

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

IN RE CATTLE AND BEEF ANTITRUST
LITIGATION

Case No. 0:22-md-03031 (JRT-JFD)

This Document Relates To:
IN RE DPP BEEF LITIGATION

**MEMORANDUM OF LAW IN
SUPPORT OF DIRECT
PURCHASER PLAINTIFFS'
MOTION FOR INTERIM
PAYMENT OF ATTORNEYS' FEES
AND SERVICE AWARDS**

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I. INTRODUCTION

After three years of hard-fought litigation in this complex antitrust class action with no guarantee of compensation, Interim Co-Lead Counsel for the Direct Purchaser Plaintiffs (“DPPs”)¹ secured final approval of a settlement totaling \$52,500,000 (“Settlement Fund”) with Defendant JBS.² See *In re Cattle and Beef Antitrust Litigation*, 0:20-cv-01319, ECF No. 641 (D. Minn. Aug. 31, 2022) (hereinafter *In re Cattle/Beef*). This settlement reflects the skill, expertise, and hard work of Interim Co-Lead Counsel and other Direct Purchaser Plaintiff counsel,³ and the benefit to Settlement Class members is substantial, real, and concrete.

Courts in this District use the percentage-of-the-fund approach to award attorneys’ fees. As such, DPPs respectfully ask the Court to award one-third of the Settlement Fund or \$17,500,000, plus interest, as attorneys’ fees and \$15,000 in service awards to each of the three named DPP Class Representatives (\$45,000 total).

The Settlement Class members had notice and an opportunity to be heard regarding this fee request. In the Court-approved notice associated with the Settlement, Interim Co-Lead Counsel informed the Settlement Class that they would seek payment of attorneys’

¹ Interim Co-Lead Counsel are Gustafson Gluek PLLC, Hartley LLP, Hausfeld LLP, and Cotchett Pitre & McCarthy LLP. *In re Cattle/Beef*, ECF No. 71.

² Defendants JBS S.A. and JBS USA Food Company (collectively, “JBS”).

³ Under Interim Co-Lead Counsel’s direction, nineteen other firms prosecuted this case on DPPs’ behalf and, together with DPPs’ Interim Co-Lead Counsel, they are referred to collectively in this Memorandum as “Class Counsel.” At all times, Interim Co-Lead Counsel directed and organized Class Counsel’s work. See Declaration of Daniel E. Gustafson, filed concurrently herewith (“Gustafson Decl.”), ¶ 2.

fees not to exceed one-third of the Settlement Proceeds; reimbursement of up to \$5 million in current and ongoing litigation expenses; and service awards to the named Class Representatives. *See In re Cattle/Beef*, ECF No. 605-1, Exhibit B (Long Form Notice), at 5–6 (“Long-Form Notice”).

Settlement Class members were informed that the instant fee request would be posted on the case website, <https://beefdirectpurchasersettlement.com/>. *In re Cattle/Beef*, ECF No. 605 (Declaration of Eric Schachter), ¶ 4. Settlement Class members have also been provided claim forms consistent with the final approval order, with the relevant information pre-populated based on the sales data from each Defendant. ECF No. 356-1, Exhibit E (Claim Form).

Interim Co-Lead Counsel informed Settlement Class members that the Court would determine the amount of the attorneys’ fees and service awards. Long-Form Notice at 5–6. And Settlement Class members were told that by June 24, 2022, they could object to Interim Co-Lead Counsel’s intention to later petition for reimbursement of fees and service awards. *Id.* at 2. No Settlement Class members did.

II. CLASS COUNSEL DEDICATED TREMENDOUS RESOURCES TO THIS MATTER AND FACED SIGNIFICANT RISKS TO SUCCESSFULLY RESOLVE THIS CASE WITH JBS

Class Counsel have dedicated tremendous time, effort, and expense to this litigation, and they have done so entirely on a contingent basis with no guarantee of compensation or full reimbursement of expenses in an effort to recover for Defendants’ wrongful conduct. A summary of those efforts is provided below.

