IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

IN RE TURKEY ANTITRUST LITIGATION This Document Relates To: *Direct Purchaser Plaintiff and Direct Action Plaintiff Actions*	No. 1:19-cv-08318 Hon. Sunil R. Harjani Hon. Keri L. Holleb Hotaling

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

Defendants Agri Stats, Inc.; Butterball LLC; Cooper Farms, Inc.; Farbest Foods, Inc.; Foster Farms, LLC; Foster Poultry Farms LLC; Hormel Foods, LLC; Jennie-O Turkey Store, Inc.; House of Raeford Farms, Inc.; Perdue Farms, Inc.; Perdue Foods LLC; Prestage Farms of South Carolina, LLC; Prestage Farms, Inc.; Prestage Foods, Inc.; Tyson Foods, Inc.; Tyson Fresh Meat, Inc.; Tyson Prepared Foods, Inc.; and The Hillshire Brands Company (collectively, "Defendants") respectfully submit this memorandum in opposition to Direct Purchaser Plaintiffs' ("DPPs") Motion for a Common Benefit Set-Aside Order (ECF No. 1137) ("Motion").

INTRODUCTION

DPPs' call for a 10% set-aside amounts to a solution in search of a problem and should be denied. Set-aside orders constitute an exception, not the rule, and this matter cannot be cast as the typical free-rider case that warrants such an exception. Here, only four direct action plaintiffs ("DAPs") have filed actions, and DPPs have not shown that DAPs have substantially benefitted from—or been unjustly enriched by—the work of DPPs' counsel. Any conjecture about future DAPs freeriding on the DPPs' efforts is pure speculation, and the Court lacks jurisdiction to enter orders binding non-present class members.

This matter is also not one in which counsel for DPPs will face inordinate hardship in pursuing reimbursement if DPPs do—in the future—labor disproportionately to advance the case such that DAPs are unjustly enriched. Notice of settlements, if any, will be publicly docketed. DPPs cannot show that they will face any undue burdens in seeking reimbursement for purported unjust enrichment from only four DAPs.

DPPs' demand also raises serious concerns about basic fairness. Counsel for DPPs can, and no doubt will, obtain attorneys' fees from any settlements they negotiate on behalf of the class. DPPs should not be able to force settling Defendants to pay their counsel's fees over and over again by taxing all other settlements reached with DAPs. DPPs' Motion threatens to substantially impact the terms and process of settlements between Defendants and DAPs, implicating the already difficult incentive structures involved in complex antitrust litigation. Moreover, DPPs' Motion seeks to unfairly saddle Defendants with the task of establishing and thereafter indefinitely maintaining an insured escrow account for the sole benefit of DPP class counsel.

For these reasons, Defendants respectfully submit that the Court should deny DPPs' Motion.

BACKGROUND

This matter involves three plaintiff groups: DPPs, a class of Commercial and Institutional Indirect Purchaser Plaintiffs ("CIIPPs") (together with DPPs, the "Classes"), and four DAPs who opted to pursue their own claims prior to the Court having granted class certification (i.e., Winn-Dixie Stores, Inc. & Bi-Lo Holdings, Inc. ("Winn-Dixie/Bi-Lo"), Aramark Food and Support Services Group, Inc. ("Aramark"), Amory Investments LLC ("Amory"), and Carina Ventures LLC ("Carina")) (together with the Classes, "Plaintiffs"). Each group is represented by its own counsel and has participated in the litigation.

While DPPs filed their initial complaint on December 19, 2019[1] (and CIIPPs filled shortly thereafter on April 13, 2020),[2] DPPs filed their current operative complaint on January 13, 2023 (ECF No. 665). Two of the four DAPs in this case—Winn-Dixie/Bi-Lo and Amory—filed their complaints in August and December 2021, respectively,[3] and were consolidated in this action on September 8, 2021 and February 3, 2022, respectively. (ECF Nos. 297, 405.) In May 2023, fact discovery closed for these Plaintiffs. (ECF No. 782.) During fact discovery, Plaintiffs, in addition to DPPs, participated in seeking discovery from Defendants and third parties. For example, CIIPPs took sixteen depositions. The Classes and certain DAPs filed eight discovery motions. In July 2023, the remaining two DAPs—Aramark and Carina—filed complaints,[4] and were consolidated into this action on October 10, 2023 and July 23, 2024, respectively. (ECF Nos. 848, 1015.) This Court granted Carina additional fact discovery on January 23, 2025 (ECF No. 1109) ("Carina Fact Discovery Schedule"). Accordingly, both the Classes and two of the four DAPs have proceeded together in this case for over three years, including through fact discovery, and one of the two remaining DAPs, Carina, has its own fact discovery period.

