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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15
16 IN RE: TFT-LCD (FLAT PANEL)
17 ANTITRUST LITIGATION

Master File No. 3:07-md-01827 SI
MDL NO. 1827

18 This Document Relates To:
19 DIRECT PURCHASER CLASS ACTION

**TRIAL BRIEF IN SUPPORT OF TOSHIBA
ENTITIES' MOTION FOR JUDGMENT AS
20 A MATTER OF LAW ON ADDITIONAL
21 GROUNDS**

22 Date: [TBD]
23 Time: [TBD]
Place: Courtroom 10, 19th Floor
24 Judge: Hon. Susan Illston

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1 INTRODUCTION

2 For the reasons stated in the Toshiba Entities' Trial Brief in Support of Their Motion for
3 Judgment as a Matter of Law filed after the close of Plaintiffs' case-in-chief (the "Motion for
4 JMOL"), Plaintiffs have failed to demonstrate (i) the single, overarching conspiracy involving
5 twelve companies, covering every LCD panel regardless of size, resolution, or application, and
6 spanning the entire class period (January 1, 1999, to December 31, 2006) that they have alleged
7 (the "Alleged Conspiracy"), and (ii) that Toshiba agreed to participate in the Alleged Conspiracy.
8 *See* Motion for JMOL, June 20, 2012 (ECF No. 5959). Toshiba hereby incorporates by reference
9 the arguments raised in its first Motion for JMOL and, without waiving or withdrawing any
10 arguments raised in the Motion for JMOL, asserts the following additional grounds for judgment
11 as a matter of law in favor of the Toshiba Entities.

12 First, Plaintiffs have failed to demonstrate that each of their class representatives have
13 suffered "injury in fact," as required to maintain standing under Article III of the United States
14 Constitution. Plaintiffs have offered no evidence of price-fixing with respect to the specific LCD
15 panels purchased by each of the class representatives. Moreover, three of the class
16 representatives made their qualifying purchases before or after the period that Plaintiffs' own
17 experts have identified as the period that the Crystal Meetings were effective. Because Plaintiffs
18 have failed to offer a sufficient evidentiary basis to support a finding that each of the class
19 representatives suffered injury as a result of the Alleged Conspiracy, Toshiba is entitled to
20 judgment as a matter of law on the class representatives' claims, and on the claims of the classes
21 as a whole.

22 Second, Plaintiffs have failed to satisfy the domestic effects exception to the Foreign
23 Trade Antitrust Improvements Act, 15 U.S.C. § 6a, which requires Plaintiffs to demonstrate that
24 Toshiba's foreign conduct had a "direct, substantial and reasonably foreseeable effect" on U.S.
25 domestic commerce. Any evidence of Toshiba's competitor contacts is limited to contacts
26 concerning large, strategic customers, who purchased LCD panels overseas and who are not part
27 of the Plaintiffs' classes. Plaintiffs have offered no evidence that Toshiba engaged in foreign (or
28 domestic) anticompetitive conduct that had any effect on prices for the products Plaintiffs

1 purportedly purchased from Toshiba. The evidence has shown that Toshiba sold only a limited
2 number of LCD panels to direct purchasers in the United States, and the prices for those panels
3 were, in fact, determined by TAEC in the United States, with quarterly price guidance from
4 Japan. Plaintiffs have offered no evidence of collusion with respect to TAEC's direct sales
5 channel to U.S. customers. With respect to finished products, Plaintiffs have offered no evidence
6 that an alleged LCD overcharge was passed through to direct purchasers of finished Toshiba-
7 branded computer notebooks, computer monitors, or televisions in the United States. While
8 Toshiba appreciates that this case was tried in light of the Court's motion-*in-limine* order barring
9 evidence of pass-through, *Royal Printing* does not relieve Plaintiffs of their burden of
10 demonstrating that Toshiba's alleged anticompetitive conduct had a direct, substantial, and
11 reasonably foreseeable effect on the U.S. markets in which Plaintiffs participated, as required
12 under the FTAIA.

13 Third, for Plaintiffs' claims that are based on import commerce, Plaintiffs have failed to
14 demonstrate that Toshiba participated in anticompetitive conduct that was intended to and did in
15 fact have a substantial effect on United States commerce, as required under *Hartford Fire Ins. Co.*
16 *v. California*, 509 U.S. 764 (1993). Plaintiffs' failure to prove their import commerce claims
17 requires that their remaining claims fail in their entirety, because the damages model presented by
18 Plaintiffs' damages expert, Dr. Edward Leamer, does not allow for disaggregation of damages.
19 See Motion for JMOL at 16-20.

20 Fourth, Plaintiffs have asserted claims based on direct purchases of LCD panels and LCD
21 computer notebooks, computers monitors, and televisions from more than a dozen entities for
22 whom there is an insufficient evidentiary basis for a reasonable jury to conclude that those entities
23 participated in the conspiracy. For instance, Plaintiffs seek damages for sales made by Mitsui &
24 Co., Ltd., but Plaintiffs have offered no evidence of anticompetitive activity — or *any* activity —
25 by Mitsui employees. Plaintiffs also seek damages based on sales made by entities that are not
26 even named as defendants or co-conspirators in Plaintiffs' Third Amended Complaint. *Compare*
27 Ex. 745 (listing, for example, Sharp Microelectronics of the Americas and Sharp Imaging and
28 Information Company of America) *with* Third Amended Direct Purchaser Plaintiffs'

1 Consolidated Complaint, Dec. 2, 2009 (ECF No. 1407). This absence of any evidence of these
2 entities' participation in any price-fixing conspiracy — much less the Alleged Conspiracy —
3 implies that Plaintiffs are relying on the rule of *Royal Printing v. Kimberly Clark Corp.*, 621 F.2d
4 323 (9th Cir. 1980), to claim damages based on alleged LCD overcharges incurred at earlier
5 stages in the LCD distribution chain. Plaintiffs, however, have failed to introduce sufficient
6 evidence for a reasonable jury to conclude that Plaintiffs purchased LCD panels or LCD finished
7 products from entities that are divisions or subsidiaries of alleged co-conspirators, as required
8 under *Royal Printing*. Plaintiffs' claims against entities for which they have not satisfied the
9 *Royal Printing* test, therefore, fail as a matter of law because Plaintiffs cannot otherwise
10 demonstrate that they have standing as direct purchasers to pursue Sherman Act claims against
11 those entities. As discussed, Dr. Leamer's damages model does not allow for disaggregation, and
12 a failure of proof as to any part of Plaintiffs' claims requires an entry of judgment for Toshiba.

