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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	Master File No. 07-MD-1827 SI MDL No. 1827
This Document Relates to: *Best Buy Co., Inc. v. AU Optronics Corp., et al.*, Case No. 10-CV-4572	Individual Case No. 10-CV-4572 SI **DEFENDANT HANNSTAR DISPLAY CORPORATION'S OPPOSITION TO BEST BUY PLAINTIFFS' MOTION FOR FEES AND COSTS** Hearing Date: November 22, 2013 Time: 9:00 a.m. Place: Courtroom 10, 19th Floor

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I. INTRODUCTION

The Best Buy Plaintiffs' request for $9,103,109.95 in attorney's fees and another $8,550,525.26 in additional costs, for a total of $17,653,635.21, is completely unreasonable in light of the outcome of the trial. The Best Buy Plaintiffs are not entitled to fees in the first place and, even if they were, asking for well over twice the damages proven is unfounded.

Recoverability of Fees: This trial was not about whether Defendant HannStar Display Corporation ("HannStar") participated in a conspiracy to fix the price of TFT-LCD panels. HannStar long ago acknowledged taking part in a TFT-LCD panels conspiracy. Instead, the trial was about whether the Best Buy Plaintiffs could recover the more than $800 million in damages they sought even though they did not purchase TFT-LCD panels from the conspirators, the conspiracy took place outside the United States, and an extremely dubious damages theory notwithstanding. After a costly six-week trial, the jury found that the Best Buy Plaintiffs had suffered only $7.47 million in damages for its direct purchases and zero in damages for its indirect purchases. The jury also found that the TFT-LCD panels conspiracy did not involve conduct which had a "direct, substantial and reasonably foreseeable effect on trade or commerce in the United States." That finding means that the Sherman Act does not apply to the Best Buy Plaintiffs' claims in the first place and compels the Court to vacate its Judgment against HannStar. By necessity, it also compels the Court to deny the Best Buy Plaintiffs' Motion for Fees and Costs.

The TFT-LCD panels conspiracy took place outside the United States. There was no evidence to the contrary. The Best Buy Plaintiffs tried to invoke the Sherman Act by having the jury find that the conspiracy had a "direct, substantial and reasonably foreseeable effect on trade or commerce in the United States." But the jury's definitive "No" answer to Question 5 means there is no basis upon which to apply any of the three exceptions to the FTAIA (domestic injury, import commerce or export commerce) and, thus, no means by which the extraterritorial TFT-LCD panels conspiracy might fall within the Sherman Act. The affirmative answers to Questions 3 and 4 do not change the outcome. Those questions did not ask whether the only conspiracy the jury found—"a conspiracy to fix, raise, maintain or stabilize the prices of TFT-

LCD panels," (Question 2)—involved "straightforward import commerce" that would be subject to the Sherman Act without an FTAIA exception. They permitted affirmative answers based on the importation of "finished goods," which by their nature do not involve "straightforward import commerce" in TFT-LCD panels. Given the absence of any evidence of "straightforward import commerce" in panels, and the jury's finding that the panels conspiracy did not have a "direct, substantial and reasonably foreseeable effect on trade or commerce in the United States," the only way to read the verdict consistently is that the *panels* conspiracy itself (without accounting for finished goods), lacked the nexus to U.S. commerce required to invoke the Sherman Act. There is thus no basis to apply the Sherman Act to the Best Buy Plaintiffs' claims, and likewise no basis to award fees or costs to the Best Buy Plaintiffs under the Clayton Act.

Results After Offset: The result obtained by the Best Buy Plaintiffs' is also effectively a loss given that the REDACTED settlement offset means there will be no net recovery from this trial. The Best Buy Plaintiffs secured settlements REDACTED REDACTED They insisted on taking Toshiba and HannStar to trial and, after a six-week trial and less than one day of deliberations, lost outright with respect to Toshiba and obtained a damages award against HannStar of only $7,471,943—*$0* in damages for their indirect purchases. The trial was completely pointless, or worse, given that the Best Buy Plaintiffs' settlements totaled over REDAC times the actual damages they were found to have suffered. Under those circumstances the Best Buy Plaintiffs have no right to now seek nearly $18 million in fees and costs. That is more than REDACTED of the actual damages found by the jury.

To ignore the net result obtained by taking this case to trial, or stated differently to exempt the award of attorney's fees and costs from offset, would eliminate any incentive for plaintiffs to negotiate reasonable settlements with a defendant who has pled guilty and would make it costless for plaintiffs to roll the dice and proceed to trial against one last defendant, regardless of the actual damages they suffered and are ultimately awarded at trial. Such a rule would mire this District Court in damages trials for years to come. This can be prevented by subjecting plaintiffs' requests for fees and costs to the settlement offset, as permitted under Ninth

Circuit law.

Admitted Non-Recoverable Fees: The Court should reject the Best Buy Plaintiffs' request for fees incurred pursuing their unsuccessful claims against Toshiba (by $2.97 million) and for work negotiating settlements with other Defendants (by almost $142,000). Plaintiffs concede these fees are unrecoverable but failed to properly remove them from their fee motion.

Unsuccessful Claims: The Court should likewise reject Plaintiffs' request for fees incurred pursuing their unsuccessful indirect purchases claims (by $1 million).

Unreasonable Billings: The Best Buy Plaintiffs' $17.6 million request is patently unreasonable when measured against the zero net recovery against HannStar. It is also no exaggeration to say that HannStar was an afterthought in this case and at this trial, and the Best Buy Plaintiffs' request should be reduced to account for the vast majority of time and work spent pursuing wholly unsuccessful claims against Toshiba. Their request also suffers pervasively from problems such as double-dipping, inaccuracies, commingled time, and lack of documentation.

Unrecoverable Costs: The Best Buy Plaintiffs' request for more than $9.1 million in "costs" should be denied because, under controlling Ninth Circuit law, a successful antitrust plaintiff cannot recover its costs unless they are taxable or expressly authorized by some other statute. Virtually all of the costs requested are non-taxable and are not otherwise authorized.

Before acting on this Motion, this Court must first find that there is a basis, grounded in substantial evidence, to even apply the Sherman Act to the Best Buy Plaintiffs' claims. In light of the jury's Special Verdict findings, there is none, and both the Judgment should be vacated and this Motion should be denied. Finally, even if this Court were to entertain this Motion, the Best Buy Plaintiffs have failed to meet their burden of demonstrating the reasonableness and necessity of all of the fees and costs requested and this Motion should be denied on those additional grounds.

II. ARGUMENT

A. Legal Standard for Recovery of Fees under the Clayton Act.

Section 4 of the Clayton Act permits a plaintiff "injured in his business or property by

reason of anything forbidden in the antitrust laws" to recover "the cost of suit, including . . . reasonable attorney's fees." 15 U.S.C. § 15.[1] To recover fees, a successful antitrust plaintiff bears the burden of proving: (1) an antitrust injury that gives rise to their entitlement to the requested fees; and (2) that the requested fees were both reasonable and necessary to the pursuit of the successful antitrust claim. *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (opining that fee applicant bears the burden of establishing the fees are reasonable and necessary); *Azizian v. Federated Dep't. Stores, Inc.*, 499 F.3d 950, 959-60 (9th Cir. 2007) (requiring proof of antitrust injury to recover fees under Section 4 of Clayton Act); *Flitton v. Primary Residential Mort., Inc.*, 614 F.3d 1173, 1178 (10th Cir. 2010) (fee applicants must "prove and . . . establish the reasonableness of each dollar, each hour, above zero").

