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

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

DPPs' request that the Court enter a common benefit set-aside order at this time is well-founded. The litigation is well advanced, and the factual and legal record is well developed. Extensive class certification proceedings have concluded. The Court appointed Interim leadership for the DPP class nearly five years ago (ECF No. 143) and recently appointed DPP Co-Lead Counsel for the certified class. ECF No. 1107. The plan of notice for the certified class has been submitted. ECF No. 1205.

The four separate opposition briefs—two from DAPs and two from Defendants—all recognize the work that DPPs have done in this case. Nevertheless, they proffer a potpourri of concerns, many of which are contradictory and at odds with the facts. Defendants' Opposition (ECF No. 1193 at 7-8) also raises questions of fairness relating to DPPs potentially receiving compensation from a DAP settlement in this case. DPPs agree that fairness is central to this Motion, but Defendants are in a poor position to assert it. DPPs litigated this case for years with no help from any DAP to compile an extensive factual and legal record that Defendants fought vigorously the entire time. What is *not* fair is for late follow-on DAPs to avail themselves of the benefit of that record but not pay fair compensation for it. That is the fairness issue at the heart of this Motion.

Given all the arguments and stated concerns, the most equitable resolution is for the Court to grant DPPs' Motion and enter a set-aside order now to establish a common benefit fund to be held in escrow and subject to the Court's authority. This proposal will not prejudice any party, and will ensure that such funds are available upon a later determination by the Court regarding whether DPPs are entitled to any portion of such funds.[1]

[1] In addition to the arguments addressed in the text, DAP Carina levels personal and untrue accusations regarding DPP Co-Lead Counsel. Carina Br. (ECF No. 1196) at 2 (calling DPPs

I. THE COURT SHOULD ENTER A SET-ASIDE ORDER.

Entering a set-aside order now is the appropriate first step in a two-step process that applies to common benefit funds. Setting aside the funds now does not entitle any party to them; instead, it simply ensures that as current and future DAPs obtain any recoveries, funds are preserved for a second step, in which DPPs can seek to prove the common benefit they provided any particular DAP, interested parties can respond, and the Court can decide on a full record. The oppositions offer no rationale to do anything different but instead suggest inefficient or illogical paths forward.

A. IT IS APPROPRIATE TO ESTABLISH A COMMON BENEFIT FUND NOW.

The oppositions argue that the timing of this Motion is either—or both—too early or too late. Defs.' Br. at 9-10, ECF No. 1193 (too early); Certain DAPs' Br. at 2 (too early) & 4 (too late), ECF No. 1195. The reality is a set-aside order is needed now, and with notice of the certified class being sent in the next few weeks (*see* ECF No. 1205), class members can evaluate whether they wish to stay in the class and if they opt out, be aware that they might—subject to the Court's later determination—be obligated to pay fair compensation for receiving a benefit created by DPPs.[2]

The argument that this Motion is too early rests on two faulty premises. First, DAPs and Defendants argue that the Motion is premature if a plan of notice to the certified class has not been

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"unreliable counsel"); *id.* at 4 ("litigation mismanagement"); *id.* at 9 (stating DPP counsel "pursued their own financial interest at the expense of DAPs"). Such accusations and name-calling are unprofessional and unserious, and they say more about counsel making the accusations than actually shedding any light on the issues in the Motion. DPPs submit that the nearly $1 billion recovered by DPPs in the *Pork* and *Broilers* cases speaks for itself (Declaration of Brian D. Clark ("Clark Decl.") ¶ 3), but DPPs do not intend to further address these accusations.

[2] Defendants suggest that DPPs have a created Rule 23 conflict among class members in arguing for a set-aside for opt-outs. Defs.' Br. at 11. But by definition, any opt-out will *not* be a member of the class that DPPs were appointed to represent, and therefore no conflict exists.

filed with the Court. Defs.' Br. at 11; Certain DAPs' Br. at 5. However, a plan of notice was filed on March 25, 2025, so this argument appears mooted. *See* ECF No. 1202.