13 Finally, Plaintiffs have failed to offer a sufficient evidentiary basis for the damages model
14 proposed by Dr. Leamer. Again, this failure to prove damages requires entry of judgment for
15 Toshiba.

16 **ARGUMENT**

17 **I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THE CLASS** 18 **REPRESENTATIVES HAVE STANDING**

19 As this Court held when it certified the DPP classes, Plaintiffs must demonstrate that all
20 (or nearly all) members of the DPP classes suffered antitrust injury as a result of the Alleged
21 Conspiracy. *See* Class Cert. Order at 27 (“The second element of plaintiffs’ section 1 claim is
22 antitrust impact, which is the injury that results from a violation of the antitrust laws.”). This
23 requirement applies to the Plaintiffs’ class representatives, as well as to the classes as a whole.
24 *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (holding that class
25 representatives “must allege and show that they personally have been injured, not that injury has
26 been suffered by other, unidentified members of the class to which they belong and which they
27 purport to represent”); *Pence v. Andrus*, 586 F.2d 733, 736-37 (9th Cir. 1978) (“[I]n class actions,
28 the named representatives must allege and show that they personally have been injured, not that

1 injury has been suffered by other, unidentified members of the class to which they belong and
2 which they purport to represent.”). For the class representatives to have standing under Article III
3 of the United States Constitution, Plaintiffs must demonstrate that the class representatives have
4 suffered “injury in fact” that is “fairly trace[able] to the challenged action of the defendant.”
5 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To demonstrate injury in fact,
6 Plaintiffs must offer “[specific] facts . . . supported adequately by the evidence adduced at trial.”
7 *Lujan*, 504 U.S. at 561.

8 Plaintiffs have failed to offer a legally sufficient evidentiary basis for a reasonable jury to
9 find that any of the Plaintiff class representatives suffered injury in fact as a result of the Alleged
10 Conspiracy. Because Plaintiffs have failed to offer legally sufficient evidence to support a
11 finding that each class representative suffered injury in fact, Plaintiffs cannot proceed under the
12 class action mechanisms of Rule 23(b)(3). See *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350
13 F.3d 1018, 1022 (9th Cir. 2003) (“[O]ur law makes clear that ‘if none of the named plaintiffs
14 purporting to represent a class establishes the requisite case or controversy with the defendants,
15 none may seek relief on behalf of himself or any other member of the class’”) (quoting *O’Shea v.*
16 *Littleton*, 414 U.S. 488, 494 (1974)). The Court’s order certifying the DPP classes must therefore
17 be vacated and the DPP classes must be decertified and dismissed. See *Lierboe*, 350 F.3d at 1023
18 (vacating class certification order and remanding with instructions to dismiss where named
19 plaintiff “never had standing”); see also Fed. R. Civ. P. 23(c)(1)(C) (“An order that grants or
20 denies class certification may be altered or amended before final judgment.”); *Roby v. St. Louis*
21 *S.W. Ry. Co.*, 775 F.2d 959, 962-63 (8th Cir. 1985) (affirming class decertification where
22 evidence produced at trial did not support a finding that the class representatives suffered the
23 same injury as the class they sought to represent).

24 **A. Plaintiffs Have Failed to Demonstrate That the Panel Class Representative**
25 **Has Standing**

26 The sole class representative for the DPP Panel Class, Texas Digital Systems, Inc. (“Texas
27 Digital”), purchased LCD panels from Sharp Microelectronics of the Americas (“SMA”) between
28 January 1999 and January 2001. See Gray Test., Trial Tr. at 1186:16-20, 1654:14-18; Ex. 2121.

1 Texas Digital’s purchases were limited to a single type of LCD display, a special 15-inch panel
2 designed for outdoor use. *See* Gray Test., Trial Tr. at 1166:10-15. Plaintiffs’ own impact expert
3 has admitted that Plaintiffs offered no evidence that SMA colluded with any other LCD supplier
4 concerning prices or production volumes for the unique type of 15-inch industrial LCD panel
5 suitable for outdoor displays that Texas Digital purchased from SMA. *See* Flamm Test., Trial Tr.
6 at 2137:10-14 (“Q. . . . Are you familiar with any testimony in this case about collusion on sales
7 to Texas Digital Systems? A. No. . . .”). As explained in section IV.B.5., *infra*, (i) SMA is not a
8 defendant in this case, (ii) there is no evidence that SMA participated in the Alleged Conspiracy
9 — or any conspiracy, and (iii) there is no evidence of the corporate relationship between SMA
10 and any other Sharp entity. There is no evidence that Sharp Corporation — or any other Sharp
11 entity — fixed prices on the type of 15-inch panel that Texas Digital purchased. *See* Trial Tr. at
12 1720:15-1722:5 (Sharp Corporation guilty plea). In the absence of direct evidence of collusion
13 on sales to Texas Digital, Plaintiffs’ expert has suggested that Texas Digital may have
14 nonetheless suffered injury as a result of “the overall collusion to raise the price.” Flamm Test.,
15 Trial Tr. at 2137:12.

16 The sole class representative of the Panels Class, Texas Digital, made no LCD panel
17 purchases during the time period when the Crystal Meetings were being conducted. Mr. Gray
18 from Texas Digital testified that Texas Digital’s purchases of LCD panels spanned the period
19 January 1999 through January 2001. *See* Ex. 2121. On January 15, 2001, Texas Digital made its
20 last order for LCD panels (*see* Ex. 2121); at the time of its order, pricing had already been
21 established even earlier — in July 2000 — for the small quantities Texas Digital was ordering.
22 *See* Ex. 2121. Thus, Texas Digital’s last purchase — on January 15, 2001 — was almost exactly
23 nine months prior to the beginning of the Crystal Meetings on September 14, 2001. The Crystal
24 Meetings manifestly could have had no effect on Texas Digital’s panel purchases. In short, as
25 discussed in more detail in the Motion for JMOL, Plaintiffs have failed to offer a legally
26 sufficient evidentiary basis for a reasonable jury to find that there was “overall collusion” to fix
27 the prices of *all* LCD panels in the period prior to the start of the Crystal Meetings in September
28 2001. There is therefore no evidentiary basis for a jury to find that Texas Digital suffered

1 antitrust injury as a result of the Alleged Conspiracy. Accordingly, Texas Digital lacks standing
2 to pursue its antitrust claims against Toshiba, and the DPP finished panel class that Texas Digital
3 represents should be decertified and its claims dismissed.