The Classes and certain Defendants litigated class certification from September 2023 to March 2025.[5] DPPs and CIIPPs *each* advanced its own class certification component of this

[1] Class Action Compl., ECF No. 1, *Olean Wholesale Grocery Coop. et al. v. Agri Stats*, 1:19-cv-08318.

[2] Class Action Compl., ECF No. 1, *Sandee's Bakery v. Agri Stats*, No. 1:20-cv-02295.

[3] Compl., ECF No.1, *Winn-Dixie Stores, Inc. & Bi-Lo Holding, LLC v. Agri Stats et al.*, No. 1:21-cv-04131; Compl., ECF No. 1, *Amory Investments, LLC v. Agri Stats*, No. 1:21-cv-06600.

[4] Compl., ECF No. 1, *Aramark Food & Support Services Group, Inc. v. Agri Stats et al.*, No. 1:23-cv-04404; Compl., ECF No. 1, *Carina Ventures LLC v. Agri Stats et al.*, No. 4:23-cv-02685 (July 21, 2023 S.D. Tex.).

[5] Tyson settled with both Classes in the spring of 2021 (*see* DPPs' Notice of Settlement with Tyson Defendants, ECF No. 251; CIIPPs' Notice of Settlement with Tyson Defendants, ECF No. 181, *Sandee's Bakery v. Agri Stats*, No. 1:20-cv-02295), and therefore, was not party to the briefing or expert discovery

litigation. *Each* filed its own class certification motion and reply, *each* retained its own expert, and *each* argued on behalf of itself at the class certification hearing. The Court granted these individual motions for class certification less than two months ago on January 22, 2025. (ECF No. 1107.) Defendants filed a Rule 23(f) petition for appeal on February 5, 2025, and the Classes filed a joint response on February 22, 2025. Petition, ECF No. 1; Response to Petition, ECF No. 22, *Hormel Foods Corp. et al., v. John Gross and Company, Inc. et al.,* Case No. 25-8004 (7th Cir.). The Seventh Circuit denied Defendants' appeal only two weeks ago on March 4, 2025. (*Id.* at ECF No. 25.) Neither DPPs (nor CIIPPs) have moved for approval of their proposed plan to disseminate class notice, as required under Rule 23 of the Federal Rules of Civil Procedure. Therefore, not only has no notice been issued to any class member, nor any class member been given the opportunity to opt-out of the DPP class, but there is no established timeline for when such notice will be approved and issued or when there will be a known universe of opt-out plaintiffs.[6]

Finally, the Court ordered a case schedule for expert discovery and summary judgment less than one month ago, on February 28, 2025 (ECF No. 1156) (the "Case Schedule"). As contemplated by the Case Schedule, and as Plaintiffs have indicated themselves, DPPs, CIIPPs, and DAPs *each* plan to retain separate experts to submit separate reports, with Class Plaintiffs' expert reports and DAPs' expert report(s) due to be served on different days, over one month apart. (Case Schedule at 1.) Further, the first trial, and whether any of the Plaintiffs will proceed together, has not yet been determined. (*See* Case Schedule at 2.)

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related to DPPs' and CIIPPs' respective motions for class certification or any other subsequent class certification related filing and/or proceeding.

[6] As counsel for DPPs admitted on February 27, 2025 "[N]one of us know for sure that -- who opts out, how many filed direct action cases . . . ." (Tr. of Status Hr'g 31:25-32:1, ECF No. 1155.)

Despite the current procedural posture, DPPs now request the Court to compel Defendants to sequester 10% of the value of any future settlement Defendants reach with DAPs, including an indeterminate number of unnotified DPP class members who may opt out of the class and have not yet appeared in this action. (*See* DPPs' Mem. Supp. Mot. Set-Aside Order, ECF No. 1138 ("Mot.") at 14-15).) Specifically, DPPs seek an order: (1) requiring counsel for each Defendant to establish and maintain an escrow account on behalf of DPPs for an indefinite time period; (2) requiring Defendants to deposit "10% of the total monetary value of such settlement or judgment" with all DAPs, whether in the Action or not; and (3) allowing DPPs to apply for an award of attorneys' fees and costs at "a later date." (*Id.* at 14-15, n.7.)

