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9
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11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 IN RE: PACKAGED SEAFOOD) Case No.: 15-MD-2670 DMS (MDD)
14 PRODUCTS ANTITRUST)
15 LITIGATION) **END PAYER PLAINTIFFS'**
16) **MEMORANDUM OF POINTS**
17) **AND AUTHORITIES IN FURTHER**
18) **SUPPORT OF END PAYER**
19) **PLAINTIFFS' MOTION FOR**
20) **COSTS IN CONJUNCTION WITH**
21) **THE COSI SETTLEMENT**

22 _____)
23 This Document Relates to:) DATE: July 15, 2022
24 End Payer Plaintiffs Class Track) TIME: 1:30 p.m.
25) JUDGE: Hon. Dana M. Sabraw
26) COURT: 13A (13th Floor)
27)
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1 **I. INTRODUCTION**

2 In conjunction with the Motion for Final Approval of the COSI Settlement
3 (filed concurrently herewith), the End Payer Plaintiffs (“EPPs”) respectfully request
4 the Court approve the costs of notice and claims administration and award certain
5 reasonable expenses incurred by Class Counsel to achieve this early partial settlement.
6 Of significance, Class Counsel does *not* seek an award of attorney fees from the
7 Distribution Fund (just reasonable out of pocket costs as of May 2021 described
8 below) and has waived any right to seek attorney fees directly from the COSI
9 Settlement.¹

10 This “icebreaker” settlement was the first settlement between EPPs and any
11 Defendant.² Although the parties finalized this early settlement, *just before* the
12 District Court issued its decision certifying the Class, preliminary approval of this
13 partial settlement was delayed until January 26, 2022.³ The delay was due, in part, to
14

15 ¹ In a Joint Stipulation (“Jt. Stip.”) (ECF No. 2673-2, Ex. 8), the Settling Parties further
16 confirmed that no agreement exists “outside of the Settlement” for the reimbursement
17 of fees and costs (other than the COSI Settlement Agreement) and that Class Counsel
18 unilaterally waived any rights to seek attorneys’ fees from the COSI Defendants or
from the Settlement Fund. *Id.* See Jt. Stip., at ¶¶ 6, 8, and 12.

19 ² The Maximum Settlement Amount is twenty million (\$20,000,000). COSI
20 Settlement Agreement, §1.a.xxvii (ECF No. 2552-3 at 8). Under Paragraphs 11(b)
21 and 18, up to five million (\$5,000,000) out of the Maximum Settlement Amount shall
22 be used to cover the reasonable costs of Class and Settlement Notices and
23 administration for distribution of the Settlement Fund of fifteen million (\$15,000,000)
24 (“Class and Settlement Notice Fund”). *Id.* at 13-14. If the reasonable costs of Class
and Settlement Notice is less than \$5,000,000, the difference shall be refunded to the
COSI Defendants under Paragraph 18(b) of the COSI Settlement Agreement. *Id.* at
14-15.

25 ³ See Declaration of Betsy C. Manifold in Support of End Payer Plaintiffs’ Renewed
26 Motion for Preliminary Approval of Partial Class Action Settlement (ECF No. 2552-
27 2), ¶¶ 1, 12. See also ECF No. 1931 (July 30, 2019 Class Certification Opinion) and
ECF No. 2734 (January 26, 2022 Order Granting End Payer Plaintiffs Renewed

1 the Defendants’ appeal of the Court’s Class Opinion (ECF No. 1931). As the Court
2 is well aware, the Class Opinion’s appellate journey in the Ninth Circuit ended with
3 an April 8, 2022 *en banc* decision of the Ninth Circuit upholding class certification.
4 *See* ECF No. 2828 (Order re Mandate Hearing). While claims remain against StarKist
5 Co. and Bumble Bee Foods LLC’s parent companies (“Non-settling Defendants”),
6 this initial settlement provides substantial relief including invaluable prosecution
7 cooperation by the COSI Defendants to allow the EPPs to pursue the other Non-
8 settling Defendants.⁴