4 **B. Plaintiffs Have Failed to Demonstrate That the Finished Product Class**
5 **Representatives Have Standing**

6 **1. Crago**

7 Plaintiffs have also failed to offer a sufficient evidentiary basis for a reasonable jury to
8 find that Finished Product class representative Crago Corp. (“Crago”) suffered injury in fact.
9 Crago purchased two lots of LCD monitors from Nexgen Mediatech USA., Inc. *See* Allen Test.,
10 Trial Tr. at 399; Ex. 600. The invoice dates of the two purchases were November 15 and
11 December 5, 2006. *See* Allen Test., Trial Tr. at 399-400, 407-408 (testifying that the November
12 15 and December 5, 2006 invoice represent Crago’s “qualifying class purchases”); Ex. 600.

13 *First*, as explained in section IV.A.3., *infra*, there is no evidence that Nexgen Mediatech
14 USA, Inc. (i) participated in any conspiracy, or (ii) is a division or subsidiary of any co-
15 conspirator. Crago, therefore, has not even proven that they purchased a product from an alleged
16 co-conspirator.

17 *Second*, as discussed in the Motion for JMOL, Plaintiffs have failed to demonstrate that
18 the Alleged Conspiracy continued to have an effect on LCD prices during the November 15 –
19 December 5, 2006 period when Crago made its qualifying purchases. *See* Motion for JMOL at
20 14-15. Plaintiffs’ expert Dr. Flamm has conceded that the Crystal Meetings ended in the first
21 quarter of 2006 and that “from that point forward, any collusion would not have been as
22 effective.” Flamm Test., Trial Tr. at 1761:7-25 (“So, fully-effective cartel operation would have
23 been sort of ended around the first quarter of 2006.”). In fact, by the end of 2005, Samsung had
24 approached DOJ to seek amnesty, and it stopped having contacts with competitors by the first
25 quarter of 2006. *See* Flamm Test., Trial Tr. at 1799:3-18. After the first quarter of 2006, “the
26 large-scale, organized Crystal Meetings were finished,” and contacts among LCD suppliers
27 occurred almost entirely through bilateral meetings. *See* Flamm Test., Trial Tr. at 1799:19-
28 1800:2. Plaintiffs’ damages expert, Dr. Leamer, used a damages model that only continued

1 through the first quarter of 2006. *See* Leamer Test., Trial Tr. at 2287:16-19. For the remainder of
2 2006, Dr. Leamer testified that there were at most “lingering effects” that lasted “*until* the fourth
3 quarter of 2006.” Leamer Test., Trial Tr. at 2287:20-23 (emphasis added).

4 Plaintiffs have offered no evidence that the LCD panels in the monitors purchased by
5 Crago, at least eight months after the Crystal Meetings ended, were subject to price-fixing
6 agreements. There is also an insufficient evidentiary basis for a reasonable jury to find that the
7 “lingering effects” described by Dr. Leamer affected the particular panels purchased by Crago
8 near the very end of the class period. Accordingly, there is insufficient evidence for a reasonable
9 jury to find that Crago suffered injury in fact as a result of the Alleged Conspiracy.

10 **2. CMP**

11 Plaintiffs have also failed to offer a sufficient evidentiary basis for a reasonable jury to
12 find that CMP Consulting Services (“CMP”) suffered antitrust injury as a result of the Alleged
13 Conspiracy. CMP purchased four LCD products, including one notebook and three tablets, from
14 TAIS. *See* Perez Test., Trial Tr. at 1309:18-1310:10. Those purchases occurred on June 26,
15 December 1, and December 6, 2006 (when two sales occurred). *See* Exs. 593-96. CMP received
16 a 40% discount off of the Manufacturer’s Suggested Retail Price on the products that it
17 purchased, as a result of CMP’s participation in Toshiba’s Preferred Partner Program. *See* Perez
18 Test., Trial Tr. at 1326:22-25. Plaintiffs have not identified the manufacturer of the LCD panels
19 included in the products purchased by CMP.

20 *First*, as discussed in the Motion for JMOL and as explained in section IV.A.10., *infra*,
21 Plaintiffs have offered no evidence that TAIS participated in any conspiracy or was a division or
22 subsidiary of a co-conspirator. *See* Motion for JMOL at 20-31.

23 *Second*, the LCD panels in three of the four products that CMP purchased contained a
24 higher-functionality LCD panel that permitted the user to write on the screen using a stylus, and
25 Plaintiffs have offered no evidence that price-fixing agreements were ever reached among any
26 suppliers with respect to such high-functionality panels. *See* Perez Test., Trial Tr. at 1346:9-18;
27 Ishimura Test., Trial Tr. at 2997:3-19 (testifying that a tablet-type laptop “was really quite a
28 specialized model. And in that sense, it was a completely different kind of model.”). Further,

1 like Crago, CMP's purchases occurred after the Crystal Meetings had ended and after the March
2 31, 2006 cutoff for the conspiracy as determined by Dr. Flamm and assumed by Dr. Leamer.
3 Plaintiffs have offered no evidence to support a finding that the LCD panels in the products that
4 CMP purchased were subject to "lingering effects" from the Alleged Conspiracy as described in
5 the opinions of Dr. Leamer. Accordingly, there is insufficient evidence for a reasonable jury to
6 find CMP suffered antitrust injury.

7 **3. Home Technologies**

8 Plaintiffs have also failed to offer a sufficient evidentiary basis for a reasonable jury to
9 conclude that Home Technologies Bellevue, LLC ("Home Technologies") suffered antitrust
10 injury as a result of the Alleged Conspiracy. Home Technologies purchased LCD televisions
11 from Sharp Electronics Corp. during the relevant period. *See* Trial Tr. at 1817:2-1819:2; Ex. 601.
12 Plaintiffs were unable at trial to identify the manufacturer of the LCD panels in the televisions
13 purchased by Home Technologies. *See* Tish Test., Trial Tr. at 1824:25-1825:21.

