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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

**IN RE: PACKAGED SEAFOOD
PRODUCTS ANTITRUST
LITIGATION**

This filing relates to the Direct
Purchaser Plaintiff Class Action
Track

Case No. 3:15-md-02670-DMS-
MDD

**ORDER GRANTING DIRECT
PURCHASER PLAINTIFFS'
RENEWED MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT**

RE: ECF No. 2674

1 **I. INTRODUCTION**

2 Pending before the Court is the Direct Purchaser Plaintiffs (“DPPs”) renewed
3 motion for preliminary approval of their proposed settlement with Defendant Chicken
4 of the Sea International (“COSI”)—as well as its parent company, Defendant Thai
5 Union Group PCL (“TUG”)—following nearly six years of litigation. The DPPs thus
6 respectfully ask the Court for preliminary approval of this Settlement and the proposed
7 notice, and that the Court set a hearing date for final approval. The DPPs also seek
8 proposed \$5,000 service awards for each of the Class Representatives.

9 The DPPs submitted their original request for preliminary approval of the
10 proposed Settlement on March 31, 2021. ECF No. 2533. At a hearing held on
11 December 8, 2021, the Court denied that motion without prejudice, instructing the
12 DPPs to refile it with more information. They did so on December 1, 2021.

13 As described below, the proposed Settlement with COSI and TUG is likely to
14 be approved as fair, adequate, and reasonable at a final approval hearing, and
15 accordingly, the Court will GRANT the DPPs’ renewed Motion.

16 **II. BACKGROUND**

17 The Parties have litigated this case for nearly six years, completing fact
18 discovery, expert discovery, and dispositive motions—including with the DPPs and
19 COSI/TUG filing cross motions for summary judgment on various issues and *Daubert*
20 motions against the opposing experts. *See, e.g.*, ECF Nos. 1967, 1970, 1976, 1984,
21 2001, 2015, 2030. The DPPs hired three experts for use against COSI and TUG: Dr.
22 Russell Mangum (economist); Dr. Gary Hamilton (sociologist); and Marianne
23 DeMario (forensic accountant). Sweeney Decl. ¶ 10. COSI and TUG hired four
24 experts to oppose the DPPs: Dr. Randal Heeb (economist); Dr. Michael Moore
25 (economist); Gary Kleinrichert (accountant); and Arthur Laby (attorney). *Id.* The
26 parties have completed all expert depositions and submitted final expert reports. *Id.*
27 The Court has already denied Defendants’ *Daubert* motion against Dr. Hamilton, who
28

1 opined on *alter ego* and agency liability of the relevant parent entities (*see* ECF No.
2 2407).

3 The Court previously certified the DPP Class in this case, following a three-day
4 evidentiary hearing. ECF No. 1931. In December of 2019, the Ninth Circuit Court of
5 Appeals granted Defendants' motion for leave to appeal the Court's class certification
6 decision pursuant to Fed. R. Civ. P. 23(f). ECF No. 2246. On April 6, 2021, a panel
7 of the Ninth Circuit vacated the class certification decision and remanded the case so
8 that the trial court could decide which expert was more persuasive on the issue of the
9 number of uninjured parties in each class. *Olean Wholesale Grocery Coop., Inc. v.*
10 *Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir. 2021). A rehearing *en banc* was
11 granted on August 3, 2021. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee*
12 *Foods LLC*, 5 F.4th 950 (9th Cir. 2021). The *en banc* rehearing was fully briefed and
13 was argued on September 22, 2021.

14 In the meantime, it appears that every DAP in this case has settled with COSI
15 and TUG, and they have dismissed their claims against these Defendants. *See, e.g.*,
16 ECF Nos. 1871-1873, 1909, 1927-28, 2450, 2454, 2494. These entities include major
17 direct purchasers like Wal-Mart, Kroger, Safeway, US Foods, CVS, and Target. The
18 DPPs understand that they were the last party to settle with COSI and TUG, after years
19 of vigorously fought litigation. Sweeney Decl. ¶ 13.

20 Now, following extensive discussions facilitated by the Honorable Jan Adler
21 (retired), a former Magistrate Judge for the Southern District of California, COSI/TUG
22 and the DPPs executed a Settlement Agreement on March 11, 2021. Sweeney Decl.,
23 Ex. A. This Settlement is the DPPs' first with any of the Defendants. Sweeney Decl.
24 ¶ 12. The Settlement Agreement was negotiated between the Parties under the
25 supervision of Judge Adler following multiple in-person, video conference, and
26 telephonic mediation sessions. *Id.*

27 Some of the material terms of the Settlement Agreement are as follows:
28

1 **Settlement Class Definition.** The Settlement Class definition consists of all
2 persons and entities that directly purchased packaged tuna products (excluding tuna
3 salad kits and cups and salvage purchases) within the United States, its territories and
4 the District of Columbia from any Defendant at any time between June 1, 2011 and
5 July 1, 2015, with minor exclusions. *Id.* ¶ 1.24; *see also* ¶ 11.1.