Writing specifically about attorney's fees under the Clayton Act, the Ninth Circuit found that "attorney's fee[s] under [§ 4 are] incidental to the statutory right to damages . . . This incidence or relationship to antitrust damages *recovered* also solves the problem of determining who is the prevailing party in an antitrust treble damages suit." *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1313-14 (9th Cir. 1982) (emphasis added); *see also Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 221 (9th Cir. 1964) (reasoning that attorney's fees "are usually fixed at a level substantially below the amount of *actual damages awarded*") (emphasis added). Attorney's fees are therefore an adjunct to an award of damages; the plaintiff must recover something more than $0 to be entitled to attorney's fees in the first instance. *See Twin City Sportservice*, 676 F.2d at 1314.

Finally, this Court has discretion to reduce fees where the amount sought is unreasonable or where the work expended was unnecessary to the plaintiff's success. *See Twin City*

[1] The Best Buy Plaintiffs also bring this Motion seeking to recover fees under Minnesota law. However, the Best Buy Plaintiffs' sole claims under Minnesota law were for indirect purchases. Those claims were unsuccessful given the jury's award of zero damages, and fees are therefore unavailable under Minnesota law. (Special Verdict at Q.10 at 5 (Docket No. 8562 in M 07-01827 SI); *see also* Jury Instructions as read to the Jury appended to the concurrently filed Declaration of Joanna Rosen ("Rosen Decl." at Ex. 4, 3386-3389.) Ultimately, it makes no difference as even Plaintiffs concede that "Minnesota antitrust law is to be interpreted consistently with the federal courts' construction of federal antitrust law.'" (Best Buy Plaintiffs' Mot. at 7:27-8:3 ("Mot.") (Docket No. 8610 in M 07-1827 SI) (citation omitted).)

Sportservice, Inc., 676 F.2d at 1312 ("The amount of attorney's fees allowed in connection with an award of damages in an antitrust suit is within the discretion of the trial court.").

B. The Jury's Findings Provide No Basis to Apply the Sherman Act, and the Best Buy Plaintiffs Therefore Cannot Recover Their Costs of Suit Under the Clayton Act.

The jury found only that HannStar knowingly participated in a conspiracy to fix the price of "TFT-LCD panels." (Special Verdict at Q.2 at 5 ("Speical Verdict") (Docket No. 8562 in M 07-01827 SI)). It then found that the panels conspiracy did not have a "direct, substantial, and reasonably foreseeable effect on trade or commerce in the United States"—something that is required in each of the three exceptions to the FTAIA. Under controlling Ninth Circuit law, the jury's findings under the *Alcoa/Hartford Fire* "effects test" are insufficient to invoke an exception to the FTAIA and Plaintiffs, thus, cannot recover under the Sherman Act.[2] *United States v. LSL Biotechnologies*, 379 F.3d 672, 678-79 (9th Cir. 2004) ("The government contends that the FTAIA merely codified the existing common law regarding when the Sherman Act applies to foreign conduct and that we should continue to employ the *Alcoa* effects test. We reject this contention."). The affirmative answers to Questions 3 and 4 do not allow the Court to draw the conclusion that the TFT-LCD panels conspiracy involved import commerce, because (a) the affirmative answers did not require that conclusion given the "and/or finished products" language in questions, and (b) there was absolutely no evidence that price-fixed *panels* were imported into the U.S. This defeats even the meager recovery the Best Buy Plaintiffs obtained, and means they are not entitled to fees and costs.

1. The Jury's "No" Answer to Question 5 Means That None of the FTAIA Exceptions Could Apply to The Conspiracy.

For the Sherman Act to apply to a foreign conspiracy, the conspiracy at issue must either involve goods that are directly imported into the U.S. or there must be a basis for invoking an FTAIA "exception." *See F. Hoffman-LaRoche Ltd. v. Empagram S.A.*, 542 U.S. 155, 161

[2] *See Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764 (1993); *See United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945)

(2004). That is, the FTAIA operates from a kind of taxonomy that foreign anticompetitive activity can be divided into import commerce and non-import commerce. Import commerce does not present an FTAIA issue; it is within the Sherman Act simply because imports are deemed to be U.S. commerce no less than domestic transactions.[3] But all foreign commerce that is not "import commerce" does present an FTAIA issue, and the statute operates to place it initially outside the reach of the Sherman Act. *Id.* This foreign, non-import commerce remains outside the Sherman Act unless one of three very specific exceptions to the FTAIA can be invoked. All three of these exceptions require some kind of "direct, substantial, and reasonably foreseeable" effect on trade or commerce in the United States. 15 U.S.C. § 6a(1)(A), (B). The "domestic injury" exception requires a "direct, substantial, and reasonably foreseeable effect" on "trade or commerce which is not trade or commerce with foreign nations" (i.e., domestic commerce), *id.* at § 6a(1)(A); the "import commerce" exception requires a "direct, substantial, and reasonably foreseeable effect" on "import trade or import commerce with foreign nations" (i.e., import commerce), *id.*; and the "export commerce" exception requires a "direct, substantial, and reasonably foreseeable effect" on the "export trade or export commerce with foreign nations" of someone exporting from the United States (i.e., export commerce"), *id.* at § 6a(1)(B).

The jury was asked to find whether the TFT-LCD panels conspiracy had the required effect for an FTAIA exception in Question 5 of the Special Verdict, and it answered "No." This means as a matter of law that there is no basis to invoke any of the three exceptions to the FTAIA and no FTAIA basis for bringing HannStar's conduct or the alleged TFT-LCD panel conspiracy within the scope of the Sherman Act.

2. <u>The Jury's Findings under Questions 3 and 4 Do Not Serve As A Basis to Apply the Sherman Act.</u>

[3] As explained by the Seventh Circuit, "straightforward import commerce" is "excluded at the outset from the coverage of the FTAIA in the same way that domestic interstate commerce is excluded" and "is subject to the Sherman Act's general requirements for effects on commerce, not to the special requirements spelled out in the FTAIA." *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 843, 854, 857 (7th Cir. 2012) (en banc). "If [a] foreign company is engaged in direct import sales, it must naturally comply with U.S. law just as all of its domestic competitors do. *Id.* at 857.

The jury's "Yes" answers to Questions 3 and 4 of the Special Verdict do not allow the Court to draw the conclusion that the TFT-LCD conspiracy involved "import commerce," which is the only available option for finding that the conspiracy is subject to the Sherman Act.

In the first place there is no evidence that price-fixed TFT-LCD panels were imported into the U.S. That means the conspirators themselves were either engaged in importing panels or selling panels directly to someone who brought them into the U.S., presumably to manufacture something in the U.S. The evidence was that the panels were sold to OEMs who invariably converted them into finished goods outside the United States, and then imported the finished goods into the U.S. This was true even with respect to U.S. OEMs such as Dell, who manufacture their finished goods in Europe or Asia. They import their own finished goods, not TFT-LCD panels.