A. Class Counsel Dedicated Tremendous Resources to Resolve DPPs' Claims Against JBS

Since the inception of this case through December 31, 2022, Class Counsel invested 23,570.60 hours of attorney and other legal professional time.⁴ Gustafson Decl. ¶ 26. Interim Co-Lead Counsel has 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: a Settlement Fund of \$52,500,000, plus interest.⁵

This Court is well acquainted with the history of this case, so Class Counsel will not describe in depth here the litigation, its procedural history, expert analysis, and all of the other work needed to build a case of this magnitude. Instead, following is an overview of Class Counsel's efforts to date:

- Interim Co-Lead Counsel filed the first antitrust complaint on behalf of direct purchasers of beef on June 6, 2020. *In re Cattle/Beef*, ECF No. 1. This complaint was the product of Interim Co-Lead Counsel's preparation, independent investigation, and research into the beef industry. Unlike other matters, there were no prior or contemporaneous criminal government investigations or indictments. Interim Co-Lead Counsel has prepared and filed multiple amended and consolidated complaints reflecting information

⁴ Class Counsel have limited the reporting of their time and lodestar through December 31, 2022, for the purpose of this motion. They have and will continue to dedicate all necessary and appropriate time and resources to the litigation until it is resolved. Gustafson Decl. ¶ 14.

⁵ "Settlement Fund" is defined as "\$52.5 million U.S. dollars, the amount JBS shall pay or cause to be paid into an interest-bearing Escrow Account maintained by an escrow agent on behalf of the Settlement Class...." *In re Cattle/Beef*, ECF No. 604-1, Ex. A (D. Minn. July 22, 2022). The total interest earned through December 31, 2023, was \$3,795,290.67. Gustafson Decl. ¶ 27 n.1.

obtained from additional investigation and discovery. *See* Gustafson Decl. ¶ 3.

- Interim Co-Lead Counsel developed numerous case management plans and worked cooperatively with two levels of indirect purchaser class counsel, cattle farmer plaintiffs, indirect cattle seller plaintiffs, direct action plaintiffs, and Defendants to implement those plans. *Id.* at ¶ 4.
- Interim Co-Lead Counsel prepared and filed comprehensive memoranda of law (and in some instances argued these issues to the Court): (a) successfully in opposition to Defendants’ motions to dismiss, (b) regarding numerous discovery issues, (c) regarding ESI Protocol, Search Methodology, Deposition Protocol, and (d) seeking preliminary and final approval of settlement with JBS. *Id.* at ¶ 5.
- Interim Co-Lead Counsel worked extensively with other Plaintiffs’ Counsel and met and conferred frequently with Defendants to: (a) negotiate extensive search term strings for ESI and mobile discovery, (b) review and analyze Defendants’ structured data productions, and (c) serve several mobile phone subpoenas to former Defendant employees as well as issued several third-party subpoenas. *Id.* at ¶ 6.
- Class Counsel conducted extensive fact discovery. Class Counsel have or are in the process of reviewing, analyzing, and coding a database currently containing more than 3.6 million documents and other records produced by Defendants and third parties. *Id.* at ¶ 7. Records have been produced by more than fifty third parties to date.
- Class Counsel consulted with experts throughout this case. *Id.* at ¶ 8.
- Interim Co-Lead Counsel engaged in extensive adversarial negotiations and mediation with JBS, in front of well-known and respected mediator Professor Eric Green, and ultimately settled. *See id.* at ¶ 9. Further, Interim Co-Lead Counsel have prepared and executed the Court-approved class notice and settlement administration programs, and are in the process of administering the Court-approved claims process. *Id.* at ¶ 10.

Class Counsel will continue to vigorously litigate this case against the remaining Defendants, through discovery, class certification, dispositive motions and trial. With respect to the settlement, Interim Co-Lead Counsel will supervise all aspects of settlement

and claims administration and supervise the final distribution of settlement proceeds to qualified DPPs. *Id.* at ¶¶ 11, 14.

B. Class Counsel Faced Significant Risk of Nonpayment

As discussed below, Class Counsel faced a significant risk of nonpayment. DPPs alleged a price-fixing conspiracy perpetrated by the United States’ leading beef producers and claimed that DPPs and the Class paid significant overcharges as a result. Class Counsel believed in DPPs’ case, invested extensive time, effort, and money, and prosecuted it vigorously. Class Counsel also investigated and brought this case without the benefit of any related criminal government investigation or indictment. Gustafson Decl. ¶ 12. Class Counsel did so at the risk of no recovery and have turned away other opportunities because of the complexity and high level of time and expense the case demanded. *Id.*

Accordingly, Interim Co-Lead Counsel risked tremendous time and resources – almost three years of litigation – to achieve this significant recovery on behalf of the DPPs. With several Defendants remaining in the case, Interim Co-Lead Counsel expect an even greater additional amount will be obtained for the Class, but Class Counsel’s efforts to date should be recognized and compensated.

III. THE REQUESTED INTERIM FEE AWARD IS APPROPRIATE UNDER CONTROLLING LAW

Rule 23(h) permits a district court in a class action proceeding to “award reasonable attorney’s fees and nontaxable costs that are authorized by law[.]” Fed. R. Civ. P. 23(h). In the Eighth Circuit, district courts possess the “sound discretion” to determine the award of attorney fees, *Yarrington v. Solvay Pharms., Inc.*, 697 F. Supp. 2d 1057, 1061 (D. Minn.