6 **Benefits.** In exchange for releasing claims against COSI and TUG in this
7 litigation, COSI and TUG have agreed to pay 3.2% of the combined sales of Packaged
8 Tuna Products that COSI and TUG sold to Settlement Class Members. *Id.* ¶ 11.1.
9 Analyzing the relevant sales, DPPs have determined that the settlement is expected to
10 provide approximately \$13 million in relief for the Settlement Class Members after
11 accounting for all of the anticipated opt outs. Sweeney Decl. ¶ 7.

12 **Release.** In exchange for the foregoing relief, the DPPs have agreed to release
13 “all Claims, . . . on account of, arising out of, resulting from, or in any way related to
14 any conduct concerning the pricing, selling, discounting, promotion, or marketing of
15 Packaged Tuna during the period from June 1, 2011 to July 31, 2015 that could have
16 been brought based in whole or in part on the facts, occurrences, transactions, or other
17 matters that were alleged in the Complaint.” *Id.*, Ex. A ¶ 9.1.

18 **Attorneys’ Fees and Costs.** COSI/TUG and the DPPs agreed to a separate,
19 contested arbitration of legal fees and costs before a neutral arbitrator, with a total
20 limit on potential fees and costs capped at \$7 million. Sweeney Decl., Ex. A ¶ 11.2.
21 The ultimate determination of fees and expenses will be decided upon by this Court
22 (*see* Fed. R. Civ. P. 23(h)), but Class Counsel agreed that they will not ask for more
23 than the amount awarded in arbitration. The arbitrator selected was former federal
24 judge Layn Phillips, who held a hearing on June 22, 2021 and issued an order on June
25 25. He ruled that DPP Class Plaintiffs were entitled to \$4,410,636.71 in past out of
26 pocket expenses and fees of \$1,539,363.29, for a total of \$5.95 million. That order is
27 attached as Exhibit C to the Sweeney Declaration and will be posted on the dedicated
28 Settlement website and will be referenced in the Settlement Class notice. Obviously,

1 this Court will ultimately decide whether it will adopt Judge Phillips' findings.
2 Additionally, the Parties agreed that if COSI and TUG reach a separate agreement to
3 settle with any potential Settlement Class Member, they will allocate 25% of the total
4 monetary value for such settlement or other resolution obtained in the manner
5 described in the DPPs' pending set aside motion, ECF No. 2446, and they stipulate to
6 the entry of an order substantially in the form as the one proposed by the DPPs in that
7 motion. *Id.*, Ex. A ¶ 11.3. This amount is separate and independent of the Settlement
8 Fund and the related cap on fees and costs in the Agreement. *Id.*

9 **Notice Payment.** COSI has agreed to advance, within five business days after
10 preliminary approval of the Settlement is granted by the Court, up to \$75,000 to be
11 credited against the Settlement Fund, to pay for the reasonable costs for notice and
12 related administration following preliminary approval of this Settlement, but that sum
13 shall not be reimbursable in the event that final approval is not granted. *Id.* ¶ 11.4.
14 Although the DPPs anticipate that notice and claims administration *together* will not
15 cost approximately more than \$100,000, the Settlement Agreement provides that
16 Settlement Class Counsel may withdraw funds as necessary for notice and
17 administration from the Settlement Fund up to \$500,000. *See id.* ¶ 5.2; *see also*
18 Sweeney Decl. ¶ 16.

19 Apart from the Settlement Agreement, the DPPs recommend notice and
20 distribution using the services of settlement and notice administrator, JND. According
21 to JND, notice of the settlement will be provided directly via mail to the DPP Class as
22 well as by email for those Settlement Class Members for whom the DPPs have email
23 addresses. *See* Declaration of Gina Intrepido-Bowden ("Intrepido-Bowden Decl.").
24 There will also be a Press Release providing additional notice of the Settlement. *Id.*
25 The DPPs' proposed notice plan also encourages Settlement Class Members to go to
26 the dedicated case website and register for further direct updates via email for future
27 important events. *Id.*

1 Under the DPPs’ proposed plan of allocation, Settlement Class Members will
2 be able to make claims for their *pro rata* share of the Settlement. If possible, the
3 Claims Administrator intends to set up an online portal or other mechanism by which
4 Settlement Class members will be able to check the volume of commerce assigned to
5 them by the Claims Administrator, and in the event that their own data suggests that a
6 different claimed volume of commerce is appropriate, any Settlement Class member
7 can provide that information, and it will be considered by the Claims Administrator,
8 subject to audit. In the event that they believe a different amount of commerce is
9 correct, they can dispute that amount, in which case their claim will be subject to an
10 audit. *Id.* This plan eases the verification process for Settlement Class Members and
11 reduces the burden on them. *Id.* The proceeds of the Settlement will be distributed at
12 a reasonable time in the future after consideration of the costs associated with such a
13 distribution and the amounts of other settlements, if any, available to distribute. *Id.*
14 This information will be included on the Settlement website and in the Settlement
15 Class notice. In both, it will be explained that distribution to Settlement Class
16 Members will occur at an appropriate time in the future, either in combination with
17 another settlement, after trial, or at the conclusion of any appeals. To the extent there
18 are any undistributed funds following an initial distribution to Settlement Class
19 Members, the Claims Administrator, upon the recommendation of Class Counsel and
20 approval by the Court, will either make subsequent distributions to Settlement Class
21 Members, or, if it is infeasible to do so in light of the amount of undistributed funds
22 and the costs of Administration, distribute those funds on a *cy pres* basis to the Center
23 for Public Interest Law at the University of San Diego School of Law. Sweeney Decl.
24 ¶ 18.