It was undoubtedly for this reason that the Best Buy Plaintiffs pressed the Court to ask Questions 3 and 4—which appear aimed at asking whether the conspiracy involved import commerce—as a disjunctive question about whether "the conspiracy involved TFT-LCD panels *and/or finished products. . . imported into the United States.*"[4] This was the only way they could get the jury's "Yes" answers to Questions 3 and 4, given the facts of the case.[5] This is confirmed by the jury's "No" answer to Question 5, which asked whether the TFT-LCD panels "conspiracy involved conduct which had a direct, substantial and reasonably foreseeable effect on trade or commerce in the United States." That is a lesser, more relaxed standard than whether the conspiracy involved "straightforward import commerce." *Minn-Chem*, 683 F.3d at 857. Straightforward import commerce will necessarily have a direct, substantial and reasonably foreseeable effect on trade or commerce in the United States," which is why it is not even necessary to think about that in FTAIA terms. Accordingly, if the TFT-LCD panels conspiracy

[4] (*See* Rosen Decl. Ex. 4 at Tr. Pages 3357:3-18, 3359:8-14, 3364:13-15.)

[5] Question 3 asks whether "the conspiracy involved TFT-LCD panels and/or finished products (e.g., notebook computers, computer monitors, televisions, camcorders, cell phones and digital cameras containing TFT-LCD panels) imported in the United States." Adding "and/or finished products" to that question guaranteed an affirmative answer, since no one doubts that "notebook computers, computer monitors, televisions, camcorders, cell phones and digital cameras containing TFT-LCD panels" are imported into the U.S.

did not have "a direct, substantial and reasonably foreseeable effect on trade or commerce in the United States, as the jury found, it is impossible to find that the panels conspiracy involved imported goods. The Sherman Act thus does not apply.

The matter is no doubt confused by the divergent answers to Questions 4 and 5, both of which ask if there is a "substantial" effect in the United States. But that reflects two problems with Question 4 and cannot save plaintiffs' case. These Questions diverge on the issue of intent—Question 4 requires an "intended" effect in the United States for a "Yes" answer, while Question 5 does not require an intended effect, and asks only whether there is a "reasonably foreseeable" effect in the United States. But import commerce of the type sufficient to invoke the Sherman Act without an FTAIA exception is not subject to U.S. law because of intent; import commerce constitutes direct participation in the U.S. economy that is always sufficient to invoke the Sherman Act. *Id.* There is no basis in the record for the jury to have found that that the only conspiracy found—on panels—operated on import commerce. Intent is thus immaterial for these purposes.[6]

In all events, the affirmative answers to Questions 3 and 4 are almost certainly the product of the option given to the jury to find that "finished products" were imported into the United States. That is indisputable—but says nothing and allows no conclusions to be drawn about whether the conspiracy's TFT-LCD panels were imported into the United States as "straightforward import commerce." The short of it is that Questions 2 and 5 both use the proper, limited term "TFT-LCD panels conspiracy," and the jury found that the conspiracy existed but did not have a "direct, substantial and reasonably foreseeable effect" on U.S. commerce to invoke the Sherman Act. The answers to Questions 3 and 4 need not mean, and on the record evidence cannot mean, that the conspiracy operated on import commerce. The jury's findings thus preclude any potential basis for the Best Buy Plaintiffs' claim under the Sherman Act, and they are not entitled to any fees or costs, accordingly.

[6] We do not doubt that intent can bear on whether conduct had the effects required for an FTAIA exception. *Hartford Fire Ins.*, 509 U.S. 764 at 796. But that does not mean that intent can turn non-import commerce into import commerce so as to avoid the need for an FTAIA exception.

C. The REDACTED **Settlement Offset Should Be Applied to the Best Buy Plaintiffs' Request For Fees and Costs.**

The Best Buy Plaintiffs' $17.6 million request should be subject to offset by the more than REDACTED already received and reduced to zero. (Declaration of Joanna Rosen ("Rosen Decl."), filed concurrently, ¶¶ 29-40, Exs. 5-13.)[7] It is axiomatic that a plaintiff who recovers damages from one co-conspirator, whether by verdict or settlement, may not recover those same damages again.[8] *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971) (finding the law does not permit double recovery). A defendant "is entitled to a set off for economic damages previously compensated through the settlement agreement" after damages are trebled. *In re Piper Aircraft*, 792 F. Supp. 1189, 1190 (N.D. Cal. 1992). Nothing in Ninth Circuit law limits offsets to damages or otherwise posits that attorney's fees and costs are immune from offset. *See Husky Refining Co. v. Barnes*, 119 F.2d 715, 716 (9th Cir. 1941) (referring to prior settlements as offsetting "amount[s] recoverable" from other tortfeasors); *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1389 (9th Cir. 1987) (referring to prior settlements as offsetting the "claim" against the remaining tortfeasor). Having been made more than whole from the REDACTED in pretrial settlements from other Defendants, the Best Buy Plaintiffs should not be allowed the additional windfall of attorney's fees and costs on a zero dollar recovery.

The Best Buy Plaintiffs' total settlement value of REDACTED million is far greater than the

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[7] REDACTED the Best Buy Plaintiffs themselves have publicly stated, indeed in their very Motion, that the cumulative cash value of the settlements is $229 million. (Silberfeld Declaration In Support Of Best Buy's Motion ¶ 13 (Docket No. 8610-1 in M 07-1827 SI)); http://investors. bestbuy.com/ phoenix.zhtml?c=83192&p=irolnews Article&ID=1848633& highlight ("During Q2 FY14, the company reached legal settlements with multiple defendants under which it will receive a total of $229 million, net of litigation costs (approximately $30 million in cash was received in Q2 FY14, with the remainder to be received in installments over the next eight quarters). Even using this conservative calculation, the settlement more than offsets the damages award).

[8] The Best Buy Plaintiffs do not dispute the principle of setoff and implicitly concedes in its Motion that setoff of pre-trial settlements has the potential to reduce a plaintiff's post-trial recovery to zero. (Mot. at 6:20-22 (Docket No. 8610 in M 07-1827 SI).)

$39 million they contend HannStar owes in treble damages ($7.47 million x 3) plus fees and costs (in excess of $17 million). The Best Buy Plaintiffs have objected and refused to disclose the financial terms of their engagement of Robins, Kaplan, Miller & Ciresi ("RKMC").[9] However, given the enormity of the Best Buy Plaintiffs' total settlements and the relatively small size of damages that the Best Buy Plaintiffs actually suffered, one can only assume that both the Best Buy Plaintiffs and RKMC have already both been made whole. There is no reason *not* to apply offset to attorney's fees awards in such a situation.

Indeed, to do otherwise contradicts the established principle that "a payment by a joint tort-feasor diminishes the claim against the remaining tort-feasor[s]." *See Seymour*, 809 F.2d at 1389. Doing so would also allow double recovery: the Best Buy Plaintiffs will not have to dip into its recovery to pay its attorney's fees if this Court applies the setoff, but the Best Buy Plaintiffs will be doubly enriched if the Court does not. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.,* 194 F.2d 846, 859 (8th Cir. 1952) (opining with regard to attorney's fees that a plaintiff "should not be made more profitable" because it was the "victim of a conspiracy in restraint of trade.").

