UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

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

PLAINTIFFS WINN-DIXIE STORES, INC., BI-LO HOLDINGS, LLC AND ARAMARK FOOD AND SUPPORT SERVICES GROUP, INC.'S RESPONSE IN OPPOSITION TO DIRECT PURCHASERS PLAINTIFFS' MOTION FOR A COMMON BENEFIT SET-ASIDE ORDER

Direct Action Plaintiffs Winn-Dixie Stores, Inc., Bi-Lo Holdings, LLC, and Aramark Food and Support Services Group, Inc. ("Certain DAPs") file this Response in opposition to Direct Purchaser Plaintiffs' Motion for a Common Benefit Set-Aside Order. DPPs Motion should be denied for several reasons.

First, DPPs Motion is not well grounded because such a set-aside motion is more appropriate in a mass tort case and not in an antitrust class action, where DPPs are entitled to their attorneys' fees and costs if they prevail. *In re Packaged Seafood Prods. Antitrust Litigation*, 2021 U.S. Dist. LEXIS 221397, *31 (S.D. Cal. 2021) ("set aside orders 'make a lot more sense' in mass tort cases" and "Unlike in mass tort litigation, DPPs Class Counsel can recover attorneys' fees and costs under Rule 23(h) of the Federal Rules of Civil Procedure and the Clayton Act, 15 U.S.C. §15(a), for work they performed on behalf of the class"). Moreover, DPPs have already settled with Tyson and Cargill in the total amount of $36.5 million, and will seek an award of fees and costs that will be reimburse them for the $4.5 million in costs that they have incurred to date, and likely pay them at least $8 million in fees. *Packaged Seafood, id.* *31-32 (noting prior class action

settlements and fee awards to class counsel, holding that "DPPs' proposed settlement with COSI significantly undercuts the concerns that initially animated DPPs [set-aside] motion"). And, of course, Certain DAPs opted out of the Tyson "ice-breaker" class settlement and will opt out of the Cargill class settlement and vigorously pursue their claims against Tyson and Cargill, including at trial. Other courts have denied set-aside motions under similar circumstances. *Packaged Seafood, id.*[1]

Second, DPPs Motion is extremely premature. This Court has indicated that DPPs and DAPs may go to trial together. If so, Certain DAPs will expend significant attorney hours and expenses preparing for and going to trial. Presumably, if the Court orders a joint DPP/DAP trial, DPP counsel will coordinate with DAP counsel for trial preparation and trial. Certain DAPs will be involved in preparing for all of the pretrial milestones, including jury instructions, special verdict form, trial exhibits, briefing and arguing motions in limine, deposition designations, opening statements, closing arguments, and direct and cross examinations. Moreover, there will likely be certain Defendants that DPPs have settled with that Certain DAPs have not settled with and will need to take to trial without DPPs' assistance. In short, there is a tremendous amount of attorney hours and expenses between now and the end of trial. Therefore, until that time and those expenses have been incurred and a final result and recovery are determined, DPPs Motion should be denied as premature.

Third, Certain DAPs never engaged in some of the conduct that forms the centerpiece of the Motion and never received any work product from DPPs. Specifically, Certain DAPs never asked DPPs for their expert reports or expert work product. This is precisely because such expert work and work product relating to class certification is irrelevant to and not useful for Certain

[1] *Id.* *32 ("The traditional mechanisms for recovery of fees and costs by class counsel are readily available under Rule 23(h) and are actively being pursued here").

DAPs claims. Moreover, to the extent that Certain DAPs asked to share in the cost of a database housing Defendants' document productions, they did so in the spirit of cooperation and efficiency. And they were willing to pay their fare share of the costs. DPPs refused Certain DAPs' request and offer to share in the costs. So Certain DAPs had to acquire the Defendants' document productions and create their own database at their own expense and attorney hours. In addition, DPPs refused to coordinate on the preparation of a contention interrogatory response and Certain DAPs spent hundreds of hours preparing their 100 page single-space contention interrogatory response, including reviewing depositions and documents. In short, the work product that DPPs now invoke in support of this Motion was never provided by DPPs to Certain DAPs.