25 **III. DISCUSSION**

26 In deciding whether to approve a proposed settlement, the Ninth Circuit has a
27 “strong judicial policy that favors settlements, particularly where complex class action
28 litigation is concerned.” *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556

1 (9th Cir. 2019) (“*Hyundai*”) (*en banc*) (internal quotation omitted); *In re Syncor*
2 *ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008). “[T]here is [also] an overriding
3 public interest in settling and quieting litigation,” and this is “particularly true in class
4 action suits.” *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

5 In December of 2018, the Rules Committee revised Federal Rule of Civil
6 Procedure 23 to formalize the preliminary approval process for district courts when
7 first evaluating a proposed class action settlement. *See* Fed. R. Civ. P. 23(e)(1). Under
8 the new rule, “[t]he court must direct notice [of the proposed settlement] in a
9 reasonable manner to all class members who would be bound by the proposal if giving
10 notice is justified by the parties’ showing that the court will likely be able to: (i)
11 approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of
12 judgment on the proposal.” Fed. R. Civ. P. 23(e)(1)(B).

13 **IV. DISCUSSION**

14 **A. The Proposed Settlement Class Satisfies The Requirements Of Rules 23(a)** 15 **And (b)(3).**

16 The Supreme Court has long recognized that antitrust class actions are a vital
17 component of antitrust enforcement. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344
18 (1979); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972). Thus, courts
19 “resolve doubts in these actions in favor of certifying the class.” *In re Cathode Ray*
20 *Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 612 (N.D. Cal. 2015) (“*CRT II*”).

21 To certify a settlement class under Fed. R. Civ. P. 23, plaintiffs must satisfy the
22 four prerequisites of Rule 23(a)—numerosity, commonality, typicality and adequacy
23 of representation—as well as at least one of the three subsections of Rule 23(b). *Sali*
24 *v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1002 (9th Cir. 2018) (“*Sali*”) (citing Fed. R.
25 Civ. P. 23(c)(1)(A)). A plaintiff seeking Rule 23(b)(3) certification must show that
26 “questions of law or fact common to class members predominate over any questions
27 affecting only individual members, and that a class action is superior to other available
28

1 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P.
2 23(b)(3).

3 The manageability requirement inherent in Rule 23(b)(3) does not apply to
4 settlement classes. “[T]he criteria for class certification are applied differently in
5 litigation classes and settlement classes.” *Hyundai*, 926 F.3d at 556.

6 **Rule 23(a) Requirements.**

7 **Numerosity** is satisfied by a class as small as 40 entities. *Lo v. Oxnard European*
8 *Motors, LLC*, No. 11CV1009 JLS (MDD), 2011 WL 6300050, at *2 (S.D. Cal. Dec.
9 15, 2011) (“*Lo*”). Here, the proposed Settlement Class is expected to contain after opt
10 outs between 500 to 600 entities.

11 **Commonality.** Rule 23(a)(2) requires that there be “questions of law or fact
12 common to the class.” “[F]or purposes of Rule 23(a)(2), even a single common
13 question will do.” *Nitsch v. Dreamworks Animation SKG Inc.*, 315 F.R.D. 270, 283
14 (N.D. Cal. 2016) (“*Nitsch*”) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338,
15 359 (2011)).

16 Where, as here, the focus is on Defendants’ anticompetitive conduct, questions
17 of law and fact are common to the class. “Where an antitrust conspiracy has been
18 alleged, courts have consistently held that ‘the very nature of a conspiracy antitrust
19 action compels a finding that common questions of law and fact exist.’” *In re High-*
20 *Tech Emp. Antitrust Litig.*, 985 F.Supp.2d 1167, 1180 (N.D. Cal. 2013) (“*High-Tech*”
21 (quoting *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 593 (N.D. Cal.
22 2010), *amended in part by* No. 07-1827, 2011 WL 3268649 (N.D. Cal. July 28, 2011)
23 (“*LCD*”). In this case, there are numerous common issues, including: (1) whether
24 Defendants participated in a conspiracy to fix prices in violation of the antitrust laws;
25 (2) the scope of that conspiracy; and (3) whether the Settlement Class members
26 suffered antitrust injury as a result of Defendants’ conspiracy.