9 In light of this initial \$20 million settlement, the EPPs respectfully request the
10 Court finally approve certain costs and expenses. First, to cover the costs of class
11 notice and administration through April 2022, the EPPs request approval to pay media
12 costs (\$914,090) and administration costs (\$233,000) of \$1,147,090. Second, the
13 EPPs seek authorization for a further distribution of \$597,870 as permitted under the
14 Settlement Agreement to cover estimated administration costs (\$500,000) and a
15 reminder media campaign (\$97,870). Finally, the EPPs request that the Court approve
16 an Expense Award of \$4,155,027.67 to reimburse Class Counsel for specific out of
17 pocket litigation costs incurred as of May 2021.

18 The Class Notice provided the specific amount of the Expense Award
19 (\$4,155.027.67) to be requested from the Distribution Fund. *See* ECF No. 2827, Ex.
20 F at 48, 52. The Class Notice further advised COSI Settlement Class Members that a
21 portion of the Settlement Fund (up to \$5 million) may be used by the Claims
22 Administrator to administer notice and claims. *Id.* ***No objection to these costs was***

23 _____
24 Motion for Preliminary Approval of Partial Settlement).

25 ⁴ The “COSI Defendants” are Tri-Union Seafood LLC d/b/a Chicken of the Sea
26 International (“COSI”) and Thai Union Group (“TUG”) and the Non-settling
27 Defendants are StarKist Co. and its parent Dongwon Industries Co., Ltd. (collectively
28 “StarKist”) and various “Lion Capital” entities (Lion Capital (Americas), Inc., Big
Catch Cayman LP).

1 *received as of May 13, 2022 (the last day to object to the settlement) and no objection*
2 *was received after the deadline to date.* Class Counsel remains willing to address
3 any objection (timely or not) at the July 15, 2022 Final Approval Hearing. For the
4 convenience of COSI Settlement Class Members, the Claims Administrator posted a
5 copy of the motion papers detailing costs on the settlement website.

6 *Approval of Reasonable Costs of Class Notice and Administration is Warranted.*

7 Under the terms of the COSI Settlement, five million (\$5,000,000) out of the
8 twenty million (\$20,000,000) shall be used to cover the reasonable costs of Class and
9 Settlement Notices and administration for the distribution of the Settlement Fund
10 (\$15,000,000). As provided in the Court’s Preliminary Approval Order (ECF No.
11 2734), “Given its depth of reach, and the need to reach tens of millions prior to final
12 approval of the COSI Settlement, an interim distribution of \$1 million prior to final
13 approval of the COSI Settlement is approved under the terms provided in the
14 Settlement Agreement.” *Id.* at 13:5-8. In accordance with the Preliminary Approval
15 Order and under the terms provided in the Settlement Agreement, an interim
16 distribution of \$914,090,000 was made to the Claims Administration (JND Legal
17 Administration, LLC (“JND”)) to fund and conduct a robust notice plan and reach
18 tens of millions of Class Members.⁵

19 In accordance with the terms of the Settlement Agreement, Class Counsel
20 requests an additional distribution of \$830,870 for the following: (i) reimbursement
21 of administration costs (\$233,000) incurred through April 2022; (ii) media costs to
22 conduct a follow up notice ad campaign (\$97,870); and (iii) estimated administration
23 expenses (\$500,000) to cover on-going costs of the website, contact center, and
24 process forms). *See* Supplemental Declaration of Betsy Manifold in Support of

25 _____
26 ⁵ *See* Declaration of Gina M. Intrepido-Bowden re: Implementation of COSI
27 Settlement Notice on behalf of End Payer Plaintiffs (“Notice Decl.”), filed on May 9,
28 2022 [ECF No. 2827].

