

**UNITED STATES DISTRICT COURT  
DISTRICT COURT OF MINNESOTA**

IN RE PORK ANTITRUST  
LITIGATION

This Document Relates To:

THE DIRECT PURCHASER  
PLAINTIFF ACTION

Case No. 0:18-cv-01776 (JRT-JFD)

Honorable John R. Tunheim

**MEMORANDUM OF LAW IN  
SUPPORT OF DIRECT  
PURCHASER PLAINTIFFS'  
MOTION FOR INTERIM  
PAYMENT OF LITIGATION  
EXPENSES**

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## I. INTRODUCTION

After almost six years of hard-fought litigation in this complex antitrust class action, Co-Lead Class Counsel for the Direct Purchaser Plaintiffs (“DPPs”)<sup>1</sup> have secured settlements totaling \$116,470,300 with Defendants JBS, Smithfield, Seaboard, and Hormel Foods, and have completed the first distribution of the net proceeds of the JBS and Smithfield settlements to qualified claimants. (*See* ECF Nos. 2215, 2208.) On July 22, 2022, this Court approved reimbursement of DPPs’ litigation expenses, together with an interim payment of attorney’s fees and Class Representative service awards. (ECF No. 1424, the “Order.”) In that Order, the Court approved the establishment of a future litigation expense fund in the amount of \$2,494,494.25. (*Id.* ¶ 9.) As of the filing of this motion, that litigation expense fund is exhausted. (Declaration of Michael H. Pearson in support of this motion (“Pearson Decl.”) ¶ 8.)

DPPs now seek Court approval of a second interim payment to replenish the future litigation expense fund in the amount of \$1,460,600.00, which is 10 percent of the total amount of undistributed proceeds from the settlements with Seaboard (\$9,750,000.00) and Hormel Foods (\$4,856,000.00 and, with the Seaboard settlement proceeds, \$14,606,000.00 total).<sup>2</sup> DPPs are not presently seeking an award of attorney’s fees, individual firm

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<sup>1</sup> Co-Lead Class Counsel are Lockridge Grindal Nauen P.L.L.P. and Pearson Warshaw, LLP. (Memorandum Opinion and Order dated March 29, 2023, ECF No. 1887 (“Class Certification Order” or “Cert. Order”), at 68.)

<sup>2</sup> DPPs reserve the right to seek an additional payment of litigation expenses from these settlements at a later date.

expenses, or Class Representative service awards, but will do so at a later date. (*See* Section III below.)

All DPP Class members have received notice of this motion. In the Court-approved notice for the Hormel Foods settlement, Co-Lead Class Counsel informed Class members that they would seek reimbursement of up to \$1,460,600.00 in litigation expenses, that this motion would be posted to the case website (<http://www.porkantitrustlitigation.com>), and that they would be allowed to object to this motion. (ECF No. 2180-2.) Co-Lead Class Counsel also informed DPPs that the Court will determine the amount of the litigation expenses to be reimbursed from the settlement funds. The deadline for Class members to object to this request is August 3, 2024. Prior to the Court's fairness hearing on September 19, 2024, Co-Lead Class Counsel will report to the Court and address any objections received. (Pearson Decl. ¶ 13.)

## **II. LITIGATION BACKGROUND**

This is an antitrust class action against certain producers of Pork. DPPs filed their class action lawsuit on June 29, 2018, and subsequently filed cases were consolidated before Judge John R. Tunheim in this Court. DPPs allege that Defendants combined and conspired to fix, raise, maintain, or stabilize prices of Pork sold in the United States in violation of the Sherman Act, 15 U.S.C. § 1. (*See generally* DPP Third Consolidated and Amended Complaint, ECF No. 431.) DPPs allege that Defendants implemented their conspiracy in various ways, including via coordinated supply restrictions, sharing

competitively sensitive price and production information, and otherwise manipulating Pork prices. (*Id.*)<sup>3</sup>

Defendants moved to dismiss all Plaintiffs' complaints. In August 2019, the Court granted their motions and granted Plaintiffs leave to amend. (ECF No. 360.) DPPs amended their complaint, and after extensive briefing by the parties, on October 16, 2020, the Court largely denied Defendants' motions to dismiss. (ECF No. 519, *amended* Oct. 20, 2020, ECF No. 520.)