27 **Typicality.** The test of typicality is “whether other members have the same or
28 similar injury, whether the action is based on conduct which is not unique to the named

1 plaintiffs, and whether other class members have been injured by the same course of
2 conduct.” *Sali*, 909 F.3d 1006 (quotation omitted). “In antitrust cases, typicality
3 usually ‘will be established by plaintiffs and all class members alleging the same
4 antitrust violations by defendants.’” *High-Tech*, 985 F. Supp. 2d at 1181; *see also Lo*,
5 2011 WL 6300050, at *2. The claims of Plaintiffs and the proposed Settlement Class
6 are all based on the same antitrust violations, and they each have suffered injury as a
7 result of Defendants’ antitrust conspiracy. Any factual differences among Settlement
8 Class members do not preclude a finding of typicality.¹

9 ***Adequacy of Representation.*** Adequacy requires that Plaintiffs “(1) have no
10 interests that are antagonistic to or in conflict with the interests of the class; and (2) be
11 represented by counsel able to vigorously prosecute their interests.” *CRT II*, 308
12 F.R.D. at 618. “The mere potential for a conflict of interest is not sufficient to defeat
13 class certification; the conflict must be actual, not hypothetical.” *In re Nat’l Collegiate*
14 *Athletic Ass’n Athletic Grant-In-Aid Cap Antitrust Litig.*, 311 F.R.D. 532, 541 (N.D.
15 Cal. 2015) (quotation omitted). There is no conflict between Plaintiffs’ interests and
16 those of absent Settlement Class members. Plaintiffs and their expert have shown that
17 all Class members were injured by having to pay supracompetitive prices for packaged
18 tuna products.

19 The DPPs and their counsel, Hausfeld, have vigorously prosecuted this case on
20 behalf of the DPP Class. Hausfeld was the first firm to file suit on behalf of the first
21 filed Plaintiff in this litigation, Olean Wholesale Grocery Cooperative (“Olean”).
22 Olean and the other class representatives, with the assistance of Class Counsel, have
23 more than adequately represented the DPP Class. Sweeney Decl. ¶ 21. They have
24 driven this litigation forward in all aspects for the betterment of all Plaintiffs. *Id.*

25
26 ¹ *See, e.g., In re Korean Ramen Antitrust Litig.*, No. 13-CV-04115-WHO, 2017 WL
27 235052, at *20 (N.D. Cal. Jan. 19, 2017); *In re Static Random Access Memory (SRAM)*
28 *Antitrust Litig.*, 264 F.R.D. 603, 609 (N.D. Cal. 2009); *see also LCD*, 267 F.R.D. at
593.

1 Among other things, Class Counsel have conducted extensive discovery,
2 reviewing millions of pages of documents and taking depositions of dozens of
3 witnesses. *Id.* ¶ 8. As a result of these and other efforts, Class Counsel were able to
4 secure relief from COSI/TUG for a period of time beyond the period for which the
5 DOJ has secured guilty pleas. *Id.* Class Counsel have also investigated and litigated
6 claims against the parent entity Defendants in this case, and as a result of those efforts,
7 TUG is settling with the DPPs as well. *Id.* ¶ 9.

8 Particularly in light of the late stage of the litigation, Class Counsel have more
9 than sufficient information to make an informed decision as to the value of the
10 Settlement compared to the risks of continued litigation. The Parties have exchanged
11 all merits expert reports and completed expert discovery; briefed four summary
12 judgment motions and four *Daubert* motions; briefed, argued and participated in an
13 evidentiary hearing on class certification; briefed and argued a class certification
14 appeal; briefed and argued multiple motions to dismiss; and conducted extensive fact
15 discovery. All of this allows Class Counsel to make an informed judgment in favor of
16 the Settlement, a factor which the Court should consider.² In addition, Class Counsel
17 have observed that the other Class Plaintiffs and all of the DAPs—which comprise the
18 largest members of the DPP Class and collectively account for around 80% of the
19 purchases by DPP Class members—have already entered into settlements with COSI
20 and TUG. Sweeney Decl. ¶ 13.

21 Class Counsel are experienced lawyers who have successfully litigated many
22 prior complex antitrust class actions such as this one, including with ACPERA

23 _____
24 ²*See In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*,
25 No. 2672 CRB (JSC), 2016 WL 6248426, at *14 (N.D. Cal. Oct. 25, 2016) (“extensive
26 review of discovery materials indicates [Plaintiffs have] sufficient information to
27 make an informed decision about the Settlement. As such, this factor favors approving
28 the Settlement.”); *see also In re Portal Software Sec. Litig.*, No. C-03-5138 VRW,
2007 WL 4171201, at *4 (N.D. Cal. Nov. 26, 2007).

1 leniency applicants, and have successfully resolved many of those cases in this Circuit.
2 *Id.* ¶ 5. Class Counsel have brought that experience and knowledge to bear on behalf
3 of the Class and in this proposed Settlement. *Id.*³.

4 **Rule 23(b)(3) Requirements.** “Predominance is a test readily met in certain
5 cases alleging . . . violations of the antitrust laws.” *Amchem Prods., Inc. v. Windsor*,
6 521 U.S. 591, 625 (1997). Courts commonly find Rule 23’s “predominance”
7 requirement satisfied in direct purchaser horizontal price fixing cases. *See, e.g.,*
8 *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012); *Nitsch*,
9 315 F.R.D. at 315.