2010), and “the responsibility of scrutinizing attorney fee requests.” *Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir. 1996). Counsel has the burden to “establish a factual basis to support the award.” *Id.*

There are two approaches used by district courts to determine an appropriate fee. The “percentage of the benefit” method “permits an award of fees that is equal to some fraction of the common fund that the attorneys were successful in gathering during the course of the litigation.” *Johnston*, 83 F.3d at 244–45. Courts commonly use the percentage of the benefit to calculate attorney fees where awards are held in a common fund. *In re UnitedHealth Grp. Inc. PSLRA Litig.*, 643 F. Supp. 2d 1094, 1103–04 (D. Minn. 2009); *see also Johnston*, 83 F.3d at 245 (citing a Third Circuit task force report recommending that “the percentage of the benefit method be employed in common fund situations.”). The alternative lodestar approach is a calculation of the “hours expended by an attorney” multiplied by the “reasonable hourly rate of compensation.” *Caligiuri v. Symantec Corp.*, 855 F.3d 860, 865 (8th Cir. 2017) (citing *Johnston*, 83 F.3d at 244).

The district court has discretion “to choose which method to apply, as well as to determine the resulting amount that constitutes a reasonable award of attorney’s fees in a given case.” *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 622 (8th Cir. 2017) (quotations and citations omitted). “Although not required to do so,” district courts who use the percentage of the benefit approach may verify the reasonableness of the award “by cross-checking it against the lodestar method.” *See Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017) (citing *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999)).

A. DPPs Seek a Percentage of the Settlement Fund as an Interim Award of Fees

Consistent with this Court’s previous fee award to class counsel for the Commercial and Institutional Indirect Purchaser Plaintiffs (CIIPPs) in this Case (ECF No. 452) and for the DPPs, CIIPPs, and Consumers Indirect Purchaser Plaintiffs in the Pork Antitrust Litigation, No. 18-cv-01776 (D. Minn.), the percentage of the benefit approach is appropriate. ECF Nos. 1424, 1006, and 1904 in Pork Antitrust Litigation. DPPs seek an award of one third of the Settlement Fund or \$17,500,000, plus interest,⁶ as attorneys’ fees.⁷

⁶ There is precedent for awarding attorneys’ fees on interest both within this Circuit and across other circuits. *See Jenkins by Agyei v. State of Mo.*, 931 F.2d 1273, 1277 (8th Cir. 1991) (affirming award of post-judgment interest on attorneys’ fees). *See also In re Interior Molded Doors Indirect Purchaser Antitrust Litig.*, No. 3:18-cv-00850, 2021 WL 5195089, at *3 (E.D. Va. July 27, 2021) (awarding attorneys’ fees equal to 30% of the Settlement fund, “plus interest earned thereon to be paid from the Settlement Fund.”); *In re Broiler Chicken Antitrust Litig.*, 1:16-cv-08637, EFC No. 5543, at 3 (April 19, 2022) (awarding interim attorneys’ fees amounting to one third of the settlement fund, with a “proportional share of interest”). The total interest earned through December 31, 2023 was \$3,795,290.67. Therefore, two-thirds of this amount would go to the Class and one-third would be awarded to Class Counsel as fees. As interest continues to accrue, the interest would continue to be split between the Class and Class Counsel accordingly. Gustafson Decl. ¶ 27 n.1.

⁷ Courts support applying the selected percentage to the settlement fund *before* deducting the litigation costs and expenses. *See, e.g., Phillips v. Caliber Home Loans, Inc.*, No. 19-CV-2711, 2022 WL 832085 at *6–8 (D. Minn. Mar. 21, 2022) (awarding costs equal to 33.33% of the gross settlement fund); *In re Sulzer Orthopedics, Inc.*, 398 F.3d 778, 780–82 (6th Cir. 2005) (affirming fee awards from a common benefit fund based on the gross settlement amount); *In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 WL 6209188, at *17 (E.D. Mich. Dec. 13, 2011) (“The fee percentage is applied to the settlement fund before the separate award of litigation costs and expenses are deducted from the fund.”); *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 531–35 (E.D. Mich. 2003) (awarding costs in addition to percentage of the fund fee).

As noted, the Court has the discretion to use the percentage-of-benefit approach to award attorney's fees. *See, e.g., In re Monosodium Glutamate Antitrust Litig.*, No. 00-MDL-01328, 2003 WL 297276, at *1 (D. Minn. Feb. 6, 2003). When a party obtains compensation for the class's benefit in the form of a common fund, courts have long recognized that an award of attorneys' fees and other costs of the litigation should be recovered from that common fund. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 991 (D. Minn. 2005) (citing *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984)); *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002)).