Second, DAPs and Defendants argue that the case is not "significantly advanced." This simply does not square with reality. Fact discovery closed years ago. DPPs took over seventy-five depositions, and analyzed more than 1.7 million documents, all of which DAPs have availed themselves. DPP Br. (ECF No. 1138) at 4-5. The only additional fact discovery that the Court has allowed going forward is (1) for plaintiffs' and defendants' merits experts to be deposed, and (2) to grant DAP Carina a limited, single-party discovery period focused on EMI, a subsidiary of Defendant Agri Stats, which the Court held should not duplicate discovery previously taken, and that any such depositions are limited to a total of thirty hours across all Defendants (the equivalent of just over four full seven-hour depositions).[3] ECF No. 1109. To characterize these remaining tasks as "substantial" is not credible; they are merely the tail wagging the dog of the seventy-five depositions taken in the main fact discovery period and the millions of pages of documents produced. The fact that merits expert reports and depositions have not yet occurred does not change the reality that the case is significantly advanced and nearing the end of discovery.

Certain DAPs' argument that this Motion is too late due to the doctrine of laches is contradicted within two pages of the same brief, when they call this motion "extremely premature," because trial has not yet occurred and a final trial result is not issued. *Compare* ECF No. 1195 at 2 *with* 4. However, the only case cited for application of the doctrine of laches to a set-aside motion (the "too late" argument) involved a post-trial verdict motion after the movant lost at trial. *In re HIV Antitrust Litigation*, 2023 WL 7397567, *1-*2 (N.D. Cal. Nov. 8, 2023). This case bears no

[3] On March 28, 2025, Carina also filed a motion for additional discovery. ECF No. 1209.

resemblance to *In re HIV*, and the doctrine of laches does not apply. In any event, as noted, Certain DAPs' "much too late" argument runs headlong into their "much too early" argument.

B. A SET-ASIDE ORDER IS APPROPRIATE IN THIS CASE BECAUSE THE LATE FILING OF OPT-OUT CASES DISTINGUISHES IT FROM TYPICAL ANTITRUST CASES.

The oppositions argue that common benefit funds are not appropriate in antitrust cases. Certain DAPs' Br. at 1; Defs.' Br at 6-7. As prior courts imposing set-aside orders in antitrust cases have found,

> While the free-rider problem may be felt most acutely by class counsel in mass tort cases with hundreds or thousands of individual plaintiffs, the risk of free-riding in class actions is not non-existent, especially in complex, vigorously contested antitrust cases such as this one. Without 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 class counsel, and reap the savings in legal fees. That situation presents a classic problem of unjust enrichment, which the common benefit doctrine is meant to remedy.

In re Zetia (Ezetimibe) Antitrust Litig., MDL No. 2:18-md-2836, 2022 WL 18108387, at *4 (E.D. Va. Nov. 8, 2022) (citing *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)).

The key distinguishing feature in this case is how long DAPs waited to file their own cases. The oppositions overwhelmingly rely on cases where the procedural posture was very different—DAPs had filed their cases early in the litigation, long before fact discovery had closed. *See* Clark Decl. ¶¶ 6-9 (summarizing the large number of DAPs that joined the other protein antitrust cases well in advance of the close of fact discovery, including *Broilers*, *Pork*, *Beef*, and *Tuna*). The key impediment to imposition of a set-aside in those cases was the difficulty of untangling the specific work done by DPP counsel because DAPs actually attended depositions, participated, and contributed in some way to developing the factual record. Further, in many of the cases Defendants cite, class certification had not yet been granted or was on appeal, so the set-aside motions were denied without prejudice. *See In re Generic Pharma. Pricing Antitrust Litig.*, MDL No. 2724, 2019

WL 6044308, *1 (E.D. Pa. Oct. 7, 2019) (denying without prejudice the motion for a set-aside order brought jointly by two classes where "no classes have yet been certified" and "the cases are moving forward as the result of the efforts of many different Plaintiff groups," including DAPs and state attorneys general).

