithout a set-aside order, tag-along plaintiffs could file their individual cases at the last possible minute, request and rely on the record developed by [lead] counsel, and reap the savings in legal fees"); *Lidoderm*, 2017 WL 3478810, at *1 (ordering a 10% set-aside based on end-payor lead counsel's extensive efforts and noting that fees and costs sought from any recovery obtained for the end-payor class "does not resolve the equitable 'free rider' problem identified by Class Counsel"); *Linerboard*, 292 F. Supp. 2d at 661 ("[T]his case warrants the establishment of a system to ensure that designated counsel are compensated for their efforts in managing the litigation" because "major entities and their counsel awaited the development of the case by designated counsel and only filed suit on the eve of the conclusion of discovery.").

The range of set-aside orders previously entered by courts for common benefit work range from 8% to 17%. *See, e.g.*, *In re Bard IVC Filters Prods. Liab. Litig.*, 603 F. Supp. 3d 822, 840 (D. Ariz. 2022) (ordering a 10% set-aside); *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-2885, 2024 WL 4767051 (N.D. Fla. Nov. 13, 2024) (ordering a 9% set-aside); *Roundup*, 544 F. Supp. 3d at 970–71 (ordering a 8% set-aside); *Smilovits v. First Solar, Inc.*, No. CV2:12-cv-00555, 2019 WL 6841736, at *4 (D. Ariz. Dec. 16, 2019) (ordering a 10% set-aside); *Lidoderm*, 2017 WL 3478810, at *3 (ordering a 10% set-aside); *In re Aggrenox Antitrust Litig.*, No. 3:14 MD 2516, 2018 WL 10705542, at *6 (D. Conn.) (ordering a 10% set-aside); *In re*

Fresenius Granuflo/Nautralyte Dialysate Prods. Liab. Litig., No. 13-2428, 2018 WL 2163627, at *1 (D. Mass. Feb. 1, 2018) (ordering a 11% set-aside); *In re NuvaRin Prods. Liab. Litig.*, No. 4:08 MDL 1964, 2014 WL 7271959, at *3 (E.D. Mo. Dec. 18, 2014) (ordering a 15.5% set-aside); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 266 (D.N.H. 2007) (ordering a 14.5% set-aside); *Turner*, 422 F. Supp. 2d at 684 (ordering a 12% set-aside); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1996 WL 900349, at *3-4 (E.D. Pa. June 17, 1996) (ordering a 17% set-aside). Moreover, all DAPs "are well equipped to handle any financial burden of contributing to [DPP Counsel]'s efforts in this case." *Zetia*, 2022 WL 18108387, at *5.

B. An order setting aside 10% of DAP recoveries for a common benefit fund is appropriate in this significantly advanced case.

The record here presents a strong factual basis for a set-aside order. Over the last five years, DPP Counsel diligently pursued DPPs' interests and faithfully discharged their Court-assigned duties. *See supra* § I(A). In the process, and at considerable labor and expense, DPP Counsel created work product that benefitted all direct purchasers of Turkey. *Id.* DAPs had the benefit of the litigation strategy formulated by DPPs, and each DAP has reaped the benefits of DPP Counsel's efforts—from their extensive pre-filing investigation to the wide-ranging fact and expert discovery essential to prosecuting the plaintiffs' claims. All DAPs, particularly later filed DAPs such as Aramark and Carina, were able to enter the ligation with much less risk—knowing their would-be claims had already survived motions to dismiss. The favorable rulings obtained by DPP Counsel have given DAPs a roadmap, as well as "the benefit of the imprimatur of [the Court] on the theory of the case formulated by [DPP Counsel] and adopted in the [DAP] actions." *Linerboard*, 292 F. Supp. 2d at 659. Therefore, any DAP recovery is thus tied in many ways to the strength of the case that DPP Counsel developed. Indeed, Carina and Amory did not outright reject a set-aside in this case, but proposed a 7.5% set-aside with a cap, which after further discussion, DPP counsel

ultimately rejected as it contained unrelated conditions concerning splitting of page limits on briefs and the case schedule, as well as failing to sufficiently narrow the issues to be presented to the Court. *See* Clark Decl., ¶ 19 & Ex. B.