Fourth, Certain DAPs never discussed any percentage set-aside with DPPs.

Fifth, DPPs' list of expenses illustrate the lack of benefit conferred on Certain DAPs. Clark Declaration, Par. 3. DPPs seek expenses for:

- paying their e-discovery platform provider more than 1.7 million pages of documents produced by the parties in this matter

  Certain DAPs obtained Defendants' document productions and created their own database, when DPPs refused to share DPPs database and costs.

- expert costs of analyzing and identifying holes in the sales and cost data produced by Defendants and third parties in this matter
- Expert costs of cleaning the sales and cost data produced by defendants and third parties

  Certain DAPs obtained Defendants' sales and cost data and their own experts have worked on that data.

- Expert costs of preparing three expert reports to date providing analyses on the turkey market and regression analyses required for any antitrust plaintiff—class or direct action—in order to sustain an antitrust claim, and (6)

  These costs relate to class certification and neither relevant nor useful to Certain DAPs' claim.

- court reporter vendor who provided in person and remote deposition services, including electronic exhibits during depositions

Certain DAPs paid Veritext for all of the deposition transcripts and exhibits.

Sixth, DPPs contend that Certain DAPs did not take an active role in organizing and coordinating discovery efforts among the plaintiff groups. However, until Aramark and Carina filed in 2023, there were only three DAPs all represented by the same counsel. So, there was no need for any formal organization or coordination of efforts. Moreover, DPPs never offered to coordinate discovery with Certain DAPs or allow them to participate in the preparation for depositions or taking them.

Seventh, DPPs never informed Certain DAPs that they would ask for a common fund set-aside order, while all the while refusing to share their work product with Certain DAPs. Moreover, DPPs now claim that the Orders that Certain DAPs entered into for the sake of efficiency are somehow evidence of free-riding. To the contrary, these are garden-variety efficiency measures, such as agreeing to the existing Protective Order and ESI Protocol, that any Court would expect and appreciate. In DPPs world, there would never be any such efficiencies and each party would have to reinvent the wheel, again hardly an efficient approach and likely a waste of party and judicial resources. Finally, again given DPPs refusal to share work product, the fact that they did not notify Certain DAPs of their intention to seek a common benefit set-aside order means that their Motion should be denied based on the doctrine of laches. *In re HIV Antitrust Litigation,* 2023 U.S. Dist. LEXIS 200986, *38-41 (N.D. Cal. 2023)(denying motion for set-aside order because, among other factors, "EPPs delayed in seeking a set-aside order. The EPPs could have asked the Retailer Plaintiffs to enter into some kind of set-aside agreement when the Retailers first filed suit in 2021").

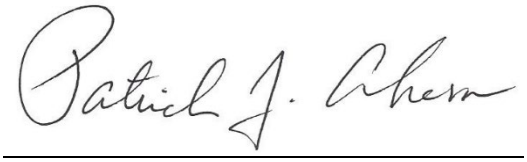
Finally, set-aside orders have been denied where, as here, "a set-aside fund would create 'administrative chaos.'" *Packaged Seafood*, 2021 U.S. Dist. LEXIS 221397 *34. In this case, notice of the contested class has not yet gone out and any future opt outs have not received notice to opt out of the class and the deadline for opting out of the Cargill direct purchaser class action settlement has not yet passed. *Id.* In addition, a set-aside order "would create 'a significant administrative process with one or more appointed administrators.'" *Id.* *35.[2]

CONCLUSION

For the reasons stated above, this Court should deny DPPs' Motion for a Common Benefit Set-Aside Order.

March 18, 2025

Respectfully submitted,



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[2] Certain DAPs also incorporate by reference the arguments in Defendants' Opposition (ECF 1993) and Tyson's Opposition (ECF 1194), and join in those arguments.