ARGUMENT

The common benefit doctrine is an "exception" to the "default" rule that "each litigant bears the responsibility to pay her attorneys' fees." *In re Hair Relaxer Mktg. Sales Pracs. & Prods. Liab. Litig.*, No. 23-CV-0818, 2024 WL 3904650 at *3 (N.D. Ill. Aug. 22, 2024). It is invoked when a plaintiff's "successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.'" *Id.* (citing *Hall v. Cole*, 412 U.S. 1, 5 (1973)). The common benefit doctrine, however, does not afford a court unbridled jurisdiction; rather, the court's authority over a common fund "comes from the equitable jurisdiction that the district court exercises over the fund, by way of the litigation," and all transactions in any such fund must "occur within the same case" and to parties who are "parties to the same case." *Id.* (citing *In re Roundup Prods. Liab. Litig.*, 544 F. Supp. 3d 950, 959-60, 963 (N.D. Cal. 2021)).

I. SET-ASIDE ORDERS ARE UNNECESSARY IN ANTITRUST CASES

Set-aside orders are unnecessary in most antitrust class actions, including in this action. Common benefit funds are "not unusual" in mass-tort MDLs when "lead counsel who have actively litigated an MDL supply other counsel with extensive work-product dubbed 'trial in a box.'" *In re Generic Pharm. Pricing Antitrust Litig.*, No. 16-MD-2724, 2019 WL 6044308, at *1 (E.D. Pa. Oct. 7, 2019); *see also In re Zetia (Ezetimibe) Antitrust Litig.*, MDL No. 2:18-md-2836, 2022 WL 18108387at *4 (E.D. Va. Nov. 8, 2022) ("The common benefit doctrine is most frequently applied in mass tort cases," which "typically involve large numbers of claims asserted by individual plaintiffs who have separately retained counsel that might 'free-ride' off the work of designated lead counsel"). But such funds are more uncommon in antitrust cases. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 661 (E.D. Pa. 2003). First, antitrust class actions do not present the same case management challenges as mass-tort MDLs, which often involve hundreds or even thousands of individual cases. Second, antitrust class actions offer a mechanism to compensate class counsel for their work, as Rule 23(h) of the Federal Rules of Civil Procedure and the antitrust statutes entitle class counsel to reasonable attorneys' fees if they prevail at trial. 15 U.S.C. § 15(a); Fed R. Civ. P. 23(h). In contrast, lead counsel in mass-tort cases have no statutory right to fees. *See Generic Drugs*, 2019 WL 6044308, at *1 (denying motion for set-aside order without prejudice and noting that "the traditional mechanisms of class actions may appropriately compensate any class counsel"); Tr. of Proceedings at 13, ECF No. 2696, *In re TFT-LCD Flat Panel Antitrust Litig.*, No 07-md-1827 (N.D. Cal. Apr. 30, 2011) (denying motion for set-aside order and explaining that set-aside orders "make[] a lot more sense" in mass-tort cases). But the Court need not resolve this question in the abstract. Even assuming that the common benefit doctrine is applicable in certain antitrust cases, DPPs have not shown its application is justified here.

II. DPPS HAVE NOT SHOWN THEY ARE ENTITLED TO THEIR REQUESTED RELIEF AS TO EXISTING DAPS

A. DPPs Have Not Shown a Set-Aside Order is Necessary in This Case

Far from thousands or even hundreds of individual cases, there are only four DAPs in this action. DPPs have offered no explanation for why they believe they need a court order burdening *Defendants* "to ensure that funds will be available to compensate them should the Court later determine such compensation is warranted." (Mot. at 15.) DPPs do not articulate why funds will not be available or provide any basis to believe *DAPs* will deny DPPs the opportunity to later seek compensation. DPPs are aware of the current four DAPs in this case, and to the extent future DAPs file complaints before this Court, these complaints will be filed on the docket. Similarly, settlements will be reflected on the public docket, even if the terms are confidential. There is, in short, opportunity for DPPs to later seek compensation from DAPs without a Court ordered set-aside.