DPPs' request for a 10% set-aside amount is within the range courts have approved for common benefit work. *See, e.g.*, *Lidoderm*, 2017 WL 3478810, at *1. DPP Counsel's proposed set-aside order is substantially similar to those entered in other antitrust cases. *See, e.g.*, *Zetia*, 2022 WL 18108387, at *7-8; *Lidoderm*, 2017 WL 3478810, at *4-5; *Linerboard*, 292 F. Supp. 2d at 668-69. DPP Counsel's proposed set-aside order provides, *inter alia*, as follows:

- In the event a direct purchaser that files its own complaint ("DAP") obtains a settlement or judgment in an action filed in this Court or transferred to this Court related to claims arising from Defendants' alleged conspiracy and combination to fix, raise, maintain, and stabilize the price of Turkey, Defendants shall establish and thereafter maintain an insured escrow account entitled, "In re Turkey Antitrust Litigation Direct Purchaser Plaintiff Class Fee and Expense Account;"[6]
- For any settlement or judgment obtained by such a DAP, Defendant(s) shall set aside and place into the "In re Turkey Antitrust Litigation Direct Purchaser Plaintiff Class Fee and Expense Account" 10% of the total monetary value of such settlement or judgment ("the set-aside funds");
- The set-aside funds shall be available, at the Court's discretion, to compensate DPP Counsel for their common benefit work, subject to a showing of entitlement to such payments[7]; and

[6] It is worth noting that the mechanism set out in Section 11(c) of DPPs' long-form settlement agreement with Defendant Cargill shows that at least one Defendant recognizes that a DAP who opts out from the settlement class still benefited from the common work done by DPP Counsel. *See, e.g.*, Long-Form Settlement Agreement Between Direct Purchaser Plaintiffs and Cargill (ECF No. 1100-1) § 11(c) (creating a mechanism to set aside funds for the purpose of compensating DPP Counsel for the work done on behalf of direct purchasers of Turkey who opt-out of the settlement class).

[7] Determining what constitutes fair and adequate compensation for DPP Counsel can be determined at a later date, on a more fully developed record. At this time, DPPs merely ask the Court to order that 10% of the monetary value of any settlement or judgment obtained by DAP be set-aside in an escrow account. This way, funds will be preserved such that, at an appropriate time, the interested parties can negotiate and agree, or the Court can determine, an amount to fairly compensate DPP Counsel for the benefit their work conferred on these DAPs.

- Any set-aside funds not paid to DPP Counsel for common benefit work shall be remitted pro rata to the DAP from whose settlements or judgments the set-aside funds were withheld.

DPPs' proposal employs the "preferable procedure" of having defendants set aside funds before distribution to DAPs rather than requiring DPP Counsel to recover common benefit attorneys' fees and expenses from DAPs directly. *Linerboard*, 292 F. Supp. 2d at 665; *see also Lidoderm*, 2017 WL 3478810, at *2. The proposed order also includes key features that will protect the interests of DAPs, including: (i) no payments will be made from the set-aside funds unless and until approved by the Court; (ii) all affected parties will be given notice of and the opportunity to object and be heard on any motions for payment from the set- aside funds; and (iii) any set-aside funds not paid to lead counsel for common benefit work will revert back to DAPs. *Linerboard*, 292 F. Supp. 2d at 667-69.

III. CONCLUSION

DPPs respectfully submit that they have "made a sufficient showing to warrant establishment of a framework to ensure that funds will be available to compensate them should the Court later determine such compensation is warranted." *Linerboard*, 292 F. Supp. 2d at 662. Accordingly, DPPs respectfully request that the Court enter the proposed set-aside order submitted with this motion. Granting the motion would not guarantee payment in any amount to DPP Counsel. Instead, it would establish a fund and a procedure for the Court to later determine whether the significant benefit DPP Counsel's work product and expenditures conferred on DAPs warrants compensation.

DATED: February 12, 2025

Respectfully submitted,

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