Here, no DAP contributed to discovery during the period for fact discovery that ended on November 1, 2022 (ECF No. 571). No matter how much DAPs try to argue that DPPs' extensive discovery work somehow mattered only to class certification, they cannot seriously contest that the body of fact discovery DPPs created forms the overwhelming corpus of facts that DAPs will reply upon at summary judgment and trial. *See* Clark Decl. at ¶¶ 3-4 (Feb. 12, 2025), ECF No. 1139. For strategic reasons known only to itself, Carina (and any additional DAPs who may file in the coming months)[4] did not enter the case until after fact discovery closed. Instead of filing right after the initial motion to dismiss was denied, most DAPs sat on the sidelines. They could sit on the sidelines with no risk for at least two reasons. First, DPP counsel was appointed as Interim Co-Lead Counsel on June 16, 2020, and from that point on acted on behalf of all absent class members under Fed. R. Civ. P. 23(g). Those absent class members include all DAPs who delayed filing their case in the subsequent years and those that took no role in discovery.[5] Second, the statute of limitations on any potential DAP case was tolled under *American Pipe & Construction*

[4] Carina complains that since it did not file in this Court but was transferred here, now it is "where it did not want to be." Carina Br. at 13. That has no relevance to this Motion—the reality is that like every single case in *Broilers*, *Pork*, *Beef*, and *Turkey*, all DAP cases have been centralized in a single court. It also does not refute the fact that Carina has benefited from the extensive body of discovery developed by others when, after sitting on the sidelines for three years, it finally entered the case.

[5] Carina relies heavily on the argument that no DPP leadership was appointed until January 2025. *See, e.g.*, Carina Br. at 7-8. That is not true. DPP Co-Lead Counsel were appointed Interim DPP Counsel in June 2020 (ECF No. 143), and from that point forward acted on behalf of all absent class members—even those who later opted out of the Tyson settlement or may soon opt out of the certified class—as long as they were class members.

Co. v. Utah, 414 U.S. 538, 554 (1974), precisely because DPP Co-Lead Counsel had filed this lawsuit on behalf of all absent class members. This allowed would-be DAPs to sit by and wait for a strategic moment to opt out and file their own cases. Until then, as absent class members they were protected from having their future lawsuits dismissed because DPPs filed this case, defeated formidable motions to dismiss, and built an extensive body of discovery.

C. FILING INDIVIDUAL, SERIAL MOTIONS FOR COMMON BENEFIT SET-ASIDES ON A RECOVERY-BY-RECOVERY BASIS IS CUMBERSOME, INEFFICIENT, AND UNWIELDY.

The oppositions also argue that it is more efficient for DPPs to file individual set-aside motions for each individual DAP recovery. Defs.' Br. at 2 ("Notice of settlements, if any, will be publicly docketed."); *id.* at 7. This is not a serious proposal. It is far less efficient than DPPs' proposal and contradicts the well-established common benefit doctrine that avoids this incredibly time-consuming, piecemeal approach. *See In re Worldcom, Inc. Sec. Litig.*, No. 02 Civ. 3288, 2004 WL 2549682, at *4 (S.D.N.Y. Nov. 10, 2004) ("Without the entry of a set-aside order in advance of Individual Action settlements or judgments, Individual Actions could be dismissed after settlement or a judgment, requiring Liaison Counsel to pursue separate compensation claims in any number of jurisdictions around the country."). Further, it is not correct that "notices of settlement" are commonly filed by DAPs. Instead, DAPs nearly always file boilerplate "notices of dismissal" that do not say whether a settlement was reached, as opposed to dismissal for arbitration or some other unique facts. *See, e.g.*, *Broilers*, No. 1:16-cv-08637, ECF No. 7549 (N.D. Ill. Mar. 27, 2025) ("stipulation and agreed order dismissing" defendant Harrison Poultry by DAP Campbell Soup, with no mention of a settlement having occurred). Further, by the time a stipulation of dismissal or notice of settlement is filed, a client and its counsel likely have already spent the funds received from the defendant, leaving DPPs with a far more difficult recourse of

chasing down funds, initiating motion practice and discovery on ability to pay, and other tasks not necessary with the establishment of a routine common benefit fund.