1 Motion for Costs in Conjunction with COSI Settlement (“Supp. Manifold Decl.”), ¶¶
2 7, 9, Ex. 1 (JND Costs Estimates). In order to conserve resources, Class Counsel
3 seeks the Court’s permission to delay the follow up notice ad campaign in order to
4 combine this follow up campaign with an appropriate and robust class notice plan to
5 be submitted by motion no later than 14 days after final approval of the COSI
6 Settlement (including costs).

7 ***It is important to note that the class relief provided in the Distribution Fund***
8 ***(\$15,000,000) is not reduced by the award of these reasonable interim costs of class***
9 ***notice and administration.***

10 *Expense Award Is Fair and Reasonable.*

11 During this lengthy and hard-fought litigation, Class Counsel incurred
12 substantial expert costs (\$3.2 million) as well as other expenses (approximately
13 \$929,000) related to document storage, e-discovery, translation services, research,
14 deposition, and other miscellaneous costs. See Supp. Manifold Decl., ¶ 12, Ex 2
15 (Detailed Chart of Expenses). These costs were reasonable and necessary to achieve
16 this early ‘ice breaker’ settlement in a complex antitrust conspiracy between the three
17 dominant manufacturers of packaged tuna. In an extensive and robust notice plan
18 (with no objection received to date), COSI Settlement Class Members were advised
19 that Class Counsel would ***not*** seek any attorney fees but would ask the Court for an
20 Expenses Award of \$4,155,027.67 to cover these expenses. ECF 2827, Ex. F (Class
21 Notice) at 48, 52.⁶ This “hard figure” represents the amount of specific costs incurred
22 by Interim Lead and Class Counsel as of May 2021 to reach this early partial
23 settlement. Supp. Manifold Decl., ¶¶ 3, 12, Ex. 2.

24 For the reasons set forth herein, the EPPs respectfully request that the Court
25

26 ⁶ The Class Notice also stated that ***Class Counsel does not request an award of***
27 ***attorneys’ fees out of the Settlement Fund*** but reserves the right to do so out of any
28 recoveries from the Non-settling Defendants. *Id.*

1 approve: (i) class notice (\$914,090) and administration costs (\$233,000) incurred
2 through April in the amount of \$1,147,090; (ii) a further distribution of \$597,870
3 under the terms of the Settlement Agreement to cover estimated administration costs
4 of \$500,000 and a reminder media effort in the amount of \$97,870; and (iii) an
5 Expense Award in the amount of \$4,155,027.67. The requested costs are reasonable,
6 necessary and fair and warrant approval.

7 **II. PROCEDURAL HISTORY OF THE LITIGATION**

8 **A. History of the Litigation**

9 Once the MDL was established, Wolf Haldenstein became instrumental in
10 organizing the indirect cases and plaintiffs; and, on behalf of fifty-four (54) End Payer
11 Plaintiffs, filed a consolidated class action in this Court alleging an antitrust
12 conspiracy in the packaged seafood industry. *See In re Packaged Seafood Products*
13 *Antitrust Litig.*, MDL No. 2670 (ECF No. 149) (S.D. Cal., filed May 23, 2016). The
14 complaint followed the DOJ’s announcement of an investigation into the packaged
15 seafood industry.⁷ Although the DOJ intervened and the case was stayed temporarily,
16 Wolf Haldenstein coordinated with the other Classes and individual direct purchasers
17 on a Protective Order and ESI and continued to investigate and advance the case
18 forward. Supp. Manifold Decl., ¶ 15.

19 _____
20 ⁷ In December of 2014, Bumble Bee announced its intention to acquire COSI and
21 presented the proposed merger to the DOJ for review. During the review process,
22 evidence of the cartel was uncovered, and DOJ began investigating the packaged tuna
23 industry for potential antitrust violations. By December of 2015, the merger was
24 cancelled, and DOJ issued a press release in which former Assistant Attorney General
25 William Baer stated: “[c]onsumers are better off without this deal.... Our
26 investigation convinced us — and the parties knew or should have known from the
27 get go — that the market is not functioning competitively today, and further
28 consolidation would only make things worse.” Department of Justice, *Chicken of the*
Sea and Bumble Bee Abandon Tuna Merger After Justice Department Expresses
Serious Concerns, available at <https://www.justice.gov/opa/pr/chicken-sea-and-bumble-bee-abandon-tuna-merger-after-justice-department-expresses-serious>.