10 Rule 23(b)(3) “does not require a plaintiff seeking class certification to prove
11 that each ‘elemen[t] of [her] claim [is] susceptible to class-wide proof.’ What the rule
12 does require is that common questions ‘predominate over any questions affecting only
13 individual [class] members.’” *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S.
14 455, 469 (2013) (citation omitted; brackets in original). Predominance is satisfied
15 when “common questions present a significant aspect of the case” such that significant
16 facts and issues underlying the proposed class’ claims are subject to common proof.
17 *CRT II*, 308 F.R.D. at 620 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022
18 (9th Cir. 1998)).

19 Here, the common questions identified above predominate over any individual
20 ones. The existence and scope of Defendants’ horizontal price-fixing conspiracy is a
21 class-wide issue that can be proved for each Settlement Class Member through
22 common evidence. “In price-fixing cases, courts repeatedly have held that the

23 ³ *See Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff’d*, 661
24 F.2d 939 (9th Cir. 1981) (“the fact that experienced counsel involved in the case
25 approved the settlement after hard-fought negotiations is entitled to considerable
26 weight”); *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D.
27 Cal. 2004) (“‘Great weight’ is accorded to the recommendation of counsel, who are
28 most closely acquainted with the facts of the underlying litigation”) (internal citation
omitted); *Bellows v. NCO Fin. Sys., Inc.*, No. 3:07-cv-01413-W-AJB, 2008 WL
5458986, at *8 (S.D. Cal. Dec. 10, 2008) (same).

1 existence of the conspiracy is the predominant issue and warrants certification even
2 where significant individual issues are present.” *Nitsch*, 315 F.R.D. at 315 (quotation
3 and internal marks omitted); *CRT II*, 308 F.R.D. at 620, 625 (holding the same); *High-*
4 *Tech*, 985 F. Supp. 2d at 1217 (holistic examination of liability, not just econometric
5 analysis, justified certification).

6 This is especially true in the context of a settlement class, such as this one. In
7 *Hyundai*, it was argued that the differences in applicable state laws defeated
8 predominance, but the Ninth Circuit, sitting *en banc*, said that in the context of a
9 settlement class, that is viewed as an issue of manageability, which is a requirement
10 that does not apply. 926 F.3d at 559-60. *Accord Jabbari v. Farmer*, 965 F.3d 1001,
11 1007 (9th Cir. 2020).

12 **B. The Settlement is Likely to be Approved.**

13 The Court finds that the Proposed Settlement meets all the relevant factors to
14 demonstrate that preliminary approval is appropriate.

15 As amended, Rule 23 now provides a checklist of factors to consider when
16 assessing whether a proposed settlement is fair, reasonable, and adequate. *See* Fed. R.
17 Civ. P. 23(e)(2) advisory committee’s note (2018) (although the Ninth Circuit
18 previously used lists of factors to be considered, the revised Rule 23 now “directs the
19 parties to present [their] settlement ... in terms of [this new] shorter list of core
20 concerns.”). Ultimately, as the Ninth Circuit has admonished, the key “underlying
21 question remains this: Is the settlement fair?” *In re Volkswagen “Clean Diesel” Mktg.,*
22 *Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 611 (9th Cir. 2018).

23 **1. The Settlement Class Representatives and Settlement Class Counsel**
24 **have adequately represented the Settlement Class.**

25 For the reasons explained above, Court finds that Class Counsel, Hausfeld LLP,
26 and the Class Representatives have adequately represented the Class, including in this
27 Proposed Settlement. Class Counsel are experienced class action lawyers.

1 After six years, Class Counsel have also conducted extensive discovery and
2 have more than sufficient information to make an informed decision as to the value of
3 the Settlement compared to the risks of continued litigation. The Parties have
4 exchanged all merits expert reports and completed expert discovery; briefed four
5 summary judgment motions and four *Daubert* motions; briefed, argued and
6 participated in an evidentiary hearing on class certification; briefed and argued a class
7 certification appeal; and briefed and argued multiple motions to dismiss. *See In re*
8 *Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672
9 CRB (JSC), 2016 WL 6248426, at *14 (N.D. Cal. Oct. 25, 2016) (“extensive review
10 of discovery materials indicates [Plaintiffs have] sufficient information to make an
11 informed decision about the Settlement. As such, this factor favors approving the
12 Settlement.”); *see also Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal.
13 1980), *aff’d*, 661 F.2d 939 (9th Cir. 1981) (“the fact that experienced counsel involved
14 in the case approved the settlement after hard-fought negotiations is entitled to
15 considerable weight”); *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D.
16 523, 528 (C.D. Cal. 2004) (“‘Great weight’ is accorded to the recommendation of
17 counsel, who are most closely acquainted with the facts of the underlying litigation”)
18 (internal citation omitted).

19 **2. The Parties negotiated the proposed settlement at arm’s length.**

20 The Court also finds that the Settlement satisfies the second Rule 23(e)(2)
21 factor, which asks the Court to confirm that the proposed settlement was negotiated at
22 arm’s length. Fed. R. Civ. P. 23(e)(2)(B); *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948,
23 965 (9th Cir. 2009) (“*Rodriguez*”) (“We put a good deal of stock in the product of an
24 arms-length, non-collusive, negotiated resolution.”).