Faced with the offset of their damages award and attorney's fees, the Best Buy Plaintiffs rely solely on cases from outside of this Circuit, *Funeral Consumers Alliance, Inc. v. Serv. Corp., Int'l,* 695 F.3d 330, 336-342 (5th Cir. 2012) and *Sciambra v. Graham News,* 892 F.2d 411, 415 (5th Cir. 1990) from the Fifth Circuit, and *Gulfstream III Assocs., Inc. v. Gulfstream*

[9] On October 15, 2013, HannStar filed a request to substitute counsel (Stipulation and Order to Amend Briefing and Hearing Schedule at 2:1-5 (Docket No. 8680 in M 07-1827 SI) ("Stipulation")), and asked the Best Buy Plaintiffs to agree to a brief extension of time to file this Opposition. Best Buy Plaintiffs' agreed to the requested extension only on the condition that HannStar agree to drop its attempts to seek further discovery, including production of any of the Best Buy Plaintiffs' settlement agreements and their fee agreement with counsel. *Id.* at 2:12-18 (indicating that HannStar will "forebear from making any further requests for information (discovery) to or asserting any entitlement to further information (discovery) from . . . Best Buy Plaintiffs other than in HannStar's (a) opposition to . . . Best Buy Plaintiffs' Motion for Attorneys' Fees and Costs and (b) opposition to . . . Best Buy Plaintiffs' Bill of Costs".) In the interim, Special Master Quinn indicated that he was inclined to require production of the Best Buy Plaintiffs' engagement agreement with Robins Kaplan. However, pursuant to the parties' agreement, Special Master Quinn did not issue a formal ruling and the Best Buy Plaintiffs have not produced this agreement. Should the Court deem the actual amount of attorney's fees paid by the Best Buy Plaintiffs to be relevant, HannStar respectfully requests that the Best Buy Plaintiffs be required to produce its engagement agreement with counsel.

Aerospace Corp., 995 F.2d 414, 419 (3d Cir. 1993) from the Third Circuit, to argue that a settlement offset does not apply to an award of attorney's fees. These findings are premised on the supposition that "an award of attorneys' fees is not dependent upon" an "award of compensatory damages." *Gulfstream III Assocs.*, 995 F.2d at 419; *see also Sciambra*, 892 F.2d at 415. From there, the courts concluded that the attorney's fee award was safe from offset because a plaintiff in those jurisdictions need only establish liability to be eligible for attorney's fees. However, that is not the law in the Ninth Circuit.

The Ninth Circuit has long recognized that the purpose of the attorney's fee provision in Section 4 of the Clayton Act "is to award the successful plaintiff a reasonable attorney's fee so that his treble damage recovery would not be unduly diminished by the payment to his attorneys and further encourage antitrust law enforcement." *Twin City Sportservice*, 676 F.2d at 1314 (citing *Perkins v. Standard Oil Co.*, 474 F.2d 549 (9th Cir. 1973)). That goal is not served by granting an award of fees to a plaintiff who vastly overreaches in a long and costly trial and ultimately recovers zero in damages. The notion that "an antitrust plaintiff can proceed to trial for a determination of liability and a potential fee award even where previous settlements already have clearly negated any actual receipt of further damages," *Funeral Consumers*, 892 F.2d at 339, n.4, undermines that goal and incentivizes trial on the question of liability even if the prospects of damages are dim or the plaintiff's odds of recouping a settlement in excess of the setoff amount is unlikely. On this point, the *Funeral Consumers* dissent warned that because "the named plaintiffs have received well over their claimed treble damages through the . . . [s]ettlement[s]," the plaintiff had been compensated for its harm and "any trial to award attorneys' fees and costs would only exponentially increase the attorneys' fees in question – with no more awarded to the plaintiff . . . This case, as it relates to the plaintiffs, is moot because their injury has been remedied." *Id.* at 352-53.

To exempt an award of attorney's fees and costs from setoff would eliminate any incentive for plaintiffs to negotiate reasonable settlements with a defendant who has pled guilty (and, thus, is not contesting liability and is guaranteed a judgment against it) and would make it costless for plaintiffs to proceed to trial, regardless of the actual damages they have suffered and

are ultimately awarded. Such a rule would clog this Court with nothing but damages trials for years to come.

D. <u>The Best Buy Plaintiffs Failed to Remove Fees and Costs They Concede Are Unrecoverable.</u>

The Best Buy Plaintiffs concede, as they must, that they cannot recover for prosecuting their unsuccessful claims against Toshiba and for negotiating settlements with other Defendants. (Best Buy Plaintiffs' Mot. ("Motion") at 5:13-20 (Docket No. 8610 in M 07-1827 SI).) However, they failed to completely remove these entries from their requests, as they claimed they did:

(1) <u>Unsuccessful Claims Against Toshiba.</u> The Best Buy Plaintiffs concede they are not entitled to fees incurred in connection with their unsuccessful claims against Toshiba, and claim to have removed all such fees from their Motion. *See id.* However, HannStar's expert, Mr. Gary Greenfield, performed a careful review of the Best Buy Plaintiffs' Motion papers and supporting documentation and found that the Best Buy Plaintiffs failed to remove nearly $124,000 in fees that specifically relate to work performed solely in connection with Toshiba, as well as nearly $263,000 in fees incurred in, for example, deposing Toshiba-related witnesses. (Declaration of Gary Greenfield ("Greenfield Decl."), filed concurrently, ¶¶ 33, 50, Exs. 16, 17.)[10]

In addition, the Best Buy Plaintiffs seek more than $10,157 in costs directly and solely related to their now-unsuccessful attempts to fasten liability on Toshiba. (Rosen Decl. ¶ 22.) For example, the Best Buy Plaintiffs include deposition and interpretation costs associated with seven Toshiba-related witnesses, amounting to nearly $7,700 in costs. (*Id.* ¶ 22(a).) These deponents are witnesses who did not testify about HannStar, who were not found by the jury to have participated in any conspiracy, and for whose costs HannStar should not be responsible. (*See generally* Best Buy's Objections to Toshiba's Application to Tax Costs at 2:14 to 5:13

[10] In addition to the foregoing, Mr. Greenfield's analysis demonstrates that the Best Buy Plaintiffs failed to deduct sufficient time or fees for their failed litigation against Toshiba. (*See* Greenfield Decl. ¶¶ 48-51, 56-61, Exs. 15, 16, 27, 30.)

(Docket No. 8671 in M 07-1827 SI).) The Best Buy Plaintiffs also seek recovery of more than $2,000 in mediator costs for a mediation session with Toshiba, which HannStar did not attend. (Rosen Decl. ¶22(c).)

(2) Settlement Proceedings With Other Defendants. The Court should not reimburse work "devoted to the case against other defendants who settle or who are found not to be liable." *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1214 (3d Cir. 1978). The Best Buy Plaintiffs tacitly accept this principle, and indicated in their Motion that they removed the fees incurred negotiating settlements with eight settling Defendants. (Mot. at 5:13-15, 7:21-26.) Nonetheless, their request still includes more than $142,000 in fees, (Greenfield Decl. ¶¶ 37, 50, Ex. 16), incurred in connection with various mediations and settlement negotiations with these Defendants. These amounts should also be deducted.

E. The Best Buy Plaintiffs Cannot Recover For Work Prosecuting Their Unsuccessful Indirect Purchaser Claims.

Just as the Best Buy Plaintiffs concede they cannot recover for work incurred in the prosecution of their unsuccessful claims against Toshiba, they are also unable to recover for work related to their unsuccessful indirect purchaser claims. *See Baughman*, 583 F.2d at 1214. The jury found the Best Buy Plaintiffs suffered zero in damages for its indirect purchases. (Special Verdict at Q.10 at 5.) This means the Best Buy Plaintiffs should not recover any of the $1 million (estimated conservatively) in attorney's fees incurred pursuing and analyzing their indirect purchases or the $1.75 million in expert witness fees for their indirect purchases damages expert, Alan Frankel.[11] (Greenfield Decl. Exs. 28, 29; Rosen Decl. ¶ 10.)