1 In March 2016, the Court appointed Wolf Haldenstein as interim lead counsel
2 for the EPP Class. ECF No. 119. Due to the location of its offices in San Diego,
3 Wolf Haldenstein also volunteered (when asked by the Court) and has acted as a
4 plaintiff contact for the Court when it was necessary to set up conferences, motion
5 dates, and communicate information to multiple tracks and counsel in this complex
6 MDL. In appointing interim lead counsel for the EPP class, the Court provided a
7 substantial list of Wolf Haldenstein’s responsibilities. *Id.*

8 As to Class Counsel’s responsibilities for the costs and expenses incurred, these
9 duties include the following: (i) To conduct or coordinate discovery on behalf of the
10 EPPs consistent with the requirements of the Federal Rules of Civil Procedure,
11 including . . . the examination of witnesses in depositions; (ii) To monitor the
12 activities of co-counsel and to implement procedures to ensure that schedules are met
13 and unnecessary expenditures of time and funds by counsel are avoided; (iii) To
14 collect time, lodestar, and expense reports from each of the law firms working on
15 behalf of the class of EPPs; (iv) To conduct all pre-trial, trial, and post-trial
16 proceedings on behalf of the class; and (v) To employ and consult with experts. *See*
17 ECF No. 119 at 7-8. Class Counsel performed these duties and responsibilities and
18 incurred reasonable and necessary expenses in the conduct of this litigation in order
19 to reach this early partial settlement on behalf of the COSI Settlement Class.
20 Manifold Supp. Decl., ¶¶ 16-18.

21 Class Counsel pushed for the production of the DOJ Documents (once the stay
22 was lifted) which resulted in a production of over two million documents. Manifold
23 Supp. Decl., ¶ 19. The Classes harmonized their review efforts and coordinated on
24 costs in the storage of this production along with other subsequent productions. *Id.*
25 The expenses incurred for hosting the millions of documents produced, and making
26 them available for both counsel and the experts’ teams to review online, have been
27 shared to reduce the cost to the classes. *Id.*, Ex. 2. This reduced amount reflects the
28

1 proportional share on the EPP class after splitting with the other classes, and would
2 be greater if a sharing arrangement had not been reached. This amount has been not
3 only incurred, but also paid from the litigation fund and/or borne directly by Wolf
4 Haldenstein. *Id.*, Ex. 2.

5 Indeed, Wolf Haldenstein has coordinated at every stage of this litigation with
6 other class counsel in order to effectively manage not only the parties' resources and
7 costs but preserve judicial resources. For example, the three separate class tracks
8 harmonized their factual allegations (as appropriate) based on coordinated
9 investigation efforts (as needed) to support substantial and expanded new allegations.
10 To prove Defendants' conduct was anti-competitive required Class Counsel to
11 investigate the joint conduct of all three manufacturers.⁸ For example, in its
12 interrogatory responses, COSI furnished a chart of seven different agreements
13 reflecting coordinated anti-competitive conduct by all three defendants. Supp.
14 Manifold Decl., Ex. 3 (Chart of COSI Agreements). Class Counsel further
15 coordinated on the filing of all of the Class amended complaints, responsive briefing
16 among all of the parties, and oral argument to ensure a similar time line for all three
17 class tracks. These efforts permitted the Court to issue coordinated opinions denying,
18 in large part, the Defendants' Motion to dismiss.⁹

19 In addition to undertaking extensive factual investigations, drafting and
20 researching motions and responding to Defendants' briefing, Class Counsel has

21
22 ⁸ The DOJ also criminally prosecuted Lischewski, Bumble Bee's former CEO, and
23 on December 3, 2019, a jury found that he had conspired with StarKist and COSI to
24 fix packaged tuna prices in violation of the Sherman Act. *See United States v.*
Lischewski, 2019 U.S. Dist. LEXIS 86432 (N.D. Cal. 2019).