25 The Settlement was reached only after prolonged, well-informed, and extensive
26 arm’s-length negotiations—including two in-person mediation sessions and additional
27 negotiations—between experienced and knowledgeable counsel facilitated by the
28 Honorable Jan Adler. Sweeney Decl. ¶ 12. The use of a mediator supports the

1 conclusion that settlement process was not collusive. *See* Fed. R. Civ. P. 23(e)(2)(B)
2 advisory committee’s note (2018) (“[T]he involvement of a neutral . . . in [the parties’]
3 negotiations may bear on whether they were conducted in a manner that would protect
4 and further the class interests.”); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09–
5 00261 SBA (EMC), 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (noting that
6 private mediation “tends to support the conclusion that the settlement process was not
7 collusive”); *see also In re Zynga Inc. Sec. Litig.*, No. 12-cv-04007-JSC, 2015 WL
8 6471171, at *9 (N.D. Cal. Oct. 27, 2015) (use of mediator and fact that some discovery
9 had been completed “support the conclusion that the Plaintiff was appropriately
10 informed in negotiating a settlement”) (internal citation omitted).

11 Moreover, neither COSI nor TUG has promised the Class Representatives or
12 Settlement Class Counsel preferential treatment in exchange for the settlement.
13 Sweeney Decl. ¶ 15. *Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157, 1165
14 (9th Cir. 2013) (preferential treatment for class representatives can create a conflict of
15 interest). Here, the settlement funds will be distributed *pro rata*, and DPP Class
16 Counsel will be reimbursed expenses and fees from the separate fund preliminarily
17 awarded by Judge Phillips, subject to the Court’s approval. Class Counsel will ask the
18 Court to approve a nominal service award to the Class Representatives out of the
19 settlement funds to reimburse them for their efforts on behalf of the settlement class
20 over the past six years, but neither Settlement Class Counsel nor COSI or TUG made
21 any promises about requesting such awards. *See In re Online DVD-Rental Antitrust*
22 *Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (“[T]he class settlement agreement provided
23 no guarantee that the class representatives would receive incentive payments”).

24 **3. The quality of relief to the Settlement Class weighs in favor of**
25 **approval.**

26 The third factor to be considered is whether “the relief provided for the class is
27 adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the
28 effectiveness of any proposed method of distributing relief to the class, including the

1 method of processing class-member claims; (iii) the terms of any proposed award of
2 attorneys’ fees, including timing of payment; and (iv) any agreement required to be
3 identified under Rule 23(e)(3).” Fed. R. Civ. P. 23(e)(2)(C). Under this factor, the
4 relief “to class members is a central concern.” Fed. R. Civ. P. 23(e)(2)(C) advisory
5 committee’s note (2018).

6 **a. Costs, risks, and delay of trial and appeal.**

7 The Court finds that the costs, risks, and delay of trial and appeal favor the
8 Settlement. COSI has admitted violations of antitrust laws, but TUG moved for
9 summary judgment as to its inclusion in this case. Even as to the claims against COSI,
10 the experts in this case have serious disputes about the likely overcharge percentage,
11 among other things. There are thus real and significant risks in antitrust class actions
12 such as this one. *Rodriguez*, 563 F.3d at 966 (summarizing risks of litigating antitrust
13 class actions); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir.
14 2005) (“Indeed, the history of antitrust litigation is replete with cases in which
15 antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only
16 negligible damages, at trial, or on appeal.” (quoting *In re NASDAQ Mkt.-Makers*
17 *Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998))); *In re Auto. Refinishing Paint*
18 *Antitrust Litig.*, 617 F.Supp.2d 336, 341 (E.D. Pa. 2007) (approving settlements in part
19 because the “antitrust class action is arguably the most complex action to prosecute[;]
20 [t]he legal and factual issues involved are always numerous and uncertain in
21 outcome”) (internal quotation omitted).

22 Moreover, there remains some risk on Defendants’ class certification appeal,
23 and that appeal has also drawn out the length of the litigation. Under these
24 circumstances, while the DPPs have “strong claims,” “significant risk and uncertainty
25 remain such that continuing the case could lead to protracted and contentious
26 litigation.” *Howell v. Advantage RN, LLC*, 17-CV-883 JLS (BLM), 2020 WL
27 3078522, at *4 (S.D. Cal. June 9, 2020).

b. The effectiveness of any proposed method of distributing relief to the Class.

The Settlement provides the Settlement Class Members with significant relief. And this relief is comparable, and in some cases superior, to other publicly reported settlements. The Settlement Class Members are mostly comprised of smaller companies, with other larger retailers having effectively opted out of the Class by filing their own suits or separately settling with COSI. The expected Settlement Class Members represent around 20% of the purchases of packaged tuna products during the relevant period. *See* Sweeney Decl. ¶ 7. The proposed settlement provides a 3.2% overcharge on all purchases from COSI and TUG by the settlement class members, which is expected to total approximately \$13 million. *Id.*

While the DPPs may have been able to recover more from COSI and TUG if they had ultimately prevailed against these Defendants at trial, the settlement figure is nonetheless significant. *Schaffer v. Litton Loan Servicing, LP.*, No. CV 05-07673 MMM (JCx), 2012 WL 10274679, at *11 (C.D. Cal. Nov. 13, 2012) (“Estimates of what constitutes a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years).”).

c. The method for processing claims.