This approach equitably apportions the costs of litigation, including attorneys' fees, among the class members who benefit from the common fund. *Boeing*, 444 U.S. at 478. "In the Eighth Circuit, use of a percentage method of awarding attorney fees in a common-fund case is not only approved, but also 'well established.'" *In re Xcel*, 364 F. Supp. 2d at 991 (quoting *Petrovic*, 200 F.3d at 1157); *see also Khoday v. Symantec Corp.*, No. 11-CV-180 (JRT/TNL), 2016 WL 1637039, at *8–9 (D. Minn. Apr. 5, 2016), *aff'd sub nom. Caligiuri*, 855 F.3d 860 (8th Cir. 2017).

As the district court in *In re Xcel* explained, "[t]here are strong policy reasons behind the judicial and legislative preference for the percentage of recovery method for determining attorney fees[.]" 364 F. Supp. 2d at 991. One benefit is that this structure incentivizes attorneys to maximize the recovery for the class while expending fewer legal hours to reach the result, which will "encourage class counsel to prosecute the case in an

efficient manner.” *Id.* Relying upon similar reasoning, courts in other districts have often used the percentage of benefit approach in large antitrust cases. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015) (holding that the district court did not abuse its discretion in applying the percentage of the benefit approach); *In re Capacitors Antitrust Litig.*, No. 3:17-md-02801-JD, 2018 WL 4790575, at *2 (N.D. Cal. Sept. 21, 2018) (finding the percent of the benefit approach was appropriate “[w]here there is an easily quantifiable benefit to the class—namely, the cash recovery achieved through settlement”); *In re Processed Egg Prod. Antitrust Litig.*, No. 08-md-2002, 2012 WL 5467530, at *2 (E.D. Pa. Nov. 9, 2012) (noting that the percentage of the benefit method is “generally favored in cases involving a common settlement fund.”) (citations and quotations omitted).

When using the percentage of the benefit approach, courts consider the following factors: “(1) the benefit conferred on the class; (2) the risk to which plaintiffs’ counsel was exposed; (3) the difficulty and novelty of the legal and factual issues of the case; (4) the skill of the lawyers, both plaintiffs’ and defendants’; (5) the time and labor involved; (6) the reaction of the class; and (7) the comparison between the requested attorney fee percentage and percentages awarded in similar cases.” *Khoday*, 2016 WL 1637039, at *9 (quoting *Yarrington*, 697 F. Supp. 2d at 1062); *see also In re Xcel*, 364 F. Supp. 2d at 993. When applied here, these factors indicate that the fee requested is fair and reasonable.

1. The Benefit Conferred on the Class is Substantial

On January 27, 2022, DPPs and JBS entered into a settlement that provided for a payment of \$52,500,000 and meaningful cooperation. Gustafson Decl. ¶ 9. The Court

granted final approval of the JBS Settlement on August 31, 2022, finding that the Settlement “provides substantial monetary compensation and secures cooperation from the JBS defendants” as well as providing “more immediate and certain relief for the class and increases the likelihood of success against non-settling defendants while eliminating the costs, risks, and delays created by trial and appeal than continuing to litigate the case.” *See In re Cattle/Beef*, ECF No. 641. There were no objections to the Settlement. *In re Cattle/Beef*, ECF No. 603. The monetary benefit, coupled with meaningful cooperation that will assist in the prosecution of the claims against the non-settling Defendants, provides DPPs significant value. *See, e.g., In re Packaged Ice Antitrust Litig.*, No. 08-01952, 2010 WL 3070161, at *6 (E.D. Mich. Aug. 2, 2010); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 702 (M.D. Pa. 2008).

The Supreme Court has held repeatedly that private enforcement of U.S. antitrust laws is essential to effective antitrust enforcement. *See, e.g., Blue Shield of Va. V. McCready*, 457 U.S. 465, 472 (1982); *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 130–31 (1969). Fee awards in antitrust actions also provide a public benefit. There is a “need in making fee awards to encourage attorneys to bring class actions to vindicate public policy (e.g., the antitrust laws) as well as the specific rights of private individuals.” *In re Folding Carton Antitrust Litig.*, 84 F.R.D. 245, 260 (N.D. Ill. 1979); *In re Cardizem CD*, 218 F.R.D. at 534 (“Society also benefits from the prosecution and settlement of private antitrust litigation.”). Society benefits when those who have violated laws fostering fair competition and honest pricing are required to reimburse affected consumers in civil proceedings. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635

(1977); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005) (“[I]t is especially important to provide appropriate incentives to attorneys pursuing antitrust actions because public policy relies on private sector enforcement of the antitrust laws.”).