25 ⁹ *See In re Packaged Seafood Products Antitrust Litig.*, No. 3:15-md-02670, 2017 WL
26 35571 (S.D. Cal. Jan. 3, 2017); *In re Packaged Seafood Products Antitrust Litig.*, 242
27 F. Supp. 3d 1043 (S.D. Cal. 2017); *In re Packaged Seafood Products Antitrust Litig.*,
277 F. Supp. 3d 1167 (S.D. Cal. 2017); *In re Packaged Seafood Products Antitrust*
Litig., 338 F. Supp. 3d 1118 (S.D. Cal. 2018).

1 coordinated with all three class tracks on case management statements and discovery.
2 Since the conspiratorial conduct consisted, in part, of certain illegal agreements
3 among Bumble Bee, COSI and StarKist to fix prices, discovery (and the associated
4 costs of discovery) is not directed at or attributable to just ‘one’ defendant but
5 necessarily focuses on proving the existence and impact of a single conspiracy among
6 ***all three defendants***. Supp. Manifold Decl., ¶ 21, Ex. 3. Class Counsel also
7 participated in coordinating, preparing for, and attending multiple evidentiary proffers
8 by COSI as the ACPERA leniency applicant. *Id.*, ¶ 22.

9 Class counsel coordinated with all of the plaintiff tracks in taking over 60
10 depositions including travel to Thailand and Korea (including the use of translators
11 for both documents and testimony). Supp. Manifold Decl., ¶ 22. Class Counsel
12 incurred, and has already paid, the cost (reporters, videographers, and sometimes
13 translators) of each of these depositions. Transcript costs for depositions taken by
14 defense counsel of plaintiffs, including the individual EPP class representatives and
15 Direct Action Plaintiffs (used by Defendants in opposing class) were also incurred
16 and paid out of pocket, years ago, and without recovery until the instant motion. Supp.
17 Manifold Decl., ¶ 22, Ex. 2.

18 All three Classes filed motions for class certification in May of 2018. Supp.
19 Manifold Decl., ¶¶ 23-25. Three respected economists from different consulting
20 firms’ declarations in support of the motions: Dr. Russell Mangum (“Mangum”)
21 (DPPs), Dr. Michael Williams (“Williams”) (CFPs), and Dr. David Sunding
22 (“Sunding”) (EPPs). Defendants countered with two experts, both from Edgeworth
23 Economics: Dr. John Johnson (“Johnson”) (responding to Mangum) and Dr. Laila
24 Haider (“Haider”) (responding to Sunding and Williams). *Id.* As part of class
25 discovery, Class Counsel also prepped and defended 16 individual EPP depositions.
26 *Id.*

27 Dr. Sunding and his team analyzed the entirety of each defendant’s transaction
28

1 data, plus a host of documents and testimony, in order to separately model the
2 production of tuna at each of the three producing firms. As detailed in his reports¹⁰
3 and the Court’s class certification opinion (ECF No. 1931 at 46-54), Dr. Sunding built
4 a regression model for each, using available real world data for all the necessary
5 explanatory variables, and measured the overcharges. He further measured pass-
6 through by analyzing two data sets from a commercial data provider, and seven from
7 retailers or distributors who produced pursuant to subpoena, to create nine separate
8 pass-through models, some specific to the store level for thousands of individual store
9 locations. *Id.*

10 Defendants challenged all or nearly all of the quantitative work Dr. Sunding
11 performed, in extensive reports by Dr. Haider on class certification (ECF No. 1411-
12 1, Ex. 1. Professor Sunding responded at length to each criticism, submitting four
13 reports, testifying at deposition twice, and then as a live witness at a full-day hearing
14 just on the EPP class for certification purposes. Manifold Decl., ¶ 25.