F. The Best Buy Plaintiffs Have Not Met Their Burden of Proving that the Requested Fees and Costs Were "Reasonable" and "Necessary."

Even if the Best Buy Plaintiffs are entitled to an award of fees and costs, they have not proved that their more than $17.6 million request is both "reasonable" and "necessary," and their request should be reduced accordingly.

[11] In addition, as explained Section II.G.(1), Best Buy Plaintiffs are not entitled to any professional fees charged/incurred by Dr. Frankel.

1. The Best Buy Plaintiffs' $17.6 Million Request Is Unreasonable in Light of its Zero Recovery From HannStar and Should Be Reduced.

As the Supreme Court has explained: "The product of reasonable hours times a reasonable rate does not end the inquiry." *See Hensley*, 461 U.S. at 434. District Courts must also ask, "did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *Id.* Where the plaintiff's recovery is nominal, technical or *de minimis*, the court may dispense with the lodestar calculation and establish a low fee or no fee at all. *See Farrar v. Hobby*, 506 U.S. 103, 116-18 (1992).[12] To that end, courts must consider the amount involved in the litigation and the results the plaintiff achieves. *See Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975) (considering the "amount involved and the results obtained" in deciding an attorney's fees award); *Wild Equity Inst. v. City and Cnty. of San Francisco*, (N.D. Cal. July 1, 2010) (Docket. No. 189 in C 11-00958 SI) at 7:18-8:5 ("*Wild Equity Institute*") ("significantly decreasing" the fee award by three-quarters from $1,306,400 to $326,000 because plaintiff gained its desired result but did not achieve anything that was not already required by the law).

As the Ninth Circuit observed years ago, attorney's fee awards "are usually fixed at a level substantially below the amount of actual damages awarded." *Goldwyn*, 328 F.2d at 221 (awarding $100,000 in fees in connection with a $300,000 trebled damages award in antitrust suit). The factors that the *Goldwyn* court observed could lead to a fee that exceeds or equals the damage award—namely, a vigorously contested suit—do not apply here given HannStar's concessions at trial. Indeed, the authorities cited by the Best Buy Plaintiffs demonstrate that the amount of actual damages is a proper limiting influence on the fee award and support the reduction of the Best Buy Plaintiffs' request. In the majority of these cases, the fees awarded

[12] Although the specific holdings of *Farrar* and *Morales* are limited to civil rights cases, their reasoning has since been used in other contexts. *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1191, n.6 (9th Cir. 2013) (applying *Farrar* and concluding that the recovery was not trifle); *Saul H. Catalan v. RBC Mortgage, Co.*, 05-cv-6920, 2009 U.S. Dist. LEXIS 84339, *5-6 (N.D. Ill. Sept. 16, 2009) (same).

were just a fraction of the damages award. And, in the antitrust cases cited by the Best Buy Plaintiffs, the total fees recovered ranged between 14 and 19%.[13]

Here, the Court should consider the fact that the Best Buy Plaintiffs received only a fraction of the direct damages they sought and failed to prove any damages on their indirect purchases. The Best Buy Plaintiffs sought nearly $800 million dollars in damages for direct and indirect purchases of liquid crystal products. After only one day of deliberations, the jury rejected more than 99% of the Best Buy Plaintiffs' claimed damages and found that the Best Buy Plaintiffs had only proved $7,471,943 in damages resulting from direct purchases. Nonetheless, the Best Buy Plaintiffs seek a fee award that is massive in comparison to its verdict. Even ignoring the issue of a zero judgment after setoff, the Best Buy Plaintiffs are seeking $17.9 million in fees and costs on a post-trebled $22.4 million verdict—a fee award equal to 80% of the trebled damages award. There is nothing in the Best Buy Plaintiffs' authorities that would justify the reasonableness of such a request. To confer upon the Best Buy Plaintiffs more than $9.1 million in fees and $8.5 million in costs would be an unreasonable windfall and confer upon the Best Buy Plaintiffs (and their counsel) a recovery the jury did not award. *See Exhibitors' Serv. v. American Multi-Cinema*, 583 F. Supp. 1186, 1192 (C.D. Cal. 1984).

2. <u>The Majority of the Best Buy Plaintiffs' Work Was Related to Their Unsuccessful Toshiba Claim And Was Unnecessary to Their Claims Against HannStar.</u>

The Best Buy Plaintiffs' reduction in time for Toshiba-related work is insufficient and

[13] *See Perkins v. Standard Oil, Co.*, 474 F.2d 549 (9th Cir. 1973) (antitrust plaintiff recovered damages pre-trebling in excess of $330,000 and a fee award of just over $143,000 (reduced from $289,000) at a post-trebling ratio of fees to damages that was just over 14%); *Masimo Corp. v. Tyco Health Care Group, L.P.*, 02-4770 MRP, 2007 U.S. Dist. LEXIS 101987, *24 (C.D. Cal. 2007) (antitrust plaintiffs who recovered $14.5 million in damages pre-trebling and sought $10 million in fees were awarded $7.8 million in fees at a post-trebling ratio less than 19%); *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1464 (9th Cir. 1988) (affirming reduction of lodestar amount by 25% because of the "limited success of the plaintiff in her suit"); *Yahoo!, Inc. v. Net Games, Inc.*, 329 F. Supp. 2d 1179, 1181 (N.D. Cal. 2004) (reducing plaintiff's request for fees nearly in half after finding the hours expended and fees were "unsubstantiated and unreasonably high").

should be further reduced.[14] HannStar is among the smallest of the Defendants and, unlike many of the other defendants such as Toshiba, none of its subsidiaries were named in the action. (*See* Compl. (Docket No. 1 in C 10-4572 SI).) The Best Buy Plaintiffs engaged in minimal pretrial effort directed at HannStar. And, it is undeniable that the Best Buy Plaintiffs spent little time or effort on HannStar at trial. This was a natural consequence of the fact that HannStar pled guilty to the alleged conspiracy in July 2010—before Best Buy Plaintiffs filed this action. Ultimately, the Best Buy Plaintiffs' case against HannStar at trial was a pure damages case. The Best Buy Plaintiffs did not prove any conduct that HannStar had not already conceded years ago, and so the fees they incurred should be deducted. *See Wild Equity Institute* at 7:3-28 (reducing fees because the plaintiffs did not prove anything to which they were not already entitled); *see also Baughman*, 583 F.2d at 1215 (Plaintiffs did not even need to "establish [defendant's] liability as a member of the conspiracy . . . [and] hours devoted in part to the case against other defendants [to establish the conspiracy] may [not] be fairly charged against" the defendant.).

To the contrary, the majority of pretrial and trial fees since August 2012, when the Toshiba entities were named in the lawsuit, were incurred in pursuing Toshiba. (*See* Compl. (Docket No. 1 in C 12-04114 SI).) By August 2012, when Toshiba was originally named in the lawsuit, HannStar and its executives had already pled guilty. Since Toshiba was originally a "Track 2" case, the Best Buy Plaintiffs moved to have it advanced to "Track 1" and, as a result of their choice to do so, had to take expensive expedited discovery of Toshiba in order to be trial-ready. (*See generally* Best Buy Plaintiffs' Mot. to Consolidate at 2-3 (Docket No. 8025 in M 07-1827).)