2. DPPs Faced Substantial Risk in Pursuing the Action

Antitrust class actions are inherently risky, due in part to their unpredictable nature, as well as the tremendous time and expense required to obtain a successful resolution. *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2016 WL 721680, at *17 (C.D. Cal. Jan. 28, 2016) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998)); see *In re Cardizem CD*, 218 F.R.D. at 530 (emphasizing a strong public interest in encouraging settlement of complex, class-action lawsuits because they are unpredictable and settlement preserves judicial resources).

Here, the risks were high. DPPs alleged a nationwide conspiracy to fix, raise, maintain, and stabilize beef prices—one of the nation’s most popular meat products—without the support of a parallel criminal government investigation. Gustafson Decl. ¶ 12. Defendants aggressively litigated and fought DPPs on the pleadings and in discovery. In the face of these risks, Class Counsel vigorously represented DPPs and obtained a substantial recovery on behalf of the Class thus far—the first settlement among all the classes and DAPs. *Id.*

3. Class Counsel Faced Complex Issues

Antitrust class actions are inherently complex. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 639 (E.D. Pa. 2003) (“An antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous

and uncertain in outcome.” (citations and internal quotation marks omitted)). This litigation presents challenging legal and factual issues, and this factor also supports the fee requested.

Investigating and proving an unlawful conspiracy is difficult, especially when not derived from a related criminal investigation. DPPs allege that Defendants combined and conspired to fix, raise, maintain, or stabilize prices of beef sold in the United States in violation of the Sherman Act, 15 U.S.C. § 1. *See generally In re Cattle/Beef*, ECF No. 303 (DPP Third Consolidated and Amended Complaint).

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 beef prices. *Id.* Defendants spared no effort in challenging DPPs’ complaint. They argued that DPPs’ claims were conjectural and implausible under *Twombly*, DPPs did not allege facts showing Defendants acted in parallel to reduce output or to raise prices for beef, and their production and pricing decisions were the result of legitimate market forces. *See, e.g., In re Cattle/Beef*, ECF No. 166. After extensive briefing, the Court denied Defendants’ motions to dismiss. *See In re Cattle/Beef*, ECF No. 238.

After DPPs prevailed on the motions to dismiss, they turned to litigating the case. To date, discovery has involved more than one hundred thirty-five Defendant document custodians, more than 3.6 million documents and communications, analysis of millions of telephone calls and messages, discovery from several third parties, and dozens (or hundreds) of anticipated depositions. Gustafson Decl. ¶ 7. Interim Co-Lead Counsel is coordinating this discovery effort against Defendants with counsel for the cattle farmers,

counsel for the indirect classes, and numerous Direct Action counsel. Plaintiffs and Interim Co-Lead Counsel are also fulfilling their own discovery obligations in response to fulsome discovery by Defendants. *Id.*

4. **Class Counsel Utilized Significant Skill and Dedicated Substantial Resources to Achieve the Settlement**

Not only were Class Counsel confronted with the inherent uncertainties of an antitrust class action litigation alleging a global conspiracy, but they also faced some of the wealthiest multinational corporations in the world, whose skilled and experienced legal counsel mounted a strong and united defense. JBS is represented by Quinn Emanuel Urquhart & Sullivan, LLP, a leading multinational and national law firm ranked among the Vault Law 100 for most prestigious law firms. Gustafson Decl. ¶ 9. The fact that the nation’s top legal counsel represented JBS is an important factor in analyzing the value of services rendered by Class Counsel. *See, e.g., In re Schering-Plough Corp. Enhance Secs. Litig.*, No. 08-2177 DMC, 2013 WL 5505744, at *25 (D.N.J. Oct. 21, 2013); *In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, MDL No. 1871, 2012 WL 6923367, at *5 (E.D. Pa. Oct. 19, 2012) (considering “the performance and quality of opposing counsel” as a factor in awarding attorneys’ fees); *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 121 (D.N.J. Mar. 30, 2012) (concluding the skill and efficiency of the attorneys involved favored approval of attorneys’ fees in part because the settling defendants were represented by experienced attorneys from prominent law firms).