14 *First*, Plaintiffs have offered no evidence that Sharp Electronics Corporation participated
15 in any conspiracy. The only evidence of a price-fixing conspiracy in the record regarding any
16 Sharp entity relates to Sharp Corporation. *See, e.g.*, Trial Tr. at 1720:15-1722:6 (Sharp
17 Corporation plea agreement). Sharp Corporation's plea agreement states that the price-fixing
18 agreements into which Sharp Corporation, entered covered specific LCD panels sold to Dell,
19 Apple, and Motorola, which are all opt-out entities. *See* Trial Tr. at 2621:21-2622:19. There is
20 no evidence that Sharp Corporation — or any other Sharp entity — fixed prices on LCD panels
21 sold to Home Technologies.

22 *Finally*, Plaintiffs have offered no evidence to demonstrate that the LCD panels
23 incorporated into the televisions purchased by Home Technologies were subject to price-fixing
24 agreements. Accordingly, there is insufficient evidence for a reasonable jury to find Home
25 Technologies suffered antitrust injury.

1 **II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT TOSHIBA’S CONDUCT**
2 **HAD A DIRECT, SUBSTANTIAL AND REASONABLY FORESEEABLE EFFECT**
3 **ON U.S. DOMESTIC COMMERCE**

4 Although Plaintiffs have offered some evidence of communications among LCD panel
5 suppliers in the United States, the conspiracy they have alleged is based on “primarily foreign”
6 conduct. *See Dee-K Enters., Inc. v. Haveqfil SDN. BHD*, 299 F.3d 281, 295 (4th Cir. 2002)
7 (holding that alleged anticompetitive conduct was “primarily foreign” where price-fixing
8 agreements “were all formed entirely outside the United States,” despite sales to the United States
9 through U.S. divisions or subsidiaries of the conspirators). Indeed, Plaintiffs have failed to offer
10 sufficient evidence for a reasonable jury to find that U.S.-based employees of any LCD panel
11 supplier reached price-fixing agreements in the United States. *See Hanson Test.*, Trial Tr. at
12 2169:13-17, 2218:19-23, 2222:2-6 (testifying that he lacked pricing authority and could not reach
13 agreements with competitors); *see also In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125 (3d
14 Cir. 1999) (citing *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982))
15 (holding that sporadic information exchanges among low-level sales personnel without pricing
16 authority does not support an inference of conspiracy). At best, Plaintiffs have offered evidence
17 that U.S.-based personnel, without pricing authority, exchanged information regarding prices and
18 demand volumes for certain large customers who have opted out of this case. *See, e.g.*, Bond
19 Test., Trial Tr. at 2481:2-18 (testifying as to exchanging information with a Vice President at
20 Sharp regarding a difficult buyer at Motorola); *Hanson Test.*, Trial Tr. at 2175:3-2176:5
21 (testifying as to information exchanges with other sales managers at other suppliers regarding
22 Dell). The only direct evidence of an LCD price-fixing conspiracy that Plaintiffs have introduced
23 relates to contacts among LCD suppliers in Asia. *See, e.g.*, Lee Test., Trial Tr. at 1385:9-20
24 (testifying that the first Crystal Meeting was held in Taiwan and that the attendees were Korean
25 and Taiwanese manufacturers).

26 However, the Foreign Trade Antitrust Improvements Act (“FTAIA”), 15 U.S.C. § 6a
27 (2012), further limits the application of the Sherman Act to foreign conduct that has a direct,
28 substantial, and reasonably foreseeable effect on U.S. domestic commerce. *See F. Hoffman-La*

1 *Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004) (holding non-import foreign commerce
2 falls “within the Sherman Act’s *provided that* the conduct *both* (1) sufficiently affects American
3 commerce, *i.e.*, it has a direct, substantial, and reasonably foreseeable effect on American
4 domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law
5 considers harmful”) (internal quotation marks omitted) (emphasis in original). Plaintiffs
6 must demonstrate compliance with FTAIA as an element of their claims. *See Minn-Chem, Inc. v.*
7 *Agrium, Inc.*, No. 1712, at *12 (7th Cir. June 27, 2012) (“the FTAIA spells out an element of a
8 claim”). To prove that Toshiba’s foreign conduct had a “direct effect” on U.S. commerce,
9 Plaintiffs must show that the effect “follow[ed] as an immediate consequence of the defendant’s
10 activity.” *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004). For an effect
11 to be “substantial,” it must impact a sufficient volume of U.S. commerce and not be a mere
12 “spillover” or “ripple” effect. *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp.
13 2d 1101, 1110 (N.D. Cal. 2007) (“A domestic effect may be ‘substantial’ if it involves a sufficient
14 volume of U.S. commerce and is not a mere ‘spillover effect.’”); *In re Intel Corp. Microprocessor*
15 *Antitrust Litig.*, 452 F. Supp. 2d 555, 561 (D. Del. 2006) (“[T]he FTAIA prevents the Sherman
16 Act from reaching such ‘ripple effects.’”). Plaintiffs have failed to offer a sufficient evidentiary
17 basis for a reasonable jury to conclude that Toshiba’s conduct had a direct, substantial and
18 reasonably foreseeable effect on the domestic markets in which the Plaintiff classes participated.

19 Plaintiffs’ evidence of Toshiba employees’ contacts with competitors relates, apparently
20 entirely, to information exchanges regarding pricing and volumes of LCD panels sold outside of
21 the United States, to customers who are not members of the DPP classes. For instance, Plaintiffs
22 have introduced evidence of contact between TMD and LG employees regarding pricing of
23 panels shipped to China for two portable DVD manufacturers based in China, Xinke and
24 Wanlinda. Chiba Test., Trial Tr. at 796:12-797:7. As discussed in more detail in the Motion for
25 JMOL, Plaintiffs have offered no evidence that price-fixing agreements were reached with respect
26 to these customers; nor have they offered evidence that Xinke and Wanlinda products were sold
27 in U.S. commerce. *See* Motion for JMOL at 31. Wholly foreign transactions, of the type
28 undertaken with Xinke, Wanlinda and numerous other foreign customers cannot satisfy the

1 restrictions of the FTAIA. *See Empagran*, 542 U.S. at 159 (holding that the FTAIA prohibits
2 claims that “rest[] solely on . . . independent foreign harm.”).