15 Additionally, the EPPs offered the expert report of Adoria Lim describing the
16 close economic relationship between the parent corporations and their subsidiaries
17 (COSI, Bumble Bee and StarKist). Defendants countered with their own economists
18 - Dr. Ilya Srebulaev (Lion Capital/Bumble Bee), Arthur Laby (COSI), and Robert
19 Daines (StarKist). Class Counsel attended all of the expert depositions and defended
20 the depositions of their experts – Professor Sunding and Ms. Lim. *Id.*

21 As part of the class certification process, the parties submitted nine briefs on
22 class certification, nine declarations, and hundreds of exhibits. The Ninth Circuit does
23 not require that a district court hold a hearing on class certification (*Bouman v. Block*,
24 940 F.2d 1211, 1232 (9th Cir. 1990)); nonetheless, the Court held a three-day
25 evidentiary hearing on January 14-16, 2019, allocating a full day to each proposed

26 _____
27 ¹⁰ See ECF No. 1130-9, Ex. 90 (Expert Report of Dr. Sunding dated May 29, 2019)
28 and 1704-2, Ex. 3 (Expert Report of Dr. Sunding dated November 29, 2018).

1 class. Manifold Decl., ¶¶ 23-25. All five experts appeared and were subject to direct
2 and cross-examination. As a result, the parties presented the Court an extensive record
3 evidentiary record including live testimony of five antitrust economists (one for each
4 of the Classes and two retained by Defendants) over the course of a three-day
5 evidentiary hearing. *Id.* In the six months following the class certification hearing,
6 after extensive arms-length negotiations, the EPPs and COSI reached a settlement in
7 principle. Supp. Manifold Decl., ¶ 2. On July 19, 2019, the district court issued a
8 thorough opinion granting class certification that carefully evaluated the parties’
9 evidence and arguments. ECF No. 1931.

10 *Before* preliminary approval of the COSI Settlement, Class Counsel also
11 coordinated on the briefing and preparation for oral argument when the Ninth Circuit
12 granted Defendants leave to appeal the Class Order and subsequently issued a panel
13 opinion, *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods, LLC, et. al.*, No.
14 19-56512 (9th Cir. Apr. 6, 2021) (“Ninth Circuit Panel Opinion”). When the Ninth
15 Circuit vacated the Ninth Circuit Panel Opinion (*Olean*, ECF No. 128), Class Counsel
16 again participated in the September 22, 2021 an *en banc* oral argument. On April 6,
17 2022, after preliminary approval of the COSI Settlement, the Ninth Circuit issued an
18 *en banc* decision affirming the District Court’s order certifying the classes.

19 **B. The COSI Settlement**

20 Incorporated by reference is the detailed History of the Litigation in the EPPs’
21 Motion (ECF No. 2552-1 at 7-14) which describes the context and terms of the COSI
22 Settlement. As set forth in the Court’s Preliminary Approval Order (ECF No. 2734),
23 “Settlement Class Counsel waived their rights to seek legal fees from the COSI
24 Defendants or the Settlement Fund” and only “seek reimbursement for \$4,155,027.67
25 in actual litigation costs to date.” *Id.* at 11-15. The Class Notice(s) contained the
26 same language advising Settlement Class Members of the specific Expense Award
27 sought including the waiver of the right to seek legal fees from the Settlement Fund.

1 *See* Notice Decl., Ex. F at 48, 52. Class Counsel has reserved its rights to seek
2 reimbursement of attorney fees from any monies recovered from the Non-Settling
3 Defendants whether by order, judgment, settlement or trial and to base any such
4 request for fees on the benefits obtained in the COSI Settlement. *Id.*

5 As the Court is aware, the EPPs retained JND, an experienced and well-
6 respected claims administrator, who conducted a comprehensive and robust notice
7 plan to alert Settlement Class Members of the COSI Settlement. *See* Notice Decl., ¶¶
8 4-22. Under the proposed distribution plan, payments to Authorized Claimants will
9 *not* be immediately distributed but held until the claims against all non-Settling
10 Defendants have been resolved by settlement, judgment, order or trial including any
11 appeals and in accordance with any subsequent Court orders. ECF 2552-1 at 13-14.
12 There is potential for additional funds from settlement or judgment against the Non-
13 settling Defendants. With the costs of claims administration, it is more efficient to
14 delay distribution of this partial settlement until the remaining claims are resolved.