The DPPs have advised the Court regarding their proposed method for processing claims. Specifically, Settlement Class Members who make a claim will be entitled to receive cash, with the actual amount received dependent on the number of claims and the volume of commerce represented in those claims. The proceeds from the Settlement Amount will ultimately be distributed on a *pro rata* basis. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-CV-2058 JST, 2017 WL 2481782, at *5 (N.D. Cal. June 8, 2017) (approving settlement distribution plan that “‘fairly treats class members by awarding a *pro rata* share’ to the class members based on the extent of their injuries.” (quoting *In re Heritage Bond Litig.*, No. 02-ML-1475, 2005

1 WL 1594403, at *11 (C.D. Cal. June 10, 2005)); *In re High-Tech Employee Antitrust*
2 *Litig.*, No. 11-CV-02509-LHK, 2015 WL 5159441, at *8 (N.D. Cal. Sept. 2, 2015)
3 (approving *pro rata* distribution of fractional share based upon class member’s total
4 base salary as fair and reasonable); *Four in One Co. v. S.K. Foods, L.P.*, 2:08-CV-
5 3017 KJM EFB, 2014 WL 4078232, at *15 (E.D. Cal. Aug. 14, 2014) (approving
6 “plan of allocation providing for a pro rata distribution of the net settlement fund based
7 on verified claimants’ volume of qualifying purchases” as “fair, adequate, and
8 reasonable”); *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1045- 46 (N.D. Cal.
9 2008) (approving securities class action settlement allocation on a “per-share basis”).

10 **d. The terms of any proposed award of attorneys’ fees, including**
11 **timing of payment.**

12 The Court also finds that the methodology used for determining the proposed
13 fee and cost award—a contested arbitration before a neutral arbitrator—is fair and
14 reasonable. It does not detract from relief for the Class in any way. And this Court will
15 have ultimate say over whether to award the arbitrator’s recommended sums. The
16 arbitrator’s award is included in the notices for the Class, and Settlement Class
17 Counsel’s motion for approval of that award and payment of their fees and costs will
18 also be posted on the case website prior to the deadline for objections.

19 **e. Any agreement required to be identified under Rule 23(e)(3).**

20 Courts also must evaluate any agreement made in connection with the proposed
21 settlement. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv), (e)(3). The DPPs have represented that
22 the Settlement Agreement before the Court is the only agreement between the Parties.
23 Sweeney Decl. ¶ 15.

24 **4. The Settlement treats all Settlement Class Members equitably.**

25 The final Rule 23(e)(2) factor turns on whether the proposed settlement “treats
26 class members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2)(D). “Matters
27 of concern could include whether the apportionment of relief among class members
28 takes appropriate account of differences among their claims, and whether the scope of

1 the release may affect class members in different ways that bear on the apportionment
2 of relief.” Fed. R. Civ. P. 23(e)(2)(D) advisory committee’s note (2018).

3 Here, the Settlement treats all Settlement Class members equitably, and there
4 are no differences between the scope of relief between any Class members. While
5 Class Counsel has requested nominal service awards for the Class Representatives for
6 their efforts on behalf of the Class to date, such awards are well-established in the
7 Ninth Circuit. *Harris v. Vector Mktg. Corp.*, No. 08-cv-5198 EMC, 2012 WL 381202,
8 at *6 (N.D. Cal. Feb. 6, 2012) (“It is well-established in this circuit that named
9 plaintiffs in a class action are eligible for reasonable incentive payments, also known
10 as service awards. In fact, the Ninth Circuit recently noted that incentive payments to
11 named plaintiffs have become ‘fairly typical’ in class actions.”); *see also Boyd v. Bank*
12 *of Am. Corp.*, No. 13-cv-0561-DOC, 2014 WL 6473804, at *7 (C.D. Cal. Nov. 18,
13 2014) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 976-77 (9th Cir. 2003)).

14 In light of all of the foregoing, the proposed Settlement merits preliminary
15 approval as it is likely to be finally approved after the Fairness Hearing.

16 **C. The Proposed Notice is the Best Practicable Under the Circumstances.**

17 Where there is a class settlement, Rule 23(e)(1) requires the court to “direct
18 notice in a reasonable manner to all class members who would be bound by the
19 proposal.” “Notice is satisfactory if it ‘generally describes the terms of the settlement
20 in sufficient detail to alert those with adverse viewpoints to investigate and to come
21 forward and be heard.’” *Rodriguez*, 563 F.3d at 962 (quoting *Churchill Vill., LLC v.*
22 *Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)).