Since the initial complaint was filed, DPPs have continued their factual investigation into the conspiracy alleged in their complaint and, once the Court largely denied Defendants' motions to dismiss Plaintiffs' complaints, DPPs commenced extensive discovery. (Pearson Decl. ¶ 3.) During discovery, DPPs obtained responses to multiple sets of interrogatories, and received millions of documents in response to their requests for production and third-party subpoenas. (*Id.*) DPPs and other plaintiffs have taken dozens of depositions of the Defendants and third parties. (*Id.*) DPPs have also provided responses to written discovery, produced documents, and DPP's named representatives have appeared for depositions noticed by the Defendants. (*Id.*)

On November 17, 2020, DPPs and the JBS Defendants entered into a settlement that provided for a payment of \$24,500,000 and meaningful cooperation. (Pearson Decl. ¶ 4.)

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<sup>3</sup> Unlike other civil antitrust actions, this case was developed and brought without the benefit of a formal antitrust investigation by the U.S. Department of Justice or the assistance of a leniency applicant under the Department of Justice's Corporate Leniency Program. *See* Corporate Leniency Policy, U.S. Dep't of Justice, <https://www.justice.gov/atr/corporate-leniency-policy>.

The Court granted final approval of that settlement on July 26, 2021. (ECF No. 838.) On June 29, 2021, DPPs and the Smithfield Defendants entered into a settlement that provided for a payment of \$83 million<sup>4</sup> and meaningful cooperation. (Pearson Decl. ¶ 4.) The Court granted final approval of that settlement on January 31, 2022. (ECF No. 1154.) On June 12, 2023, DPPs and Seaboard Foods LLC entered into a settlement that provided for a payment of \$9,750,000 and meaningful cooperation. (Pearson Decl. ¶ 4.) The Court granted final approval of that settlement on March 5, 2024. (ECF No. 2137.) On March 29, 2024, DPPs and Hormel Foods Corporation entered into a settlement that provided for a payment of \$4,856,000. (Pearson Decl. ¶ 4.) The Court granted preliminary approval of that settlement on May 6, 2024. (ECF No. 2218.) Notice to the DPP Class of these settlements was approved by the Court and successfully implemented by A.B. Data, Ltd. (the Court-appointed Settlement Administrator, *see* ECF Nos. 631, 845, 2014, 2218) each time. (ECF Nos. 838, 1154, 2137.) There have been no objections to any of the settlements in this case. (Pearson Decl. ¶ 6.)

On August 25, 2023, this Court approved the DPPs' Motion for First Distribution of Net Settlement Proceeds. (ECF No. 2015.) Since that time, A.B. Data, in consultation with Co-Lead Class Counsel, disseminated notice, diligently processed thousands of claims, determined each claimant's eligibility, and sent a *pro rata* payment to each qualified claimant. (ECF No. 2144; *see also* Pearson Decl. ¶ 7.)

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<sup>4</sup> The Smithfield settlement was subject to a \$5,635,700 reduction based on the opt-outs received during the settlement administration process. The total net amount paid by Smithfield equaled \$77,364,300. (Pearson Decl. ¶ 4.)

On March 29, 2023, the Court certified the following DPP Class:

All persons and entities who directly purchased one or more of the following types of pork, or products derived from the following types of pork, from Defendants, or their respective subsidiaries or affiliates, for use or delivery in the United States from June 29, 2014 through June 30, 2018: fresh or frozen loins, shoulders, ribs, bellies, bacon, or hams. For this lawsuit, pork excludes any product that is marketed as organic or as no antibiotics ever (NAE); any product that is fully cooked or breaded; any product other than bacon that is marinated, flavored, cured, or smoked; and ready-to-eat bacon.

Excluded from this Class are the Defendants, the officers, directors or employees of any Defendant; any entity in which any Defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any Defendant. Also excluded from this Class are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, any juror assigned to this action, and any Co-Conspirator identified in this action.

Cert. Order at 4-5 (the “Certified Class”), and at 69 (granting class certification).

The case now has a trial date of June 2, 2025, and the parties presently are in the dispositive motions phase of the pretrial schedule. (*See* ECF Nos. 2119, 2209].)