D. <u>THERE IS NOTHING DUPLICATIVE OR UNFAIR ABOUT COMPENSATING DPPS FOR COMMON BENEFITS CONFERRED UPON DAPS.</u>

The oppositions also argue that it is unfair for DPPs to be compensated from DAP recoveries because DPPs may also have attorneys' fees paid and litigation expenses reimbursed as part of any class recoveries. Carina Br. at 13-14; Defs.' Br. at 6; Certain DAPs' Br. at 1-2. But this is not a justification to relieve DAPs from paying fair compensation for receiving the benefit of someone else's work. It is also wrong. Of course, DPPs will petition the Court for attorneys' fees and expenses from class recoveries. But by opting out late and not contributing any time or money to the development of the factual record described above, opt-outs put a heavier load on DPPs to litigate the case while at the same time decreasing the size of DPP recoveries by opting out of the class and reducing the size of class commerce. In recognition of this, courts considering similar motions from antitrust class action plaintiffs have determined that it is appropriate for class counsel to be compensated separately (over and above any award of fees from class recoveries) for common benefits provided to opt-outs, since the Court will review and approve all fee and expense awards to class counsel from any source. *See In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 343, 350-51 (E.D. Pa. 2004) (approving of $3 million fee payment to class counsel, in addition to separate fee awarded for class recoveries, after earlier order establishing a set-aside fund); *In re Lidoderm Antitrust Litig.*, No. 14-MD-02521-WHO, 2017 WL 3478810, at *1 (N.D. Cal. Aug. 14, 2017) ("EPP Class Counsel will of course seek a recovery for their fees and costs from any common fund secured for the EPP Class members who do not opt-out. But that does not resolve the equitable 'free rider' problem identified by Class Counsel. And there is no chance of a double

recovery for EPP Class Counsel's time or expenses; any distributions from the set-aside account as well as any final fee order will be approved by the Court.").

II. WHO ULTIMATELY BENEFITED FROM DPPS' WORK, WHO SHOULD BE COMPENSATED FOR IT, AND IN WHAT AMOUNT, WILL BE SUBJECT TO LATER FULLY DEVELOPED MOTION PRACTICE.

Most of the arguments in the oppositions relate not to the first step sought in this Motion—*whether* a set-aside order should be issued now, but to the second step—the Court's eventual record-based determination whether any portion of that common benefit fund should be awarded to DPPs for the benefit their work bestowed on a DAP. But as made clear in DPPs' Motion, at this time DPPs are only asking the Court to enter a set-aside order so funds will be available to address any award arising from the second step. Each such argument by the oppositions is addressed below.

First, the argument that DPPs' work in this case has conferred no benefit to DAPs is facially unfounded. *See* Carina Br. at 9-11; Defs.' Br. at 8. It is uncontroverted that for the seventy-five depositions taken in this case, DAPs contributed nothing to planning or taking those depositions. DPP Br. at 4-5, ECF No. 1138. Carina even states in its brief that "Carina's discovery is largely limited by the DPP-negotiated record," which is a result of Carina waiting nearly four years to file its own case. Carina Br. at 12. And its piggy-backing on DPPs' work continues. Just last week, Carina requested a copy of all third-party document and data productions from DPPs, which total more than 1.3 million pages from over three dozen entities. Clark Decl., ¶ 4. This request in itself establishes the value that Carina sees in the work DPPs have performed to date. *See Linerboard*, 333 F. Supp. 2d 343, 349 (E.D. Pa. 2004) ("The fact that direct action plaintiffs have sought—and used—class discovery at every stage of their involvement in the case to date is a strong indication of the utility attributed to that discovery by direct action plaintiffs.").

In a somewhat extraordinary argument, Certain DAPs seemingly concede they contributed nothing to the discovery record in this case because "DPPs never offered to coordinate discovery

with Certain DAPs or allow them to participate in the preparation for depositions or taking them." Certain DAPs' Br. at 4.[6] It should go without saying that no attorney representing a client in litigation should wait to be invited to fulfill their obligations to represent their client. Deciding not to act yourself to obtain discovery from opposing parties, but instead to rely entirely on the work of a co-plaintiff, means you are receiving a common benefit. It also rings hollow to call all the motion practice that laid the basis to obtain that discovery "garden variety efficiency measures" (Certain DAPs' Br. at 4), when no DAP assisted in any way with such efforts that *some* plaintiff had to do, and that *no* DAP did.