3 Plaintiffs have also introduced evidence that Toshiba exchanged information regarding
4 prices and volumes for U.S.-based customers who took received shipments and took title to LCD
5 panels outside of the United States. *See, e.g., Amano Test.*, Trial Tr. at 937:3-21 (discussing sales
6 to “U.S. PC makers” Dell, HP and IBM); Trial Ex. 325. Toshiba’s “strategic” U.S.-based
7 customers all required Toshiba to ship LCD panels to overseas destinations, where the LCD
8 panels would be incorporated into finished products before being shipped elsewhere. Amano
9 Test., Trial Tr. at 1083:17-1084:8 (testifying that Dell, HP and Apple required TMD to ship LCD
10 panels to manufacturing sites in China, Taiwan and Malaysia); Chiba Test., Trial Tr. at 830:10-12
11 (testifying that LCD panels sold to Motorola were shipped to China).

12 Plaintiffs have offered no basis for a reasonable jury to conclude that Toshiba’s conduct
13 with respect to large strategic customers, who purchased LCD panels overseas, had a substantial
14 effect on the domestic market for panels that were directly sold in U.S. commerce to members of
15 the DPP Panel class. Toshiba’s witnesses have offered un rebutted testimony explaining that
16 pricing for strategic U.S.-based customers, who made their purchases overseas, was determined in
17 Japan by TMD (or Toshiba Corporation prior to April 2002). *See Amano Test.*, Trial Tr. at
18 1086:7-17. By contrast, pricing for direct sales of LCD panels to U.S. customers was determined
19 by TAEC based on a price range that was issued by TMD on a quarterly basis. Amano Test.,
20 Trial Tr. at 1086:7-17 (“[T]here was a quarterly range that was set and supplied to overseas sales
21 companies. And then the decisions on prices were left to the local companies.”); Bond Test.,
22 Trial Tr. at 2463:23-2464:6 (“In the case of factory automation [direct sales to U.S. customers],
23 we [TAEC] set the pricing on the United States.”). Because the prices for panels sold directly to
24 customers in the United States, including the members of the Panel class, were determined by
25 U.S.-based sales entities, there is no basis for a reasonable jury to conclude that Toshiba’s
26 conduct related to overseas sales had a substantial effect on the market for direct sales of LCD
27 panels in the United States. Accordingly, the LCD Panel class’s claims should be dismissed for
28

1 failure to meet the FTAIA's domestic injury exception, and judgment should be entered for
2 Toshiba as a matter of law.

3 Plaintiffs have similarly failed to demonstrate that the Finished Products class participated
4 in a U.S. domestic market that suffered substantial effects from the conspiracy. The Finished
5 Products class has alleged injuries based on overcharges to the LCD component of notebooks,
6 monitors and televisions purchased directly from the alleged co-conspirators. However, Plaintiffs
7 have failed to offer a sufficient evidentiary basis for a reasonable jury to conclude that the
8 members of the Alleged Conspiracy agreed to fix prices on LCD panels sold to the finished
9 product manufacturing divisions of alleged co-conspirators for inclusion in notebooks, monitors
10 and televisions sold in the United States. Nor have Plaintiffs demonstrated that any such LCD
11 panel overcharge was passed through to customers in the United States. *See, e.g.*, Brian Lee
12 Test., Trial Tr. at 1428:24-1429:19 (testifying that customers including Toshiba Corporation's PC
13 division frequently requested rebates on LCD panel purchases); Trial Ex. 1070.

14 Hiroshi Ishimura of TAIS has explained that the LCD panels that are incorporated into
15 finished notebooks and sold by TAIS are sold several times through a complicated overseas
16 manufacturing and distribution network before they enter U.S. commerce. *See* Ishimura Test.,
17 Trial Tr. at 3038:7-3039:1 (testifying that Toshiba Corporation's PC division purchased LCD
18 panels overseas, incorporated the LCD panels into finished products overseas and sold the
19 finished products to TAIS overseas, before TAIS in turn sold finished products to purchasers in
20 the United States). Plaintiffs simply assume, with no substantial proof, that retail prices for
21 finished LCD products purchased from alleged co-conspirators reflected an overcharge. Perez
22 Test., Trial Tr. at 1318:24-1319:3 ("Q. Given that you described receiving a discount from
23 Toshiba for some of the purchases, how does that affect your belief that you paid too much for
24 these laptops? A. Well, we still paid too much, because the discount would have applied to the
25 MSRP of the products.").

26 The rationale of *Royal Printing* in this case as tried has relieved Plaintiffs of the burden of
27 demonstrating that they were injured to the full extent of the LCD panel overcharges that were
28 incurred at the initial stages of the manufacturing and distribution chain. However, the LCD

1 overcharges that Plaintiffs seek to recover were, in fact, incurred in foreign commerce by the
2 finished product manufacturers. *See, e.g.,* Ishimura Test., Trial Tr. at 3038:2-20 (“[W]hen the
3 Toshiba PC group would pay for the LCD panels that it purchased . . . where would payment be
4 made? A. When you say ‘where,’ well, Toshiba, which was in Japan, would pay Sharp in Japan.
5 Or they would pay Samsung, which was in Korea. Or they would pay Chi Mei, which was in
6 Taiwan.”). Regardless of the pre-trial rulings on *Royal Printing*, Plaintiffs have not been relieved
7 of their burden under the FTAIA of demonstrating that the alleged overcharges on LCD panels
8 incorporated into the notebooks, monitors and televisions purchased by members of the Finished
9 Products class had a substantial effect on United States domestic commerce. In the absence of
10 substantial basis for a reasonably jury to conclude that LCD panel overcharges were passed
11 through to direct purchasers of notebooks, monitors and televisions in the United States, the
12 claims asserted by the Finished Products class must be dismissed under the FTAIA and judgment
13 entered in favor of Toshiba.

14 **III. PLAINTIFFS HAVE FAILED TO PROVE THE ELEMENTS TO SUPPORT THEIR** 15 **CLAIMS FOR DAMAGES FOR IMPORT COMMERCE**

16 Plaintiffs’ wide-ranging class action consists of two classes, each of which relies on
17 damages theories based on import commerce as well as foreign commerce. In addition to
18 Plaintiffs’ failures to meet the requirements for establishing Sherman Act liability of Toshiba
19 under FTAIA, Plaintiffs have not established the requisite elements for the classes to recover
20 under the Sherman Act with respect to foreign commerce involving imports into the United
21 States.