**III. CLASS COUNSEL DEDICATED EXTENSIVE RESOURCES TO THIS MATTER AND FACED SIGNIFICANT RISKS**

From the inception of their investigation into this matter, Class Counsel (which includes Co-Lead Class Counsel as well as other lawyers and law firms) dedicated their time, expertise, and capital to ensure the Certified Class would recover for Defendants’ alleged wrongful conduct. Class Counsel have done so entirely on a contingent basis, with no guarantee of compensation or reimbursement of expenses. Since the inception of this case (which was many months before it was filed in June 2018), Class Counsel invested thousands of hours of attorney and other legal professional time. (*See* Pearson Decl. ¶ 3.) Co-Lead Class Counsel have worked diligently to ensure that throughout the case, Class



Counsel's efforts have been coordinated, detailed, vigorous, and efficient. To date, the result of these efforts is a substantial recovery for the DPPs: settlements totaling more than \$116 million. (*See* Pearson Decl. ¶ 4.)

The time, expertise, and capital discussed in detail herein were required to effectively and efficiently prosecute a complex antitrust case against enormous and wealthy business entities. (Pearson Decl. ¶ 15.) DPPs are not presently seeking an award of attorney's fees, individual firm expenses, or Class Representative service awards, but will do so at a later date.

**IV. CLASS COUNSEL'S LITIGATION EXPENSES WERE REASONABLY INCURRED AND THE FUTURE LITIGATION EXPENSE FUND SHOULD BE REPLENISHED**

In addition to the time and resources invested in this case discussed above, DPPs have incurred significant litigation expenses in prosecuting this litigation. Under the common fund doctrine, class counsel customarily are entitled to reimbursement of reasonable expenses incurred during the litigation. (ECF No. 1424 at ¶ 7 (“It is well established that counsel who create a common fund like the one at issue are entitled to the reimbursement of litigation costs and expenses, which include such things as expert witness costs, mediation costs, computerized research, court reports, travel expenses, and copy, telephone, and facsimile expenses.” *Krueger v. Ameriprise Fin., Inc.*, No. 11-CV-02781 (SRN/JSM), 2015 WL 4246879, at \*3 (D. Minn. July 13, 2015)).) *See also Yarrington v. Solvway Pharms., Inc.*, 697 F. Supp. 2d 1057, 1065 (D. Minn. 2010); *Khoday v. Symantec Corp.*, No. 11-CV-180 (JRT/TNL), 2016 WL 1637039, at \*12 (D. Minn. Apr. 5, 2016), *aff'd sub nom. Caligiuri v. Symantec Corp.*, 855 F.3d 860 (8th Cir. 2017) (“Courts

generally allow plaintiffs' counsel in a class action to be reimbursed for costs and expenses out of the settlement fund, so long as those costs and expenses are reasonable and relevant to the litigation.'").

**A. Accounting of the Future Litigation Expense Fund**

In this Court's July 22, 2022 Order awarding an interim payment of attorney's fees, reimbursement of litigation expenses, and Class Representative service awards (ECF No. 1424), the Court approved the establishment of a future litigation expense fund in the amount of \$2,494,494.25. (*Id.* ¶ 9.) At that time, DPPs represented that they would provide an accounting of the future expense fund in a subsequent motion for litigation expenses. (ECF No. 1363 at 26.) Expenses by category are described in detail below, as well as in the Pearson Declaration, and were reasonably necessary to advance the interests of the Certified Class and to obtain the favorable results achieved to date. (Pearson Decl. ¶ 10.) Due to the risk that they might never be recovered, Class Counsel endeavored to keep expenses to a minimum. (*Id.*)

From May 1, 2022 through May 31, 2024, DPPs have incurred Litigation Fund expenses of \$3,065,434.44,<sup>5</sup> while settling with two additional Defendant families (Seaboard and Hormel Foods) for an additional \$14,606,000. (Pearson Decl. ¶¶ 10, 4.) Litigation Fund costs fall into eight categories: (1) Investigators & Consultants, (2) Experts, (3) Document Database Vendor, (4) Mediators, (5) Phone Records Vendor &

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<sup>5</sup> Litigation expenses incurred by individual Class Counsel firms that were not paid out of the Litigation Fund are not included in this motion and will be sought at a later date, subject to Court-approved notice to the DPP Class.