Second, the argument that the record DPPs built to get their class certified is "irrelevant" to DAPs is misleading and inaccurate. Certain DAPs' Br. at 2-3; Carina Br. at 10-11. It is absurd to suggest that all the discovery DPPs assembled pertained solely to getting a class certified.[7] Far from being irrelevant, the factual narrative compiled *not only* for class certification *but also* to establish the merits of the case (based on taking dozens of depositions and reviewing millions of pages of documents) presented an off-the-shelf work product for DAPs to use once they got off the sidelines and entered the case. Further, the expert reports on market structure, damages, and other expert issues at class certification are all issues that will be the focus of all plaintiffs' merits

[6] Certain DAPs also represent in their brief that they "had to acquire the Defendants' document productions and create their own database," (Certain DAPs' Br. at 3), however, this appears unlikely given that Carina and Amory (who used to be represented by the same counsel as Certain DAPs) has had to obtain document productions from Defendants or DPPs to date, and Certain DAPs do not appear to be in possession of them. *See* Clark Decl., ¶ 4.

[7] *See Linerboard*, 292 F. Supp. 2d 644, 659 (E.D. Pa. 2003) ("In addition to case-management matters and the taking of discovery, designated counsel conferred a benefit on the tagalong actions through their preparation and argument of the class certification motions. In the favorable rulings of this Court and the Court of Appeals on the class action motions, the tag-along plaintiffs obtained the benefit of the imprimatur of those courts on the theory of the case formulated by class plaintiffs and adopted in the tag-along actions. That is so because '... many of the questions entering into determination of class action questions is intimately involved with the merits of the claim.'").

expert reports. Indeed, on March 31, 2025, the Court in *Pork* denied all of Defendants' extensive "broadside attack" *Daubert* motions in five pages of a longer order, noting it had already analyzed the same expert issues at class certification. *Pork*, 18-cv-01776, ECF No. 2928 at 28 ("The Court already addressed this argument at class certification. . . . The Court's mind has not changed."); 27 ("The Court has already considered this precise issue and found it meritless.").

Third, Carina argues that because the factual analysis and synthesis of seventy-five depositions and millions of pages of documents they received were filed on the docket, they should not be required to contribute money or effort for the common benefit they received from the work underlying those filings. Carina Br. at 10-11. That is an incredibly simplistic argument, and if it were actually supported by any case law, it would mean that all the hard work by attorneys to confer a common benefit should not be compensated because it will all end up summarized in ECF filings anyway. However, no court considering whether to impose a set-aside fund appears to have even mentioned this argument, so the Court need not credit it.

Fourth, the oppositions make another ineffective "what about" argument concerning whether CIIPP Co-Lead Counsel have a claim to common benefit funds. Defs.' Br. at 3-4. That argument is irrelevant to the question of *whether* to create a set-aside fund to preserve the status quo. And in any event, after such funds are set aside, in step-two of this process the parties must meet and confer. Am. Proposed Order at ¶ 6, ECF No. 1182. In the second step, DPPs likely would have no objection to CIIPP Co-Lead Counsel submitting a request to receive common benefit funds. *See Lidoderm*, 2017 WL 3478810, *4 (creating set-aside fund to "pay attorneys' fees and expenses incurred by EPP Class counsel *or other counsel* for their common benefit work, subject to a showing of entitlement to such payments.") (emphasis added). But that is no reason not to take the first step now and establish the fund.

Fifth, Carina makes various other arguments that go to the second step of the set-aside process. For instance, that Carina's future work at summary judgment or trial should factor into the common benefit analysis. Carina Br. at 11; *see* Certain DAPs' Br. at 2. That is an argument Carina may raise with the Court at that time, but again it is no reason not to establish a common benefit fund now.[8] Similarly, Carina argues the settlements achieved by DPPs are "too low." But unrestrained by consistency, within a week of making that argument in opposition to this Motion, it relied upon the large size of those exact same settlements to attempt to fend off summary judgment in its case.[9] Again, Carina may make such arguments when applications for common benefit funds are filed, but such arguments are no reason not to create a common benefit fund.

III. THE REQUESTED PERCENT SET-ASIDE IS IN LINE WITH OTHER ORDERS, BUT THE AMOUNT IS FULLY WITHIN THE COURT'S DISCRETION.