22 Plaintiffs claim damages based, in part, on overcharges incurred on LCD panels and LCD
23 finished products imported from Asia. *See, e.g.,* Bond Test., Trial Tr. at 2463:23-2464:6
24 (testifying about direct sales to U.S. customers); Ishimura Test., Trial Tr. at 3038:7-3039:1
25 (testifying on sales channel to U.S. customers). But Plaintiffs have not established the elements
26 for a Sherman Act claim based on import commerce. *See Hartford Fire Ins. Co. v. California*,
27 509 U.S. 764, 796 (1993) (holding that the Sherman Act does not extend to foreign conduct
28 unless the foreign conduct was “meant to and did in fact produce some substantial effect in the

1 United States”); *Minn-Chem*, slip op. at 26 (“Under *Hartford Fire* the plaintiffs thus must allege
2 that the conduct of the foreign cartel members was (1) meant to produce and (2) did in fact
3 produce some substantial effect in the United States.”).

4 Plaintiffs have failed to offer sufficient evidence for a reasonable jury to find that the
5 requirements of *Hartford Fire* are met in this case. There is no evidence sufficient to demonstrate
6 that Toshiba engaged in anticompetitive conduct that was intended to produce a “substantial
7 effect” and did in fact produce a “substantial effect” in the United States. Accordingly, Plaintiffs
8 cannot recover damages based on import commerce. Because Dr. Leamer’s damages model
9 includes sales of all LCD panels shipped to or billed to the United States, and because Dr.
10 Leamer’s model cannot be disaggregated, Plaintiffs’ claims must fail and judgment should be
11 entered in favor of Toshiba.

12 **IV. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY ARE ENTITLED**
13 **TO RECOVER OVERCHARGES UNDER *ROYAL PRINTING***

14 Plaintiffs have failed to demonstrate that they have standing to prosecute their claims for
15 damages under Section Four of the Clayton Act. Plaintiffs must demonstrate that they purchased
16 LCD panels or LCD computer notebooks, monitors, or televisions *directly* from a participant in
17 the Alleged Conspiracy. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730-31 (1977). Plaintiffs
18 may also demonstrate standing by offering sufficient evidence for a reasonable jury to find that
19 Plaintiffs purchased LCD panels or LCD computer notebooks, monitors, or televisions from “a
20 division or subsidiary of a co-conspirator.” *Royal Printing v. Kimberly Clark Corp.*, 621 F.2d
21 323, 326 (9th Cir. 1980); Order Denying Motion for Summary Judgment on *Illinois Brick* at 2
22 (holding that “*Royal Printing* was concerned with the relationship between the conspirator and
23 the direct purchaser”). Plaintiffs have failed to offer proof that they made direct purchases from
24 each of the alleged co-conspirators, or divisions or subsidiaries of the alleged co-conspirators
25 identified in Plaintiffs’ Third Amended Complaint. Plaintiffs’ claims against those alleged co-
26 conspirators, therefore, must be dismissed.

27 Plaintiffs’ damages expert, Dr. Leamer, has nonetheless included LCD panel sales data
28 and LCD finished product sales data from numerous entities whose alleged status as co-

1 conspirators has not been established, and whose alleged status as divisions or subsidiaries of co-
2 conspirators has not been established. As discussed in the Motion for JMOL, Dr. Leamer's
3 damages model cannot be disaggregated. *See* Motion for JMOL at 20; Mot. to Exclude Test. Of
4 Dr. Leamer at 11 (D.E. 6014); *see also* Leamer Test., Trial Tr. at 2397:13-16. Dr. Leamer's
5 damages model is therefore fatally flawed because it includes sales data for entities whose role in
6 the alleged conspiracy has not been proven, or whose status as divisions or subsidiaries has not
7 been proven. Plaintiffs therefore have failed to satisfy the requirement that they provide a
8 reasonable basis for calculating damages, and their claims must be dismissed, with judgment
9 entered for Toshiba. *See, e.g., MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081,
10 1165-66 (7th Cir. 1983) (rejecting plaintiff's damages analysis because (i) it was premised on the
11 illegality of conduct that, at trial, was unproven, and (ii) plaintiff offered no evidence on the
12 adjustment of the damages).

13 **A. Plaintiffs Have Not Proven the Necessary Corporate Relationships Among the**
14 **Separate Corporate Defendants Necessary to Establish Direct-Purchaser**
15 **Standing for the Finished Product Class Plaintiffs**

16 In calculating his damages estimate for the Finished Product class, Dr. Leamer included
17 finished-product sales from the following entities: (1) Chi Mei Corp.; (2) Nexgen Mediatech,
18 Inc.; (3) Nexgen Mediatech USA, Inc.; (4) HannStar Display Corp.; (5) Hitachi Ltd.; (6) non-
19 defendant LG Electronics; (7) non-defendant Koninklijke Philips Electronics N.V. (KPE); (8)
20 Samsung Semiconductor, Inc.; (9) non-defendant Samsung Group; (10) Sharp Electronics; (11)
21 non-defendant Sharp Imaging and Information Company of America (SIICA); (12) Tatung
22 Company of America; and (13) Toshiba America Information Systems, Inc. *See* Ex. 745; Leamer
23 Test., Trial Tr. at 2277:13-16 (referring to Exhibit 745: "Q. So is this a list of the defendant
24 entities that produced transactional records showing sales to the class, as you were instructed to
25 define it? A. That's correct."). Plaintiffs can satisfy their directness requirement only by offering
26 evidence that these direct-purchaser entities from whom Plaintiffs allegedly purchased finished
27 products were either "a division or a subsidiary of a co-conspirator." *Royal Printing*, 621 F.2d at
28 326. They have not done so.

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1 Mediatech, Inc. had with CMO, *i.e.*, a Crystal Meeting conspiracy participant, was “pure
2 customer to supplier.” Ex. 3007 (Yeh Dep. at 18:12-17). Plaintiffs have offered insufficient
3 evidence that their purchases (if any) from Nexgen Mediatech, Inc. qualify as purchases from a
4 co-conspirator’s “division or subsidiary”; therefore, this Court must dismiss as a matter of law
5 any claims that Plaintiffs may have based on the purchase of Nexgen Mediatech, Inc. finished
6 products and any Nexgen Mediatech, Inc. sales included in Dr. Leamer’s damages calculation
7 must be excluded.