15 **III. ARGUMENT**

16 Under FRCP Rule 23(h), “[i]n a certified class action, the court may award
17 reasonable attorney’s fees and nontaxable costs that are authorized by law or the
18 parties’ agreement.” This rule is equitable in nature and “rests on the perception that
19 persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly
20 enriched at the successful litigant’s expense.” *Boeing Co. v. Van Gemert*, 444 U.S.
21 472, 478 (1980). Here, Class Counsel is *not* requesting an award of attorneys’ fee.
22 An equitable analysis based on the financial burden incurred by plaintiffs in achieving
23 a substantial financial benefit to the settlement class (\$20,000,000) after surviving
24 multiple motions to dismiss and completing substantive and class discovery, however,
25 warrants an award of reasonable costs.

26 As an initial crosscheck to the reasonableness of Class Counsel’s request for an
27 Expense Award of \$4,155,027.67, the Court may consider the DPPs’ request for out
28 of pocket costs of \$4,410,636.71. *See* Memorandum of Points and Authorities in

1 Support of Direct Purchaser Plaintiffs’ Motion for Attorneys’ Fees and Costs and
2 Service Awards for the Class Representatives in Conjunction with COSI/TUG
3 Settlement, ECF No. 2785-1 at 19-20. The DPPs’ expense request arises out of a
4 contested fee dispute decided by a well-respected arbitrator and includes an award of
5 similar expert costs as well as litigation expenses. The comparison is appropriate (and
6 the EPP’s expenses are approximately \$250,000 less) because the various MDL tracks
7 (including the classes) coordinated and equally shared litigation expenses for
8 document hosting, translations, and discovery costs to create efficiencies and engaged
9 similar econometric experts to model the relevant market for their respective class.
10 As a result, the contested DPP expense request is good crosscheck on the
11 reasonableness and fairness of Settlement Class Counsel’s request.

12 In addition, under the Court’s Preliminary Approval Order, the deadline for
13 Class Members to object to the COSI Settlement was May 13, 2022 (ECF No. 2734
14 at 14); and *no objections have been received to date*. The Claims Administrator will
15 post this motion for costs on the settlement website for review and access and Class
16 Counsel are willing to address any objections, whether late or not, at the final approval
17 hearing set for July 15, 2022.

18 **A. Notice and Administration Costs Are Reasonable**

19 Under the terms of the COSI Settlement, five million (\$5,000,000) out of the
20 twenty million (\$20,000,000) shall be used to cover the reasonable costs of Class and
21 Settlement Notices and administration for the distribution of the Settlement Fund
22 (\$15,000,000). In accordance with the Preliminary Approval Order and under the
23 terms provided in the Settlement Agreement, the Claims Administrator received an
24 interim distribution of \$914,090,000 to fund and conduct a robust notice plan reaching
25 tens of millions of Class Members. ECF No. 2734 at 13:6-8. Class Counsel requests
26 permission under the terms of the Settlement Agreement to make an additional
27 distribution of \$830,870 in order to conduct a follow up notice ad campaign (\$97,870)

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1 and to cover administration costs (\$733,00 which includes \$233,000 incurred through
2 April plus an estimated \$500,000 additional to cover on-going costs of the website,
3 contact center, and process forms). *See* Supp. Manifold Decl., Ex. 1 (JND Costs
4 Estimates).