Subpoena Costs, (6) Deposition Costs, (7) Court Transcripts, and (8) Miscellaneous Costs. Each of these eight categories is described in further detail below.<sup>6</sup>

(1) Investigators & Consultants. Co-Lead Class Counsel have engaged investigators, industry consultants, economic consultants, and e-discovery consultants to assist them in litigating this case. These costs were necessary to investigate the case, analyze data relating to the Pork market, and assist in resolving complex e-discovery collection and search issues. Between May 1, 2022 and May 31, 2024, DPPs have incurred \$29,813.14 for the services of investigators and consultants.

(2) Experts. Co-Lead Class Counsel have engaged the services of a testifying expert economist (Russell W. Mangum III, Ph.D.) as well as Dr. Mangum's team, and a prominent economic analyst firm (OSKR) to assist him and his team in standardizing and processing substantial amounts of data. Between May 1, 2022 and May 31, 2024, Dr. Mangum and OSKR's reasonable and necessary expenses total \$2,696,844.21.

(3) Document Database Vendor. In connection with discovery in this case, Co-Lead Class Counsel retained a vendor with expertise in designing and maintaining electronic databases ("Document Database Vendor"). DPPs' Document Database Vendor provided a database that enabled Class Counsel to search, review, analyze, and code a database with more than 8 million documents and other records produced by Defendants and various third parties. The review, analysis, and coding of documents has been integral to Co-Lead Class

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<sup>6</sup> Upon request by the Court, DPPs will provide the Court further detail and documentation concerning any category, but requests that such information be submitted *in camera* to protect Class Counsel's work product from disclosure to Defendants.

Counsel's efforts relating to fact and expert discovery. The Document Database Vendor's product also included a technology-assisted review ("TAR") tool that increased the accuracy of the review and decreased the percent of the overall documents it was necessary to have manually reviewed by attorneys. Between May 1, 2022 and May 31, 2024, DPPs have incurred Document Database Vendor costs totaling \$259,962.48.

(4) Mediators. In connection with the Seaboard settlement, Co-Lead Class Counsel engaged the services of a prominent mediator, Gregory Lindstrom. DPPs split the cost of Mr. Lindstrom with Seaboard, with DPPs paying \$17,056.25.

(5) Phone Records Vendor & Subpoena Costs. Another critical element of Co-Lead Class Counsel's discovery effort has been the services provided by a vendor that has expertise in processing and analyzing phone records ("Phone Records Vendor"). DPPs obtained the phone records of Defendants' employees pursuant to subpoenas to phone service providers such as AT&T and Verizon. These phone records were provided to the Phone Records Vendor, who in turn analyzed the data and provided DPPs with information establishing an extraordinary number of direct inter-company communications – phone calls and text messages – between Defendants' employees. The review and analysis of Defendants' phone records has been integral to Co-Lead Class Counsel's discovery and litigation efforts. Between May 1, 2022 and May 31, 2024, DPPs have received invoices from the Phone Records Vendor totaling \$9,794.34.

(6) Deposition Costs. Another critical element of discovery has been the fact and expert depositions taken by all parties. Co-Lead Class Counsel and Defendants retained separate vendors with expertise in providing deposition transcription services in complex

antitrust litigation (“Deposition Vendors”). The services provided by the Deposition Vendors have been critical to Co-Lead Class Counsel’s efforts to prosecute DPPs’ claims. Between May 1, 2022 and May 31, 2024, for deposition-related costs DPPs have paid a total of \$26,342.35.

(7) Court Transcripts. DPPs have incurred costs obtaining hearing transcripts in this matter. These costs were necessary to litigate this case. In total, costs for court transcripts, between May 1, 2022 and May 31, 2024, are \$241.20.