8 **3. Nexgen Mediatech USA, Inc.**

9 Plaintiffs have offered no evidence that Nexgen Mediatech USA, Inc. either (i)
10 participated in any conspiracy, or (ii) is a division or subsidiary of a co-conspirator. Mr. Yeh
11 testified that Nexgen Mediatech USA, Inc. is a subsidiary of Nexgen Mediatech, Inc. *See* Ex.
12 3007 (Yeh Dep. at 37:24-38:1). There is no other evidence in the record regarding Nexgen
13 Mediatech USA, Inc.’s relationship with any other corporate entity. The most that could be
14 inferred from the evidence is that Nexgen Mediatech USA, Inc. is an indirect subsidiary of Chi
15 Mei Corp. This evidence fails as a matter of law to prove that Nexgen Mediatech USA, Inc. is a
16 division or subsidiary of a conspirator. There is no evidence in the record regarding the
17 relationship between Nexgen Mediatech USA, Inc., and the Crystal Meeting participant CMO.
18 Plaintiffs have offered insufficient evidence that their purchases from Nexgen Mediatech USA,
19 Inc. qualify as purchases from a co-conspirator’s “division or subsidiary”; therefore, this Court
20 must dismiss as a matter of law any claims that Plaintiffs may have based on the purchase of
21 Nexgen Mediatech USA, Inc. finished products, and any Nexgen Mediatech USA, Inc. sales
22 included in Dr. Leamer’s damages calculation must be excluded.

23 **4. Hitachi Ltd.**

24 Plaintiffs have offered no evidence that Hitachi Ltd. either (i) participated in any
25 conspiracy, or (ii) is a division or subsidiary of a co-conspirator. The only Hitachi entity about
26 which Plaintiffs have offered conspiratorial evidence is Hitachi Display, Ltd. (“HDL”). *See, e.g.*,
27 Trial Tr. at 1722:7-1723:11 (HDL plea agreement). Under *Royal Printing*, Plaintiffs must prove
28 that Hitachi Ltd. was a division or subsidiary of HDL. 621 F.2d at 325 (holding that plaintiff

1 must prove that, if it did not directly purchase from a co-conspirator, the true direct purchaser
2 must be “a division or subsidiary of a co-conspirator”). The evidence suggests, however, that
3 HDL is a subsidiary of Hitachi Ltd.; however, Plaintiffs have not proven the precise corporate
4 relationship. *See, e.g.*, Ex. 3003 (Yamada Dep. at 34:25-35:2); Kumazawa Test., Trial Tr. at
5 1202:6-8; Tokinosu Test., Trial Tr. at 1564:11-13. Plaintiffs have offered insufficient evidence
6 that their purchases (if any) from Hitachi Ltd. qualify as purchases from a “division or
7 subsidiary” of a conspirator; therefore, any Hitachi Ltd. sales included in Dr. Leamer’s damages
8 calculation must be excluded.

9 Even if, *arguendo*, Plaintiffs had satisfied the directness requirement under *Royal Printing*
10 with regard to the relationship between HDL and Hitachi Ltd., Hitachi Ltd.’s sales should still be
11 excluded because of Plaintiffs’ failure of proof regarding HDL’s participation in a single,
12 overarching conspiracy. The only HDL conspiratorial evidence in the record relates to its sales to
13 Dell, an opt-out entity (*see* Trial Tr. at 2621:21-2622:19); therefore, Plaintiffs have presented no
14 evidence of HDL joining a conspiracy that covered any products sold to the Plaintiffs. For this
15 additional reason, this Court must dismiss as a matter of law any claims that Plaintiffs may have
16 based on the purchase of Hitachi Ltd. finished products, and Hitachi Ltd.’s sales should be
17 excluded from any damages calculation.

18 **5. Non-Defendants LG Electronics and Koninklijke Philips** 19 **Electronics NV (KPE)**

20 Plaintiffs have offered no evidence that LG Electronics or Koninklijke Philips Electronics
21 NV (KPE) (“Philips”) either (i) participated in any conspiracy, or (ii) is a division or subsidiary of
22 a co-conspirator. The only related entities about which Plaintiffs have offered conspiratorial
23 evidence are LG Display Co. Ltd. and LG Display America, Inc. (often referred to as “LG
24 Philips” by witnesses). *See, e.g.*, Trial Tr. at 1716:19-1717:24 (LG Display plea agreements).
25 Under *Royal Printing*, Plaintiffs must prove that each of LG Electronics and Philips was a
26 division or subsidiary of one of these LG Philips entities. The evidence indicates, however, that
27 LG Display Co. Ltd. was a 50-50 joint-venture formed by LG Electronics and Philips. *See* Ex.
28 3004 (Kwon Dep. at 35:22-36:3). Plaintiffs have offered insufficient evidence that their

1 purchases (if any) from LG Electronics or Philips qualify as purchases from a “division or
2 subsidiary” of a conspirator; therefore, this Court must dismiss as a matter of law any claims that
3 Plaintiffs may have based on the purchase of LG Electronics or Philips finished products, and any
4 LG Electronics or Philips sales included in Dr. Leamer’s damages calculation must be excluded.

5 **6. Samsung Semiconductor, Inc.**

6 Plaintiffs have offered no evidence that Samsung Semiconductor, Inc. (“SSI”) sold any
7 LCD finished products in the United States to a plaintiff in this case. The only evidence that SSI
8 sold finished products in the United States came from the testimony of Michael Hanson. He
9 testified only regarding SSI’s sales to Dell (*see* Hanson Test., Trial Tr. at 2167:11-16), which is
10 an opt-out (*see* Trial Tr. at 2621:21-2622:19). Plaintiffs’ proof regarding SSI’s sales, therefore,
11 fails as a matter of law. This Court must dismiss any claims that Plaintiffs may have based on the
12 purchase of SSI finished products, and SSI’s sales must be excluded from any damages
13 calculation.

14 **7. Sharp Imaging and Information Company of America (SIICA)**

15 Plaintiffs have offered no evidence that Sharp Imaging and Information Company of
16 America (“SIICA”) sold any LCD finished products in the United States. In fact, Toshiba is
17 unable to find a single reference to this entity in the entire trial record other than as a listed entity
18 on Exhibit 745. Because Plaintiffs have proved neither that there were any sales from this entity
19 nor that this entity was connected in any way to an alleged co-conspirator, this Court must
20 dismiss as a matter of law any claims that Plaintiffs may have based on the purchase of SIICA
21 finished products, and SIICA’s sales must be excluded from any damages calculation.