23 In Rule 23(b)(3) actions, “the court must direct to class members the best notice
24 that is practicable under the circumstances,” and that notice “must clearly and
25 concisely state in plain, easily understood language:” (1) the nature of the action; (2)
26 the definition of the class certified; (3) the class claims, issues, or defenses; (4) that a
27 class member may enter an appearance through an attorney if the member so desires
28 (5) that the court will exclude from the class any member who requests exclusion; (6)

1 the time and manner for requesting exclusion; and (7) the binding effect of a class
2 judgment on members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

3 The notice plan proposed by the DPPs with the advice and assistance of JND
4 provides a thorough approach to notice. Intrepido-Bowden Decl. ¶¶ 11-28; *see also*,
5 *e.g.*, *Ross v. Trex Co.*, No. 09-00670-JSW, 2013 WL 791229, at *1 (N.D. Cal. Mar. 4,
6 2013) (“[A]ctual notice is not required Due Process does not entitle a class
7 member to ‘actual notice,’ but rather to the best notice practicable, reasonably
8 calculated under the circumstances to apprise him of the pendency of the class action
9 and give him a chance to be heard.”) (internal quotation omitted). The rigorous notice
10 plan proposed by JND satisfies requirements imposed by Rule 23 and the Due Process
11 clause of the United States Constitution.

12 Moreover, the contents of the notice satisfactorily informs Settlement Class
13 members of their rights under the Settlement. *See* Intrepido-Bowden Decl., Exs. B-D;
14 *see also* 4 *Newberg on Class Actions* § 11:53 (4th ed. 2002) (notice is “adequate if it
15 may be understood by the average class member”). Accordingly, the notice program,
16 through direct mail and email where available and the press release, as well as the
17 accompanying forms, are reasonable and adequate and are fairly calculated to apprise
18 Settlement Class members of their rights under the Settlement.

19 The Court finds that notice of the Settlement with the DPPs is appropriate at
20 this time. As noted in the DPPs’ Motion and notice plan, Settlement Class members
21 are encouraged to register on the case website to receive direct updates about the case
22 going forward. This is the most effective and efficient way to notify the Settlement
23 Class of the class action and the proposed Settlement and updates about the litigation.

24 **D. Service Awards.**

25 As noted above, the DPPs also request service awards of \$5,000 per Class
26 Representative, as partial compensation for their work and efforts in this case. The
27 Class Representatives have faithfully represented the Class for nearly six years,
28 including producing documents, sitting for depositions, and monitoring the progress

1 of the case. Sweeney Decl. ¶ 21. These proposed service awards are modest and a
2 reasonable, nominal acknowledgment of their service. *Id.* As noted, such awards are
3 routine in the Ninth Circuit. *See Harris*, 2012 WL 381202, at *6; *Boyd*, 2014 WL
4 6473804, at *7. Accordingly, the Court finds such service awards are reasonable.

5 **V. CONCLUSION**

6 For the foregoing reasons, the Court hereby preliminarily approves the
7 Settlement Agreement, and ORDERS the following:

8 (1) The Court certifies, for settlement purposes, the following Settlement
9 Class:

10 All persons and entities that directly purchased packaged tuna products
11 within the United States, its territories and the District of Columbia from
12 any Defendant at any time between June 1, 2011 and July 31, 2015.
13 Excluded from the class are all governmental entities, Defendants, any
14 parent, subsidiary or affiliate thereof, and Defendants' officers, directors,
15 employees, and immediate families, as well as any federal judges or their
16 staffs.

17 (2) The Court appoints Hausfeld LLP as Class Counsel for settlement
18 purposes.

19 (3) The Court appoints Olean Wholesale Grocery Cooperative, Inc., Pacific
20 Groservice Inc. d/b/a PITCO Foods, Piggly Wiggly Alabama Distributing Co., Inc.,
21 Howard Samuels as Trustee in Bankruptcy for Central Grocers, Inc., Trepcos Imports
22 and Distribution Ltd., and Benjamin Foods LLC as Class Representatives, for
23 settlement purposes.

24 (4) The Court finds that the Settlement Agreement has been negotiated at
25 arm's length.

26 (5) The Court finds the Settlement Agreement fair, reasonable, and adequate,
27 and in the best interests of the Settlement Class.

28 (6) The Court approves the notice content and plan for providing notice of the
to members of Settlement Class.

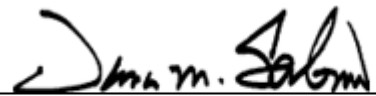
1 (7) The Court orders COSI and TUG to provide the relevant notices as
2 required by the Class Action Fairness Act, 28 U.S.C. § 1711, *et seq.*, to the extent they
3 have not already done so.

4 (8) Finally, the Court adopts and sets the following deadlines:

5 Deadline for disseminating Settlement Class notice	February 28, 2022
6 Deadline for filing of affidavit attesting that notice was disseminated as ordered	March 9, 2022
7 DPPs to file a motion for award of costs and attorneys' fees	March 24, 2022
8 Deadline for Settlement Class members to opt out of the Settlement and deadline to object to the Settlement	April 28, 2022
9 DPPs to file a motion for final approval of the Settlement	May 10, 2022
10 Final approval hearing	June 17, 2022, at 1:30 p.m.

11 **IT IS SO ORDERED.**

12 Dated: January 26, 2022

13 
 14 _____
 15 Hon. Dana M. Sabraw, Chief Judge
 16 United States District Court