DPPs also do not explain why a set-aside order is the "preferable procedure" in this case. (Mot. at 15.) In fact, such an order creates only unnecessary inefficiencies by involving Defendants in a dispute between DPPs and DAPs and even potentially incentivizing future opt-outs to file in other jurisdictions, defeating the efficiencies of consolidated pretrial proceedings. *See In re Lidoderm Antitrust Litig.*, No. 14-MD-02521-WHO, 2017 WL 3478810, at *3 (N.D. Cal. Aug. 14, 2017) ("Once a class member opts-out, it is no longer a party to any case before [the court] and [the court] no longer ha[s] jurisdiction over it or over the monies due to it…"). DPPs' failure to show why a set-aside fund is necessary in this action cannot be squared with the extraordinary relief they seek in this case, particularly because any set-aside order will likely have a chilling effect on future settlements between Defendants and DAPs who would be faced with DPPs' unfair tax. Defendants should be free to negotiate and enter settlements directly with DAPs

on terms acceptable to parties to any such settlements. Allowing DPPs to extract attorneys' fees from those claims raise serious policy and fairness concerns.

B. DPPs Have Not Established Any Common Benefit

Additionally, DPPs have made no specific showing that they have or will confer an actual "benefit" on anyone for purposes of the common-fund doctrine. DPPs provide various examples of how they have advanced this case (Mot. at 3-6), but advancement of a litigation does not equate to the conferral of any specific benefit and/or unjust enrichment or any free-rider problem. *See In re Packaged Seafood Prods. Antitrust Litig.*, Case No. 3:15-MD-02670-DMS-MDD, 2021 WL 5326517 at *3 (S.D. Cal. Nov. 16, 2021) ("While Class Counsel's work has indisputably advanced this litigation, they fail to show that non-parties to this action have received any specific benefit from their efforts, let alone a 'free-ride.'"). Not only have non-DPP Plaintiffs largely been party to fact discovery (*supra* Background), but they will also participate in their own expert discovery, for example (Case Schedule at 1).

C. There Is No Support for the 10% Set-aside that DPPs Seek

Similarly, DPPs provide no basis for their request for a 10% assessment on all future settlements between Defendants and DAPs. Assuming *arguendo* that the various mass tort cases DPPs cite have any relevance to *this* antitrust case, the representative range in mass tort cases is 3% to 6%, a fraction of what DPPs seek here. *See Zetia*, 2022 WL 18108387, at *7. Both the scale and duration of the case must be considered. *See id*. at *8. Here, the procedural posture of this case, including the limited number of parties, the lack of any expert discovery, and, where fact discovery is still ongoing for one DAP, does not support DPPs' request for a 10% assessment. Indeed, in two of the cases that DPPs cite, where expert discovery was already underway, the set-aside percentage was significantly lower than 10%. *See id.* (5%); *In re Linerboard Antitrust Litig.*,

333 F. Supp. 2d 343, 348 (E.D. Pa. 2004) (5%). Even in *Lidoderm*, the court acknowledged 10% constituted a notable divergence from the standard range. 2017 WL 3478810, at *3.[7]

III. DPPS' MOTION IS PREMATURE AS TO ANY FUTURE DAPS AND EXCEEDS THE COURT'S JURISDICTION

To the extent that DPPs seek to have the Court bind future opt-out plaintiffs by their set-aside request, the Court lacks jurisdiction to do so. *See First Impressions Salon, Inc. v. Nat'l Milk Producers Fed'n*, No. 3:13-CV-454-NJR-GCS, 2019 WL 13180924 at *3 (S.D. Ill. Apr. 5, 2019) ("But the Court cannot impose an order on 'any' Opt-Out Plaintiff. The Court can only exercise authority over parties that have subjected themselves to the Court's jurisdiction."); *Lidoderm*, 2017 WL 3478810, at *3 ("While I may have jurisdiction over the defendants—obviously essential parties to any negotiated settlement and the payors of any judgments—that does not mean I have jurisdiction over the *recoveries* belonging to opt-outs who are not before me. That these potential opt-outs are currently class members in a certified class and under my jurisdiction does not change my analysis."). Accordingly, DPPs' demand that the requested set-aside order apply to all DAPs who may file in this Court in the future is disallowed. (Mot. at 14.)