The breadth and disparity of resources available to opposing parties is also significant when considering the gravity of the risk class counsel faced. *See BCJJ, LLC v.*

LeFevre, No. 8:09-cv-00551, 2011 WL 5597349, at *2 (M.D. Fla. Nov. 17, 2011) (considering relative economic resources in determining appropriateness of attorneys' fees); *Brewer v. S. Union Co.*, 607 F. Supp. 1511, 1531 (D. Colo. 1984); *Trist v. First Fed. Savings & Loan Ass'n of Chester*, 89 F.R.D. 8, 13 (E.D. Pa. 1980). In *Brewer*, the district court remarked that inequality of resources available to the parties greatly increases the risk to class counsel. *See* 607 F. Supp. at 1531.

That inequality was prominent here. Available resources vastly favored JBS, which is among the world's largest and wealthiest business entities. The Class, meanwhile, was represented by small and medium-sized regional distributors who purchased beef from the Defendants. None of those businesses could have financed this litigation alone or even collectively. *See Khoday*, 2016 WL 1637039, at *10; *In re Xcel*, 364 F. Supp. 2d at 995-96; *Yarrington*, 697 F. Supp. 2d at 1063; *In Re Polyurethane Foam Antitrust Litig.*, No. 10-MD-2196, 2015 WL 1639269, at *7 (N.D. Ohio Feb. 26, 2015); *In re Packaged Ice*, 2011 WL 6209188, at *19.

In order to combat the financial, legal, and substantive resources available to the Defendants, Class Counsel has worked diligently, efficiently, and effectively throughout the course of the case. Class Counsel, led and organized by Co-Lead Counsel, has utilized tremendous legal and organizational skills to ensure that this nationwide class action is vigorously adjudicated and to bring JBS to the table to enter into a significant settlement.

5. **The Time and Labor Involved in Obtaining the Settlement was Significant.**

Since the inception of this case through December 31, 2022, Class Counsel invested 23,570.60 hours of attorney and other legal professional time.⁸ Gustafson Decl. ¶ 26. Interim Co-Lead Counsel has worked diligently to ensure that throughout the case, Class Counsel's efforts have been coordinated, detailed, vigorous, and efficient.

6. **No Settlement Class Members Objected to this Pre-Announced Request for Attorneys' Fees and Expenses**

Settlement Class members received notice that Interim Co-Lead Counsel would request the instant attorneys' fee, which they are doing only after having accrued sufficient data to repopulate Settlement Class members' claims forms, thus making the claims process more efficient and accurate. On May 10, 2022, Settlement Class members received notice that Interim Co-Lead Counsel would seek an interim payment of attorneys' fees in an amount not to exceed one-third of the Settlement Proceeds. *See In re Cattle/Beef*, ECF No. 605 and 331, Exhibit B (Long-Form Notice). Simultaneous with the filing of this motion—and as indicated in the notice—Interim Co-Lead Counsel is posting this motion and all supporting exhibits on the case website, <https://beefdirectpurchasersettlement.com>.

⁸ Class Counsel have limited the reporting of their time and lodestar through December 31, 2022, for the purpose of this motion. They have and will continue to dedicate all necessary and appropriate time and resources to the litigation until it is resolved. Gustafson Decl. ¶ 14.

7. **The Requested Fee Percentage is Appropriate and Supported by Authority**

A fee award of one-third of the settlement fund is a generally accepted percentage in the Eighth Circuit. Indeed, this Court and others in this District routinely approve attorneys' fees in class actions of at least one-third of the common fund created for the settlement class. *See* ECF No. 452 (awarding CIPPs in this Case attorneys' fees in the amount of one-third of the net settlement funds); *In re Pork Antitrust Litig.*, 18-cv-01776, ECF Nos. 1424, 1006, and 1904 (awarding DPPs, CIPPs, and CIPPs, respectively, attorneys' fees in the amount of one-third of the settlement fund). *Khoday*, 2016 WL 1637039, at *11; *Yarrington*, 697 F. Supp. 2d at 1064 (noting that awards between 25 and 36 percent of a common fund are typical); *In re Xcel*, 364 F. Supp. 2d at 998 (collecting cases routinely approving fee awards of 33 percent); *Carlson v. C.H. Robinson Worldwide, Inc.*, No. 02-3780, 2006 WL 2671105, at *8 (D. Minn. Sept. 18, 2006) (approving a fee award representing 35 1/2 percent of the settlement fund).⁹ This Court's previous fee award to class counsel for the Commercial and Institutional Indirect Purchaser Plaintiffs (CIIPPs) in this Case (ECF No. 425) and for the DPPs, CIIPPs, and Consumers Indirect Purchaser Plaintiffs in the Pork Antitrust Litigation, No. 18-cv-01776 (D. Minn.), further demonstrate