DPPs' request for a 10% set-aside is in line with prior antitrust cases where set-aside orders have been put in place. *See, e.g.*, *In re Lidoderm Antitrust Litig.*, 2017 WL 3478810 at *1 (adopting 10% set aside after reviewing cases). Of course, at the appropriate time and on an appropriate record the Court can award a lower amount to DPP counsel if it sees fit, so the precise amount of the set-aside is not determinative of what ultimately is awarded. But if the Court feels that a 10%

[8] Carina's opposition notes that three separate classes in *Pork* opposed Carina filing an unapproved additional brief at summary judgment not authorized by the Court (Carina Br. at 4), as it ended up allowing Defendants significant additional pages to brief the issue. In the end, the brief was a sideshow, as the Court rejected DAPs' novel theory argued in that brief and noted "[t]he problem the DAPs face is that virtually all of the caselaw that seems to give legitimacy to a standalone § 1 claim under a hub-and-spoke test also relies on the support of allegations of parallel conduct and plus factors." *See Pork*, No. 18-cv-01776, ECF No. 2929 at 41.

[9] *See* Carina Statement of Undisputed Facts, ECF 1164 at ¶¶ 14-26 (stating facts supporting Carina's summary judgment opposition include the fact that "Defendants have paid tens of millions to settlement antitrust claims against them" and listing out settlements in *Turkey* and *Broilers* by the classes).

set-aside is too high, it is better to set a lower rate than create no set-aside at all. *See, e.g.*, *id.* at *3 (declining to impose the 12.5% set-aside requested by plaintiffs and ordering a 10% set-aside).

Carina's arguments for a lower percent set-aside related to the amount of the Cargill settlement are not well-founded. *See* Carina Br. at 14-15. Carina argues that it should only potentially be responsible for *expenses* in a set-aside, but that makes no sense given that the common benefit it has and will receive was created not only by DPPs' out-of-pocket expenses but also by an extensive investment of their time. Accordingly, case law is clear that both expenses and *attorney hours* are the basis for issuing a set-aside for late follow-on cases like Carina's. Carina notably has not and cannot assert that its experts are not using DPPs' expert work and discovery record to quickly catch up in this case. And that information plainly is the product of DPPs' hard work, including the investment of over 50,000 attorney hours. *See* DPP Br. at 6. In any event, these arguments go to the portion of a set-aside the Court ultimately determines as to each plaintiff, not to whether to establish a common benefit fund in the first place.

Again, how *much* DPPs ought to obtain for the common benefits provided to Carina is a question for step two. Step one, establishing the set-aside, ensures that the funds are available. Then the parties can make these arguments to each other as they meet and confer, and to the Court as it ultimately decides who is entitled to compensation from the fund and how much.

IV. THERE IS NO JURISDICTIONAL ISSUE WITH THE PROPOSED SET-ASIDE ORDER.

Defendants argue that the Court lacks jurisdiction to establish a common benefit fund, but this is simply wrong. Defs.' Br. at 9. It is axiomatic that, should an opt-out case filed outside this District *not* be transferred to this Court, the common benefit order would not apply to such cases, and the Proposed Order states this on its face. Am. Proposed Order at ¶ 8, ECF No. 1182 ("[T]his Order shall apply to all actions reassigned or otherwise transferred to this Court that assert claims

on behalf of direct purchasers of Turkey products that are the same or substantially similar to those asserted by Direct Purchaser Class Plaintiffs in this litigation and shall continue to apply after any remand of such actions."). But courts routinely establish common benefit funds for current and future opt-out cases *filed in* or *transferred to* the Court issuing the common benefit order. *See, e.g.*, *In re Lidoderm Antitrust Litig.*, 2017 WL 3478810 at *2 (applying 10% set-aside order only to cases "filed in or transferred to this Court"). Otherwise, the Court would be issuing serial common benefit orders as each opt-out appears. Such issues would clutter the docket and be inefficient for all parties. The Court may properly apply a common benefit order to future opt-out cases that are filed with or transferred to this Court.