DPPs' Motion is also premature. DPPs acknowledge that a set-aside order can be entered only where the litigation is "significantly advanced" (Mot. at 13), an inquiry that can be revisited if and when new DAPs appear. In support of their argument that this litigation is "significantly advanced" enough for the Court to grant its Motion, DPPs claim the "facts and timing in this case are similar to those in the *Zetia*, *Lidoderm*, and *Linerboard* antitrust cases . . ." (Mot. at 11) three cherry-picked out-of-circuit antitrust cases. However, in both *Zetia* and *Lidoderm*, the court

[7] In *In re Aggrenox*, the parties freely negotiated a 10% set-aside for the class as part of a settlement agreement. *See* Mot. for Settlement at 11, ECF No. 784-3, *In re Aggrenox Antitrust Litig.*, 3:14-md-2516 (D. Conn. Jan. 8, 2018).

granted a motion for a set-aside where expert discovery was well underway, including "retaining and preparing 16 experts" and "deposing 12 of Defendants' 15 experts." *See Zetia*, 2022 WL 18108387 at *1 ("[t]he multi-district litigation has been ongoing for over four years. Discovery is now closed. *Daubert* rulings are complete . . . Plaintiffs have obtained partial summary judgment on the relevant market . . . Defendants' motion for summary judgment has been fully briefed and argued" and where moving plaintiffs had "retain[ed and prepar[ed] 16 experts" and "depos[ed] 12 of Defendants' 15 experts"); *Lidoderm,* 2017 WL 3478810, at *3 (granting motion for set-aside "[g]iven the circumstances of this case—specifically the amount of discovery, motion practice, and *expert work* required to get to case to this juncture . . . ") (emphasis added). Here, a case schedule for expert discovery was only granted less than a month ago, with the first expert discovery deadline set for the end of June 2025. (Case Schedule at 1.)

Further, unlike *Linerboard*, this is not "the rare antitrust case" in which tag-along plaintiffs "awaited the development of the case by designated counsel and only filed suit on the eve of the conclusion of discovery." *Linerboard* at 661. Two of the four DAPs have proceeded through discovery with DPPs (and CIIPPs) for multiple years. And as DPPs acknowledge, DAP Carina—the most recent-joining DAP—is proceeding with its own fact and expert discovery. (Mot. at 9; *see also* Case Schedule at 1; Carina Fact Discovery Schedule.)

That DPPs' Motion is premature is also apparent from their own brief. DPPs repeatedly hypothesize about common benefits they might provide to unknown DAPs at unknown future times. (*See, e.g.*, Mot. at 14 n.7 ("Determining what constitutes fair and adequate compensation for DPP Counsel can be determined *at a later date, on a more fully developed record*.") (emphasis added), 15 ("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") (emphasis added).) Moreover, this Court already suggested that any additional opt-outs who file might be placed on a separate track and might be subject to separate case schedules. (*See* Case Schedule at 1.) As such, the extent of any benefit DPPs might provide to future, yet-to-file DAPs is even more unknowable at this stage.

Finally, the filing of this Motion before DPPs (and CIIPPs) have even filed notice plans to opt out of the class raises considerable Rule 23 conflicts. A mandatory 10% set-aside from all future settlements by current class members (i.e., future DAPs) is a conflict between DPP class members who are interested in settling their claims individually, and those DPP class members who are not. *See* Fed. R. Civ. P. 23(a)(4) (requiring "representative parties [who] will fairly and adequately protect the interests of the class"). As court-appointed class counsel, Lockridge Grindal Nauen and Hagens Berman Sobol Shapiro (together, "DPP Co-lead Counsel") are responsible for "fairly and adequately" representing the interests of the *entire* DPP class. *See* Fed. R. Civ. P. 23(g)(4). Yet here, DPPs seek to sequester funds from absent class members who have yet to receive notice of DPPs' class counsel role, much less its intent to recover 10% of their future settlements if they choose to file in this Court. A large, mandatory set-aside would also surely chill future settlement discussions with absent class members. Therefore, at this point in the case when proposed notice plans have not yet even been filed, this Motion conflicts with DPP Co-lead Counsel's responsibilities to represent the best interests of all class members, making any set-aside order "administratively unworkable." *Packaged Seafood Prods.*, 2021 WL 5326517, at *3 ("At this juncture of the litigation, establishing a set-aside is administratively unworkable, particularly where the issue of class certification is on appeal and putative class members have not received notice of class counsel designation, the proposed set-aside, or their right to opt out of the class.")

(citing *In re Generic Pharm. Pricing Antitrust Litig.*, 2019 WL 6044308, at *1 (E.D. Pa. Oct. 7, 2019)).

Accordingly, the Court should deny DPPs' Motion as premature.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court deny DPPs' Motion for a Set-Aside Order.

Dated: March 18, 2025

Respectfully submitted,

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