⁹ *See also In re U.S. Bancorp Litig.*, 291 F.3d at 1038 (fee of 36 percent); *In re Combustion, Inc.*, 968 F. Supp. 1116, 1133, 1142 (W.D. La. 1997) (awarding fee of 36 percent and noting that "50 percent of the fund is the upper limit on a reasonable fee award from a common fund"); *Waters v. Intern. Precious Metals Corp.*, 190 F.3d 1291, 1292–94 (11th Cir. 1999); *In re Vitamins Antitrust Litig.*, No. 99-197, 2001 WL 34312839, at *10 (D.D.C. 2001) (awarding one third of \$359 million antitrust recovery, which is "within the fifteen to forty-five percent range established in other cases"); *In re Ampicillin Antitrust Litig.*, 526 F. Supp. 494, 499 (D.D.C. 1981) (awarding fee of 45 percent).

that the percentage of the benefit approach is appropriate. ECF Nos. 1424, 1006, and 1904 in Pork Antitrust Litigation.

A one-third percentage for attorneys' fees is also standard for many contingency fee agreements, including large, complex non-class cases. *See* Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 Fordham L. Rev. 1151 (2021); *see also* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 Fordham L. Rev. 247, 248 (1996) (noting that "standard contingency fees" are "usually thirty-three percent to forty percent of gross recoveries"); *Blum*, 465 U.S. at 905 ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.").

Here, such a fee award is justified by the remarkable results obtained for the Settlement Class and the risks faced by Class Counsel. The fee award requested here is well within the acceptable range of attorneys' fee awards in protracted, complex, and expensive litigation such as this.

B. A Lodestar Cross-Check Confirms that the Fee Requested is Appropriate

Although not required, courts may apply a lodestar cross-check on the reasonableness of the fee calculated as a percentage of the fund. *Keil*, 862 F.3d at 701. A cross-check of the lodestar incurred by Class Counsel indicates that the fee requested constitutes fair and reasonable compensation for the risks assumed, the work done, and the benefits achieved for the members of the Settlement Class.

Under the lodestar methodology for awarding attorney fees, the total hours expended by the attorneys advancing the litigation are multiplied by a reasonable hourly rate of compensation. *See Caligiuri*, 855 F.3d at 865 (citing *Johnston*, 83 F.3d at 244); *Petrovic*, 200 F.3d at 1157. “The lodestar cross-check need entail neither mathematical precision nor bean counting but instead is determined by considering the unique circumstances of each case.” *In re Xcel*, 364 F. Supp. 2d at 999. A court may give an upwards of adjustment to a lodestar (through a positive multiplier) to reflect “the contingent nature of success, and . . . the quality of the attorney’s work.” *Id.*

A lodestar cross-check in this case supports the requested fee. The risks, complexities and challenges Class Counsel faced are discussed in detail above. During that time, Class Counsel invested more than 23,570.60 hours of attorney and other professional time from case inception through December 31, 2022. Gustafson Decl. ¶ 26. Class Counsel’s total lodestar is \$13,555,094.50, using historic hourly rates, with a cap of \$350.00 per hour on document review.¹⁰ *Id.*

Awarding a 33 1/3% fee would result in a multiplier of 1.38 on such a lodestar. *Id.* at ¶ 27. Such a multiplier is well within accepted ranges. *See, e.g., Khoday*, 2016 WL 1637039, at *11 (multipliers typically range between two and five); *In re Xcel Energy*, 364 F. Supp. 2d at 999 (awarding a fee representing a 4.7 multiplier); *Yarrington*, 697 F. Supp.

¹⁰ Hourly rates presented in this petition are based on historical rates, i.e., the rate each firm charged at the time the service was performed. Gustafson Decl. ¶ 17. Courts also routinely look at current hourly rates when performing a lodestar cross-check, which would lower the multiplier discussed *infra* even further.

2d at 1076 (awarding a fee representing a 2.26 multiplier); *In re St. Paul Travelers Sec. Litig.*, 2006 WL 1116118, at *1 (D. Minn. Apr. 25, 2006) (using a multiplier of 3.9).

Each of the reasons set forth above establishing the reasonableness of the fee award under the percentage approach, establishes that the multiplier is within the range of reasonableness.

IV. CLASS COUNSEL IS NOT SEEKING REIMBURSEMENT OF ITS LITIGATION EXPENSES AT THIS TIME

As part of its final approval order of the JBS settlement, the Court preapproved litigation expenses of \$5,000,000. Class Counsel incurred significant expenses on behalf of the Class since that order, which have not yet been reimbursed.¹¹ Nevertheless, Counsel has decided to defer any request for reimbursement until a later date in order to preserve the \$5,000,000 earmarked for expenses. Accordingly, Interim Co-Lead Counsel does not make a request for repayment of unreimbursed litigation expenses, at this time, but intends to do so at a later date. If funds from this \$5,000,000 are not fully used by the time the case is resolved in its entirety, Interim Co-Lead Counsel will report to the Court and propose a method regarding the disposition of those funds.