Accordingly, the majority of the Best Buy Plaintiffs' fees between August 2012 and up to pre-trial are attributable to Toshiba. Mr. Greenfield opines that over $4.5 million (approximately 50% of the $9 million in requested fees) were incurred after August 2012—when Toshiba was

[14] The Best Buy Plaintiffs generally state that they reduced their fee request by over 11% (equivalent to $1.25 million in fees) to account for both Toshiba related work and for work incurred in connection with pursuing settlements with other defendants. The Best Buy Plaintiffs do not specifically indicate how much they reduced from their fee request on account of Toshiba related work. (Mot. 5:13-20.)

named in the suit and eight (8) months *after* the discovery cutoff as to HannStar. (Greenfield Decl. Ex. 30.) All discovery after Toshiba entered the case was thus Toshiba-related, and not directed at HannStar. (Stipulation Re. Discovery Cut-Off (Docket No. 4394 in M 07-1827 SI).) Given that during this time the Best Buy Plaintiffs were preparing their case and taking discovery—on an expedited basis—of Toshiba, it would be unreasonable to charge the fees incurred during this period to HannStar. Indeed, in reviewing the time entries that remain even after the Best Buy Plaintiffs purportedly removed Toshiba time, Mr. Greenfield believes that only 20%-30% of the fees incurred from the time Toshiba was named in the action until trial are properly recoverable against HannStar.[15] (*See* Greenfield Decl. ¶¶ 57-59, Ex. 27.)

It is also undeniable that the majority of time spent at trial was focused on Toshiba. A total of 42 witnesses testified at trial, 17 of whom were affiliated with, employees of or former employees of an alleged co-conspirator, 12 were affiliated with, employees of or former employees of Toshiba, five (5) were expert witnesses, seven (7) were affiliated with, employees of or former employees of Best Buy and only one (1) was affiliated with HannStar. (*See* Rosen Decl. ¶ 2.) Given the foregoing and the fact that HannStar was not contesting liability, but only damages, HannStar should not be solely liable for the over $1.2 million in fees incurred by the Best Buy Plaintiffs in a five week trial that included unsuccessful claims against Toshiba. (*See* Greenfield Decl. ¶ 57, Ex. 62.) Even under a conservative estimate, HannStar is only liable, if at all, for 50% of the Best Buy Plaintiffs' fees incurred in trial. (*See id.*)

The Best Buy Plaintiffs' contention that it is entitled to fees for "proving an overarching conspiracy" must also be rejected. Toshiba, the principal trial target, was found not to be liable; HannStar conceded liability; the Best Buy Plaintiffs entered the guilty pleas by other Defendants

[15] Mr. Greenfield's analysis of the number of times each Defendant is mentioned in the Best Buy Plaintiffs' time entries is telling. HannStar, who was sued in 2010 and against whom the Best Buy Plaintiffs went to trial, was only mentioned in 30% of the time entries. REDACTI, with whom the Best Buy Plaintiffs settled, was mentioned 20% of the time despite the fact that the Best Buy Plaintiffs said that they removed all entries related to time incurred for settling defendants, and Toshiba, for whom the Best Buy Plaintiffs contend they removed all time entries, continued to appear 4% of the time. (*See* Greenfield Decl. Ex. 21.) Using a conservative estimate, Mr. Greenfield also opined that HannStar is only liable, if at all, for ¼ of the fees incurred before Toshiba was named, even though it was only one of ten different defendant corporate entities named. (*Id.* ¶ 60, Ex. 27.)

into evidence; and there was no meaningful proof of any other non-conceded conspiratorial activity. Sound policy and common sense support this rule. "[R]equiring a losing defendant to pay plaintiff for hours spent against non-losing defendants could encourage frivolous claims in an effort to inflate fees. And such a policy could have an adverse effect on the conduct of litigation, impelling a defendant who believes itself not to be liable to settle out of fear that it will be saddled with attorney's fees incurred by plaintiff in prosecuting his case against other, more egregious offenders who choose to settle rather than risk trial." *Baughman*, 583 F.2d at 1215. HannStar should not be penalized because Toshiba was found not liable or because other defendants chose to settle with the Best Buy Plaintiffs, especially when the amount of time and energy (and thus fees) expended in litigating the claims against HannStar were *de minimis* as compared to these other entities. [16]

3. The Best Buy Plaintiffs' Requests Are Unreasonable and Should Be Reduced On Various Additional Grounds.

As this Court has recognized, a district court only "begins its calculation of fees by multiplying the number of hours reasonably spent on litigation by a reasonable hourly rate," (the "lodestar"), and the plaintiff bears the burden of "document[ing] the appropriate hours expended in the litigation by submitting evidence in support of those hours worked.'" *Wild Equity Inst.* at 5:24-28 (citing *Hensley*, 461 U.S. at 436); *Lucas v. White*, 63 F. Supp. 2d 1046, 1057 (N.D. Cal. 1999); *Masimo*, 2007 U.S. Dist. LEXIS 101987 (emphasizing that the lodestar method requires a determination of the reasonable number of hours expended).

Both "[f]ee applicants, and the Court, should exclude hours that are 'excessive, redundant, or otherwise unnecessary.'" *Wild Equity Inst.* at 6:4-5; *see also Cairns v. Franklin*

[16] It is notable that Best Buy Plaintiffs argue in their response to Toshiba's Bill of Cost that they should not have to shoulder all of Toshiba's costs and the Court should apportion costs, such as deposition costs, between prevailing and non-prevailing parties depending on the identity of the witness, and/or for whose case the evidence was elicited/utilized. (*See generally* Best Buy's Objections to Toshiba's Application to Tax Costs at 2:14 to 5:13 (Docket No. 8671 in M 07-1827 SI).). The Best Buy Plaintiffs further argue that the non-prevailing party should not be responsible for costs that are attributable to another case or another party. HannStar agrees. Applying the Best Buy Plaintiffs' own logic here would mean that HannStar should not have to bear any of the fees that Plaintiffs incurred in pursuing other defendants, including Toshiba; yet, the Best Buy Plaintiffs would have HannStar do precisely that.

Mint Co., 292 F.3d 1139, 1158-59 (9th Cir. 2002) (affirming reduction of fees on account of excessive hours/work). The Court should also reduce costs that are excessive, wasteful, duplicative and/or improper or poorly documented. *See Brookside Theater Corp.*, 194 F.2d at 859. Here, the Best Buy Plaintiffs' request includes numerous examples of improper, inflated, excessive and/or wasteful spending, as well as poorly documented costs:

(1) Admitted double-recovery. The Best Buy Plaintiffs admit that they are seeking double recovery of costs by way of this Motion, (Mot. at 2, n.2.), and by way of their Bill of Costs (Best Buy Plaintiffs' Bill of Costs ("Bill of Costs") Docket No. 8612 in M 07-1827)), but they neither itemize nor enumerate the costs for which they seek double recovery. HannStar's review, however, reveals that, at a minimum, the Best Buy Plaintiffs seek double recovery for 51 of the 57 depositions listed in their Bill of Costs, translation costs and trial transcript costs, amounting to more than $83,000 in costs sought here. (*See* Rosen Decl. ¶¶ 24, 25, Ex. 3.) In addition, Best Buy Plaintiffs seek double recovery for nearly $468,000 in expert fees. (*See id.* ¶ 15.) The Court should reduce the Best Buy Plaintiffs' request by these amounts.