(8) Miscellaneous Costs. Miscellaneous costs have been incurred between May 1, 2022 and May 31, 2024. These costs include a one-time charge for printed checks (\$242.47) and nominal bank fees (\$6.00 per month), as well as a \$25,000.00 payment related to the Court’s prior award of Class Representative service awards (*see* ECF No. 1424 at ¶¶ 12-14). Regarding the latter, the Class Representative service award to Plaintiff Olean Wholesale Grocery Cooperative, Inc., was inadvertently paid to an entity owned by one of Olean’s former principals. (Pearson Decl. ¶ 11.) Upon discovery of the error, Co-Lead Class Counsel immediately contacted the other entity, who agreed to return the funds. (*Id.*) In the interim, Co-Lead Class Counsel promptly paid Plaintiff Olean \$25,000 from the Litigation Fund. (*Id.*) When the inadvertently paid funds were repaid, they were deposited in the Smithfield settlement escrow account, instead of in the Litigation Fund. (*Id.*) The Smithfield and JBS escrow accounts were transferred to the Claims Administrator in September 2023 in preparation of the first distribution. (ECF No. 2015.) DPPs now request approval from the Court to transfer the repaid \$25,000 from the Smithfield settlement funds set for redistribution to the Litigation Fund as reimbursement. This

transfer has no impact on the DPP Class or the recently completed distribution. (*Id.*) In total, Miscellaneous Costs between May 1, 2022 and May 31, 2024, are \$25,380.47, however, the net amount is actually \$380.47 once the reimbursement transfer is approved and complete.

These expenses were reasonably necessary to advance the interests of the Certified Class and to obtain the favorable results achieved to date. (Pearson Decl. ¶¶ 10, 12.)

**B. DPPs' Request for Replenishment of the Future Litigation Expense Fund is Proper**

DPPs now seek Court approval of a second interim payment to replenish the future litigation expense fund in the amount of \$1,460,600.00. Allowing a portion of class settlement funds to be used for future expenses is a well-accepted practice. *See, e.g.*, ECF No. 1424 at ¶ 9; *Newby v. Enron Corp.*, 394 F.3d 296, 302 (5th Cir. 2004) (affirming 37.5 percent set aside for establishment of a \$15 million litigation expense fund from the proceeds of a partial settlement); *In re Auto Parts Antitrust Litig.*, No. 12-2311, 2018 WL 7108072, at \*2 (E.D. Mich. Nov. 5, 2018); *In re Auto Parts Antitrust Litig.*, No. 12-2311, 2016 WL 9459355, at \*2 (E.D. Mich. Nov. 29, 2016) (approving request to set aside nearly \$10 million for use in future litigation); *In re Auto Parts Antitrust Litig.*, No. 12-2311, 2015 WL 13715591, at \*2 (E.D. Mich. Dec. 7, 2015); *In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. 07-5634, 2015 WL 3396829, at \*3 (N.D. Cal. May. 26, 2015); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008); *In re WorldCom, Inc. Sec. Litig.*, No. 02-3288, 2004 WL 2591402, at \*22 (S.D.N.Y. Nov. 12, 2004); *In re California Micro Devices Sec. Litig.*, 965 F. Supp. 1327, 1337 (N.D. Cal.

1997); *see also* Manual for Complex Litigation (Fourth), § 13.21 (“[P]artial settlements may provide funds needed to pursue the litigation . . .”).

Many of the costs described above and in the accompanying attorney declarations are not one-time expenses; they are ongoing. (Pearson Decl. ¶ 12.) Four Defendants remain in the case, and significant litigation lies ahead including dispositive motion practice, expert depositions, *Daubert* motion practice, and, absent acceptable settlements with the remaining Defendants, trial. The same and similar expenses will be incurred as DPPs continue to prosecute this case, and they also will be reasonable and necessary to support this litigation. (*Id.*) As with the already-incurred expenses, these funds will only be used for reasonable expenses incurred in the ongoing litigation against the remaining Defendants.<sup>7</sup> (*Id.*)

## V. CONCLUSION

For these reasons, DPPs respectfully request that this Court approve replenishment of the exhausted future litigation expense fund in the amount of \$1,460,600.00, to be paid *pro rata* from the Seaboard and Hormel Foods settlement proceeds.

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<sup>7</sup> In any future petition for reimbursement of expenses, or at the Court’s request, Co-Lead Class Counsel will provide an accounting to the Court of their payment of future costs from this award. (Pearson Decl. ¶ 14.) If funds from this requested award of future expenses are not fully used by the time the case is resolved in its entirety, Co-Lead Class Counsel will so report to the Court at that time and propose a method to return any such remaining funds to the benefit of the Class. (*Id.*)

Date: July 3, 2024

/s/ Michael H. Pearson

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