¹¹ A summary of the common cost expenses that were reasonably incurred for the prosecution of this action and were paid from the Litigation Fund is contained in the Declaration of Jason Hartley submitted in support of this motion. *See* Declaration of Jason S. Hartley, ¶¶ 5–10, as Exhibit 2, attached to the Declaration of Daniel E. Gustafson.

V. **THE CLASS REPRESENTATIVES SHOULD RECEIVE INTERIM SERVICE AWARDS**

Class representatives frequently contribute to the successful resolution of a class action by assisting with the preparation of the pleadings, participating in discovery, continually providing information to class counsel, and participating in settlement negotiations. Their contributions undoubtedly benefit the class as a whole, and courts in this circuit regularly see fit to compensate class representatives for their service to the class. *See Khoday*, 2016 WL 1637039, at *12 (“Courts in this District routinely grant service awards for named plaintiffs.”) (citing *Yarrington*, 697 F. Supp. 2d at 1068 (upholding service awards and recognizing that “unlike unnamed Class Members who will enjoy the benefits of the Settlement without taking on any significant role, the Named Plaintiffs [make] significant efforts on behalf of the Settlement Class and [participate] actively in the litigation”) and *Zillhaver v. UnitedHealth Group, Inc.*, 646 F. Supp. 2d 1075, 1085 (D. Minn. 2009)). In determining whether a service award is appropriate, courts consider the following factors the: “actions plaintiff[s] took to protect the class's interests, [the] degree to which the class has benefited from those actions, and [the] amount of time and effort [the named] plaintiff[s] expended in pursuing litigation.” *Khoday*, 2016 WL 1637039, at *12; *Zillhaver*, 646 F. Supp. 2d at 1085 (quoting *In re U.S. Bancorp Litig.*, 291 F.3d at 1038).

Here, DPPs request that the Court confer an interim service award of \$15,000.00 on each of the three Class Representatives. This lawsuit would not have been possible if these named plaintiffs did not agree to serve as Class Representatives. Unlike indirect purchaser

plaintiffs, the named DPPs have or had a direct business relationship with the Defendants. They have exposed themselves to a substantial business risk by filing this lawsuit against the producers of beef who are key suppliers for their businesses. Throughout this litigation, the Class Representatives advised Class Counsel and approved pleadings, reviewed and responded to written discovery, searched for, gathered, preserved, and produced documents, are preparing for and will sit for depositions, have kept up to date on the progress of the case, and performed other similar activities. Gustafson Decl. ¶ 30. In fact, the Class Representatives have produced hundreds of thousands of documents—Samuels has produced over 78,000 documents, Redners has produced over 262,000 documents, and R&D has produced over 16,000 documents. *Id.*

These Class Representatives were never promised that they would receive any additional compensation for leading the case. *Id.* at ¶ 32. Rather, they devoted their time and efforts solely to recover some portion of their own overcharges and to enable other Class members to recover theirs. Their help has been instrumental to the success of this litigation and, DPPs respectfully submit, they are deserving of these service awards. *Id.*

VI. CONCLUSION

For these reasons, DPPs respectfully request that this Court award interim attorneys' fees in the amount \$17,500,000, plus interest, which is equivalent to one-third of the Settlement Fund, and service awards to each of the three Class Representatives in the amount of \$15,000 (\$45,000 total).

Dated: January 30, 2024

Respectfully submitted,

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***Interim Co-Lead Counsel for the Direct
Purchaser Plaintiffs***

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

IN RE CATTLE AND BEEF ANTITRUST
LITIGATION

Case No. 0:22-md-03031-JRT-JFD

This Document Relates To:
IN RE DPP BEEF LITIGATION

**DIRECT PURCHASER
PLAINTIFFS' RULE 7.1(f)
COMPLIANCE CERTIFICATE**

The undersigned hereby certifies that, pursuant to Local Rule 7.1(f), Direct Purchaser Plaintiffs' Memorandum of Law in Support of Motion for Interim Payment of Attorneys' Fees and Service Awards, contains 5,956 words, as determined through the word count feature of the Microsoft Office Word 2016 word processing software used to prepare the memorandum. The word processing program has been applied specifically to include all text, including headings, footnotes, and quotations. The memorandum was prepared in 13-point font in accordance with the type size limitation of Local Rule 7.1(h).

Dated: January 30, 2024

Respectfully Submitted,

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