(2) Block billed entries that include non-compensable fees. The Best Buy Plaintiffs request more than $4.5 million in "block billed" time entries that include clearly non-compensable fees, such as tasks related solely to other Defendants. (Greenfield Decl. ¶¶ 19-21, fn. 9, Ex. 9.) For example, in *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007), the Court reduced block-billed entries because block-billing "lump[ed] together multiple tasks," making it impossible to determine whether any given entry or work description was reasonable and recoverable. The Best Buy Plaintiffs' block-billed time entries mix tasks that may have been attributable to HannStar with tasks that are not recoverable here. As such, it is impossible to determine how much time was spent on any specific HannStar-related task within this block of time and whether that amount of time was reasonable. It also, by definition, includes time that is not "necessary" and, thus, fails to meet Plaintiffs' burden of demonstrating that time spent and fee incurred were "reasonable" and "necessary." These block-billed entries should be deducted from Plaintiffs' request or, at a minimum, reduced in amount.

(3) Redacted entries. Compounding the problem of block-billed entries, over

$415,000 in fees are both block-billed *and* redacted, making it nearly impossible to ascertain the work performed and the reasonableness of time expended, and thus recoverable. (*Id.* Ex. 6.)

(4) Missing documentation and ambiguous expenses. The Best Buy Plaintiffs also request $2.7 million in costs that lack sufficient, or any, documentation. (*See* Rosen Decl. ¶27.) Costs that lack proper descriptions and documentation should be denied or, at a minimum, reduced. *See Collins v. Gorman*, 96 F.3d 1057, 1058 (7th Cir. 1996) (vacating the district court's decision and disallowing full cost recovery for service fees incurred by unidentified persons regarding unidentified documents and recipients). The Best Buy Plaintiffs seek nearly $1.8 million in line item expert fees that either lack sufficient documentation or substantiation, as well as over $70,000 in ambiguous "copying" costs, and $100,000 in circumspect litigation software costs. (*See* Rosen Decl. ¶¶ 12-17, 22, 23.) Because the Best Buy Plaintiffs bear the burden of documenting all costs and expenses, the Court should reduce these amounts from any award.

(5) Incorrect entries for attendance at trial on weekends. The Best Buy Plaintiffs seek over $100,000 in fees where the description expressly claims time billed "attending trial" on either a Friday, Saturday or Sunday. (*Id.* ¶ 36, Ex. 12.) Since Court was dark on Fridays, Saturdays and Sundays, these entries cannot be correct and, again, raise questions about the accuracies of the Best Buy Plaintiffs' requests overall. (*See id.* ¶ 37.)

(6) Vague and ambiguous entries and "trial prep" years before trial. The Best Buy Plaintiffs seek more than $1 million in fees for entries that are vague and ambiguous. (*Id.* Exs. 8, 9.) Mr. Greenfield calculated that the Best Buy Plaintiffs have more than $1 million and nearly 2,000 hours of entries vaguely described as "email," *see Allen v. City of L.A.*, 10-4695 CS, 2012 U.S. Dist. LEXIS 168247, at *50-51 (C.D. Cal. Nov. 19, 2012) (holding that entries billed as "email" for the purposes of "composing and reading" electronic correspondence were "difficult to parse … for reasonableness" and reducing attorney's fees as a result), or "review documents," or "trial prep" (or "trial" on days on which trial was not in session.) (*See* Greenfield Decl. ¶¶ 27, 28, n.12, Exs. 8-9). In addition, some of the Best Buy Plaintiffs' legal team purportedly started preparing for trial months, if not years, before trial began. For example, one paralegal's time entries claim time for "trial preparation" in 2011, even though no trial date

was set and trial did not start until July 2013. (*Id.* Ex. 10.)

(7) Legal issues unrelated to HannStar. The Best Buy Plaintiffs ask HannStar to compensate them for fees incurred in researching and litigating legal and factual issues that did not relate to HannStar or this case at all, such as time likely spent monitoring other opt-out cases ($125,000),[17] time spent litigating/monitoring the Track 2 cases ($118,000), time spent monitoring or otherwise participating in the class action and monitoring the class certification proceedings ($71,000), time spent researching "spoliation" of evidence ($1,700), and time spent pursuing legal fees from other defendants ($5,400). (*See id.* Exs. ¶ 54, 22-26.) This work was not expended in litigating the case against HannStar, and should be reduced from any fee awarded.

(8) Alleged co-conspirators not part of the conspiracy. The Court should also reduce the fees and costs expended on the seven defendants[18] whom the Court either found were not part of the alleged conspiracy and/or the Best Buy Plaintiffs did not seek to prove at trial were part of the alleged conspiracy. Mr. Greenfield's analysis shows that the Best Buy Plaintiffs incurred nearly $100,000 and 250 hours litigating against these seven (7) companies, which should be deducted from the Best Buy Plaintiffs' request. (*Id.* ¶ 54(a), Ex. 20.)

(9) Boilerplate entries that repeat themselves for months on end. The Best Buy Plaintiffs also seek recovery of boilerplate, near verbatim time entries that repeat for days and/or months on end in near identical time intervals. For example, at least two different paralegals at RKMC billed 7.5 hours per days for days on end that had the same description detail, for a total billed by these two individuals to this matter of over $500,000. (*See id.* ¶¶ 29, 30, Exs. 10-11.) It is questionable that these individuals were in fact doing the same exact type of work on this

[17] In his Declaration, Mr. Geibelson indicates that time spent working on the class action case and on other opt-out cases were removed from this fees request. (Geibelson Decl. ¶ 13.) The time entries, however, suggest that not all of this time was properly removed, (*see* Greenfield Decl. ¶ 54, Exs. 22-26), and should thus be deducted.

[18] These defendants are: Acer Display Co.; NEC LCD Technologies Ltd.; Hydis Technologies Co., Ltd (BOE Hydis Technology Co., Ltd.); Unipac Optoelectronics; Mitsubishi Electronics Corp.; Royal Philips Electronics N.V.; Toppoly Optoelectronics. (HannStar Display Corporation's Notice of Motion and Motion for Judgment as a Matter of Law Pursuant to Rule 50(b) at 5-10 (Docket No. 8653 in M 07-1827 SI).)

case every day for months on end in for, in most cases, exactly 7.5 hours of billable time, and thus suggests that these individuals and others were not recording the work performed, and time billed with sufficient detail. (*Id.*)

(10) The Best Buy Plaintiffs' Accounting Error. The Best Buy Plaintiffs state that they applied a 5% discount to all fee entries associated presented in their Motion. Mr. Greenfield found, however, that the Best Buy Plaintiffs failed to apply this 5% discount as to a substantial number of entries, resulting in a nearly $80,000 overcharge to HannStar. (*See id.* ¶ 17). The Court should deduct this amount from any fees awarded.