5 The claims administrator has expended substantial efforts and incurred
6 significant expenses in providing a robust and expansive class notice. Notice Decl.,
7 ¶¶ 6-22. As of May 20, 2022, JND had delivered over 760 million digital media
8 impressions with over 1.8 million page views on the settlement website. Supp.
9 Manifold Decl., ¶8. JND has provided a breakdown of the expenses necessarily
10 incurred by a claims administrator to date and has provided a detailed estimate of
11 follow up notice costs and claims administration for reimbursement as provided
12 under the terms of the Settlement Agreement. *Id.*, Ex. 1. For example, JND seeks
13 reimbursement for media placements, website administration, and robust responses
14 to class member inquiries. *Id.* These are standard expenses incurred by a claims
15 administrator in creating and implementing a robust notice plan in a complex
16 antitrust case. Both JND and Class Counsel carefully scrutinized all requested
17 expenses. *Id.* These expenses are in line with those approved by courts in other
18 complex consumer class action in antitrust and other areas and an important element
19 of the notice and claims process.

20 In order to conserve resources, Class Counsel further requests Court approval
21 to delay the follow up notice ad campaign in order to combine this follow up campaign
22 with an appropriate and robust class notice plan to be submitted by motion no later
23 than August 1, 2022 (or within 14 days of court approval of the costs motion). The
24 costs of class notice and administration are reasonable in light of the robust notice
25 plan reaching tens of millions of settlement class members and warrants approval by
26 the Court under the terms of the Settlement Agreement.

27 **B. An Award of Class Counsel’s Reasonable Expenses Is Warranted**

28 “Reasonable costs and expenses incurred by an attorney who creates or

1 preserves a common fund are reimbursed proportionately by those class members
2 who benefit by the settlement.” *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp.
3 1362, 1366 (N.D. Cal. 1995) (citation omitted). Such expense awards comport with
4 the notion that the district court may “spread the costs of the litigation among the
5 recipients of the common benefit.” *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1121
6 (9th Cir. 2002).

7 Class Counsel has incurred expenses of \$4,155,027.67 as of May 2021 in the
8 prosecution of this Action. Supp. Manifold Decl., ¶¶ 3, 4 and 12-14, **Ex. 2**. Class
9 Counsel provides a breakdown of the unreimbursed expenses necessarily incurred by
10 counsel in this case. *Id.*, **Ex. 2**. For example, Class Counsel seeks reimbursement
11 for expert fees (\$3,226,002.90) and for filing fees, service of process, legal research,
12 document storage, photocopying, court reporters, mediation, and translation fees
13 (approximately \$929,024.77). *Id.* These are standard expenses incurred in
14 prosecuting a civil lawsuit and are the type of expenses typically billed by attorneys
15 to paying clients in the marketplace. Class Counsel carefully scrutinized these
16 expenses. *Id.* These expenses are in line with those approved by courts in this
17 District and are all the type of expenses routinely charged to hourly paying clients.
18 *See, e.g., In re LendingClub Sec. Litig.*, 2018 U.S. Dist. LEXIS 163500, at *15 (N.D.
19 Cal. 2018) (expenses such as expert and consultant fees, court fees, travel and lodging
20 costs, legal research fees, and copying expenses were reasonable and recoverable);
21 *In re High-Tech Empl. Antitrust Litig.*, 2015 U.S. Dist. LEXIS 118052, at *58-59
22 (N.D. Cal. 2015). The request for litigation costs and expenses is reasonable here.

23 **IV. CONCLUSION**

24 The EPPs respectfully request that the Court approve: (i) the costs of class
25 notice and administration in the amount of \$1,147,090 incurred as of April 2022; (ii)
26 an estimated additional distribution of \$830,870 to be paid under the terms of the
27 Settlement Agreement to cover the costs of a follow up notice campaign and on-going
28

1 claims administration; and (iii) an Expense Award in the amount of \$4,155,027.67.

2 The requested costs are reasonable, necessary and fair and warrant final approval.

3 Dated: May 25, 2022

By: s/ Betsy C. Manifold
BETSY C. MANIFOLD

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