The cases Defendants cite in support of their jurisdictional argument are inapposite. For instance, in *First Impressions Salon Inc. v. National Milk Producers Federation*, No. 3:13-cv-454, 2019 WL 13180924, *3 (S.D. Ill. Apr. 5, 2019), the court noted that "[a]t this juncture, Class Counsel have not identified, and the Court is unaware of, any Opt-Out Plaintiff who is pursuing a claim against Defendants." In addition, the motion sought entry of an order against not just opt-outs who filed before the court (and therefore over whom the court had jurisdiction), but also against opt-outs who may never have a case transferred to or filed with the court. *Id.* The court ultimately granted the set-aside motion in part, requiring defendants to notify plaintiffs of any settlement activity with any opt-out. *Id.* at *4 ("[T]his Order is intended to ensure future creation of a common benefit fund, if warranted in the future."). Similarly, the other case cited by Defendants, *Lidoderm*, merely noted the truism that the court did not "have jurisdiction over the *recoveries* belonging to opt-outs who are not before me," but the court did impose a set-aside order for opt-outs before the court, precisely as DPPs request here. *See In re Lidoderm Antitrust Litig.*, 2017 WL 3478810 at *3-*4.

V. THE FACT THAT DPPS SETTLED WITH TYSON IS NOT A REASON TO EXCLUDE DAP RECOVERIES FROM TYSON FROM A SET-ASIDE ORDER.

Tyson argues that its settlement with DPPs in May 2021 should exclude it from the relief this Motion seeks. Tyson Br. at 2, ECF No. 1194. DPPs disagree. The provision Tyson cites addresses Tyson's responsibilities to DPPs with respect to the DPP litigation, but this Motion concerns only DAPs, who are by definition not DPPs given they have opted out of the DPP class. Tyson need not settle with any DAP, but if a DAP recovers from Tyson, the Motion seeks to include it in any set-aside order addressing common benefits bestowed by other parties such as DPPs. Notably, neither Farbest Foods nor Cooper Farms, who have also settled with DPPs, join Tyson's arguments.

The parties' litigation standstill in the Tyson settlement does not bar the relief this Motion seeks because the Motion concerns DAPs and the common benefit they have received from DPPs. The only aspect of the Motion that could arguably directly affect Tyson is the creation of the escrow account contemplated by the Proposed Order. Therefore, when DPPs met and conferred with Tyson on this issue, they inquired whether having the Proposed Order amended to require the DAPs—rather than Tyson—set up the escrow fund would change Tyson's position. Clark Decl., ¶ 5. This would avoid Tyson incurring any costs associated with setting up the escrow account. But Tyson's position remained unchanged, so it appears that neither the litigation standstill itself nor any administrative costs are driving Tyson's position.[10]

Additionally, Tyson argues that because the parties have a litigation standstill, the common benefit work DPPs did was not to prove the conspiracy against Tyson. *See* Tyson Br. at 3-4.

[10] Of course, if the Court believes it is preferable to have DAPs create the proposed escrow account, DPPs would have no objection. But prior set-aside orders have required Defendants to create such escrows because they are the ones paying the money in the first instance. For efficiency and consistency, DPPs submit the same method should be followed here.

However, Tyson fails to cite paragraph 38 of the parties' Settlement Agreement, which states "Irrespective of any term in this Agreement, it is expressly agreed that nothing in this Agreement prohibits DPPs and DPP counsel in ongoing litigation of the Action from establishing a conspiracy under the Sherman Act, including discovering and introducing evidence of Settling Defendant as a co-conspirator in the Action or from effecting the cooperation provisions herein." ECF No. 1138. Of course, DPPs have taken discovery to prove the conspiracy against Tyson as well as the other Defendants. DPPs have asked many witnesses questions and obtained discovery from many sources establishing Tyson's role in the conspiracy.[11] At the appropriate time when applications are made for common benefit compensation, DPPs will make a more detailed showing of the common benefit they provided DAPs. But DPPs' Motion already provides ample evidence of this common benefit to all DAPs, and Tyson's protestations that DPPs have not provided enough benefit to a DAP specifically against Tyson hold no water.

VI. CONCLUSION

For these reasons, the Court should grant DPPs' Motion and enter a set-aside order now to establish a common benefit fund, to be held in escrow and subject to the Court's authority and later determination as to its ultimate distribution.

[11] *See, e.g.*, Expert Reply Report of Michael A. Williams, Ph.D. (ECF No. 830-3, filed under seal) at 29; fn. 65; 145, Table 6. These are but a few instances of evidence regarding Tyson in expert reports, depositions, and documents.

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Respectfully submitted,

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