G. The Best Buy Plaintiffs Can Only Recover "Costs" That Are Specifically Authorized By Statute.

Finally, the Best Buy Plaintiffs misunderstand the "costs of suit" available under the Clayton Act, and their $8,550,525.26 in "costs" should be rejected. Long ago, the Ninth Circuit made clear that the Clayton Act does not authorize the recovery of any additional "costs" beyond what is already taxable to a prevailing party. *Goldwyn*, 328 F.2d at 224 ("We hold that the only costs recoverable by a successful plaintiff in a private antitrust suit are those which are normally allowable under 28 U.S.C. § 1920 and Rule 54(d). . ."). The Supreme Court has since made clear: "absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). Taxable costs include certain reproduction and transcripts costs, witness appearance fees, and docketing fees, *see* 28 U.S.C. § 1920, already claimed on the Best Buy Plaintiffs' Bill of Costs, and do not include any of the following:[19]

(1) Expert witness fees. Expert witness fees are not compensable as attorney's fees under the Clayton Act. *Seven Gables Corp. v. Sterling Recreation Org.*, 686 F. Supp. 1418,

[19] For example, Best Buy Plaintiffs claim approximately $350,000 in non-taxable, non-recoverable travel, lodging and subsistence fees and expenses for themselves. (*See* Declaration of Michael Geibelson in support of Best Buy Plaintiffs' Mot., Ex. B ("Geibelson Decl.") (Docket No. 8610-2 in M 07-1827).) They also claim over $30,000 in online research and computer fees, which are not taxable. (*See id.*) Similarly, they claim over $7,500 in expedited delivery and messenger fees, which are not taxable to HannStar. (*See id.*)

1421 (W.D. Wash. 1988) (citing *Crawford Fitting* and denying successful antitrust plaintiff's request for $121,024.35 in expert witness fees). This is because neither 28 U.S.C. § 1821 nor 28 U.S.C. § 1920 allow costs paid to expert witnesses, other than the $40 per day in subsistence fees, travel fees and appearance fees under 28 U.S.C. § 1821(b). *Id.* ("[t]he court does not interpret the provisions of the Clayton Act providing for recovery of attorney's fees as explicit statutory authorization for compensating plaintiff for fees paid to experts beyond that authorized by the cost statutes"); *see also U.S. Industries, Inc. v. Norton Co.*, 578 F. Supp. 1561, 1568 (2d Cir. 1984) ("The Court of Appeals, Second Circuit, has expressed unequivocally that a prevailing party under this antitrust statute [the Clayton Act] is not to be compensated for fees paid to an expert witness as a cost of suit under the statute.") (citations omitted). Similarly, costs incurred in connection with other retained or engaged professionals such as jury consultants and outside trial consultants, are also not recoverable as non-taxable costs. *See Theme Promotions, Inc. v. News Am. Mktg. FSI, Inc*., 731 F. Supp. 2d. 937 (N.D. Cal. 2010) (disallowing cost recovery for outside trial consultants); *see also Pacific West Cable Co. v. Sacramento*, 693 F. Supp. 865 (E.D. Cal. 1988) (disallowing cost recovery of expert witnesses and consultants beyond statutory limits set by 28 U.S.C. §§ 1821 and 1920).

Here, Best Buy seeks more than $7.6 million in "professional" fees attributable to experts and non-testifying outside consultants, including more than $7.2 million spent on expert witness fees. (*See* Rosen Decl. ¶¶ 10; *See* Declaration of Michael Geibelson in support of Best Buy Plaintiffs' Mot., Ex. B at 10, 115-16 ("Geibelson Decl.") (Docket No. 8610-2 in M 07-1827).) Remarkably, the Best Buy Plaintiffs attempt to pass-off more than $182,000 in late fees and accrued interest as part of these expert fees. (*See* Rosen Decl. ¶ 18.) HannStar should not be held liable for the Best Buy Plaintiffs' failure to pay their bills in a timely manner. Their expert witness fees also include nearly $1.8 million in line item expert fees without sufficient documentation or substantiation, (*see id.* ¶¶ 12-17), and nearly $468,000 in the same expert fees are sought twice. (*See id.* ¶ 15.) The Court should reject the $7.6 million in expert witness fess as non-taxable or, at a minimum, reduce that amount to account for these late fees, lack of documentation, and double recovery.

(2) ESI Consultants and Technical Advisors. Likewise, fees paid to non-testifying professionals such as ESI consultants and technical advisors are non-taxable and, thus, cannot be recovered as costs. *Theme Promotions, Inc.*, 731 F. Supp. 2d. 937; *Pacific West Cable Co.*, 693 F. Supp. 865; *see* 28 U.S.C. §§ 1821, 1920. Here, the Best Buy Plaintiffs seek recovery of more than 2,000 hours and more than $500,000 in time billed by non-lawyer, non-para-professional "Technical Advisor" time. However, these "Technical Advisors" are not, as they were titled by the Best Buy Plaintiffs for the purposes of this Motion, database or information technology or computer specialists, but sophisticated accounting and financial experts employed in-house in the Financial and Economic Consultants Practice[20] at RKMC. (*See* Greenfield Decl. ¶¶ 67-69, Exs. 3, 30, 31). In addition, the Best Buy Plaintiffs request non-recoverable fees incurred by "in-house" ESI consultants and "Database Specialists." In total, the Best Buy Plaintiffs seek nearly $1 million dollars for technical staff time. (*See id.* Ex. 3, ¶ 69.)

However, courts routinely refuse to tax accountants, computer retrieval services and media-related work. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979) (computer services); *El Dorado Irrigation Dist. v. Traylor Bros., Inc.*, 03-949-LKK, 2007 U.S. Dist. LEXIS 31638, *13-14,*16 (E.D. Cal. April 13, 2007) (media-related work and in-house counsel); *Goldwyn*, 328 F.2d at 224 (accountants).[21] By including these attorney's fees as costs, the Best Buy Plaintiffs seek to bypass well-settled law that these are not taxable costs. The fact that these ESI consultants and technical advisors are "in-house" staff does not alter this conclusion. Furthermore, the time billed by these Technical Advisors and ESI technicians and database specialists are vague and unclear, and the Best Buy Plaintiffs make no effort to justify the work these professionals performed or to establish that they were necessary and reasonable. *See Cabrales v. County of Los Angeles*, 864 F.2d at 1467 (9th Cir. 1988). The Best Buy

[20] *See* http://www.rkmc.com/services/financial-and-economic-consultants.

[21] These professionals are similar to accountants, whose time/fees courts routinely refuse to reimburse. *See Exhibitors' Serv.*, 583 F. Supp. at 1195 (refusing to reimburse two accountants who billed time, ostensibly in support of the litigation, but who never testified); *see also Brager & Co. v. Leumi Sec. Corp.*, 530 F. Supp. 1361, 1364 (S.D.N.Y. 1982) (refusing to reimburse for the services of a professional accounting firm that prepared documents considered by the experts).

Plaintiffs have not properly documented or sufficiently supported these fees and cannot convert non-taxable costs into recoverable fees merely by bringing consultants in-house and putting them on staff. The Court should deny the Best Buy's Plaintiffs' request for these fees and deduct the near $1 million in fees billed by these Technical Advisors and ESI technicians and database specialists.

III. CONCLUSION.

The Best Buy Plaintiffs' request for more than $17.6 million in fees and costs should be denied. By operation of the FTAIA, the Best Buy Plaintiffs claims are outside the Sherman Act and cannot serve as a basis for a fee award. The Best Buy Plaintiffs' request should also be subject to the more than $229 million settlement offset and denied as a result. There are numerous additional grounds for rejecting and reducing the Best Buy Plaintiffs' request for fees and costs, including the unavailability of many of these requested costs as a matter of law, numerous inaccuracies, errors, and a lack of documentation. It would unreasonable to award more than $17.6 million in fees and costs on a $22 million treble damages award and a zero dollar recovery. This Court should deny the Best Buy Plaintiffs' Motion for attorney's fees and costs.

Dated: October 30, 2013

Respectfully submitted,

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