22 **8. Sharp Electronics Corp.**

23 Plaintiffs have offered no evidence that Sharp Electronics Corp. either (i) participated in
24 any conspiracy, or (ii) is a division or subsidiary of a co-conspirator that joined the Crystal
25 Meeting conspiracy. The only related entity about which Plaintiffs have offered conspiratorial
26 evidence is Sharp Corp, not Sharp Electronics Corp. *See, e.g.*, Trial Tr. at 1720:15-1722:6 (Sharp
27 Corp. plea agreement). The evidence indicates Sharp Electronics Corp. is a subsidiary of Sharp
28 Corp. *See* Ex. 3012 (Yokota Dep. at 132:9-18).

1 Sharp Electronics Corp.'s sales should still be excluded because of the Plaintiffs' failure
2 of proof regarding Sharp Corp.'s participation in a single, overarching conspiracy. The only
3 Sharp Corp. conspiratorial evidence in the record relates to its sales to Dell, Apple, and Motorola
4 (*see* Trial Tr. at 1720:15-1722:6), which are all opt-outs entities (*see* Trial Tr. at 2621:21-
5 2622:19). Plaintiffs have presented no evidence of Sharp Corp. joining a conspiracy that covered
6 any products sold to the Plaintiffs in this case. For this reason, this Court must dismiss as a
7 matter of law any claims that Plaintiffs may have based on the purchase of Sharp Electronics
8 Corp. finished products, and Sharp Electronics' sales should be excluded from Plaintiffs'
9 damages calculation.

10 **9. Tatung Company of America**

11 Plaintiffs have offered no evidence that Tatung Company of America ("Tatung America")
12 either (i) participated in any conspiracy, or (ii) is a division or subsidiary of a co-conspirator. The
13 only related entity about which Plaintiffs have offered conspiratorial evidence is Chunghwa
14 Picture Tubes, Ltd. ("CPT"). *See, e.g.*, Trial Tr. at 1712:22-1714:6 (Chunghwa plea agreement).
15 Under *Royal Printing*, Plaintiffs must prove that Tatung America was a division or subsidiary of
16 CPT. 621 F.2d at 325. Plaintiffs have provided insufficient evidence to prove the corporate
17 relationship between Tatung America and CPT; however, the small amount of evidence in the
18 record indicates that both CPT and Tatung America were partially-owned subsidiaries of Tatung
19 Company. *See, e.g.*, Trial Tr. at 1546:3-1547:19. Plaintiffs have offered insufficient evidence
20 that their purchases (if any) from Tatung America qualify as purchases from a "division or
21 subsidiary" of a conspirator; therefore, this Court must dismiss as a matter of law any claims that
22 Plaintiffs may have based on the purchase of Tatung America finished products, and any Tatung
23 America sales included in Dr. Leamer's damages calculation must be excluded.

24 **10. Toshiba America Information Systems, Inc.**

25 Plaintiffs have offered no evidence that Toshiba America Information Systems, Inc.
26 ("TAIS") either (i) participated in any conspiracy, or (ii) is a division or subsidiary of a co-
27 conspirator that joined the Crystal Meeting conspiracy. Plaintiffs have offered no evidence that
28 TAIS participated in any anticompetitive activity, much less a single, overarching conspiracy to

1 fix the price of LCD panels. TAIS, of course, does not even manufacture or sell LCD panels;
2 instead, TAIS sells finished products. *See, e.g., Amano Test., Trial Tr. at 901:3-5.* TAIS buys
3 LCD panels.

4 Under *Royal Printing*, Plaintiffs must prove that TAIS was a division or a subsidiary of a
5 co-conspirator. As explained more fully in the Motion for JMOL, Plaintiffs have offered
6 insufficient evidence as a matter of law that any Toshiba entity, including TAIS, joined a single,
7 overarching conspiracy; therefore, this Court must dismiss as a matter of law any claims that
8 Plaintiffs may have based on the purchase of TAIS finished products, and TAIS's sales should be
9 excluded from Dr. Leamer's damages calculation.

10 Further, Plaintiffs have failed to provide sufficient evidence for a jury to find that TAIS
11 was a subsidiary or division of any Toshiba entity that was even alleged to be a co-conspirator.
12 During the class period, the only Toshiba entities involved manufacture or sale of LCD panels
13 were Toshiba Corp. and TMD. TAIS is an indirect subsidiary of Toshiba Corp. *See Amano*
14 *Test., Trial Tr. at 900:23-901:20.* The evidence indicates that Toshiba Corp. and TAIS operate at
15 arm's length. *See Ishimura Test., Trial Tr. at 3028:8-10; Exs. 2141, 2142* (in describing the
16 nature of the relationship between Toshiba Corp. and TAIS, Mr. Ishimura testified that the
17 contract between Toshiba Corp. and TAIS has an arbitration clause and that the prices charged
18 between Toshiba Corp. and TAIS for LCD panels "would be those of an arms-length transaction
19 entered into by independent parties"). Plaintiffs have offered no evidence to the contrary.

20 Plaintiffs have also failed to provide sufficient evidence that TAIS is a subsidiary or
21 division of TMD. TMD was formed in April 2002 as a joint venture between Toshiba Corp. and
22 Matsushita. *See Bond Test., Trial Tr. at 2449:19-2451:22, 2455:3-21.* In 2006, Toshiba Corp.
23 purchased Matsushita's shares in TMD, and TMD became a wholly owned subsidiary of Toshiba
24 Corp. *See Amano Test., Trial Tr. at 894:11-895:1; 1072:4-9.* The most that could be inferred
25 from the evidence is that TMD and TAIS were affiliated companies that shared an ultimate parent
26 company, Toshiba Corp. Beyond the (lack of) official corporate relationship, Mr. Amano
27 testified that there was no business relationship between TMD and TAIS. *See Amano Test., Trial*
28 *Tr. at 1071:22-1073:7.* This is insufficient evidence that TAIS was a division or subsidiary of

1 TMD; therefore, Plaintiffs cannot show that they have direct-purchaser status under *Royal*
2 *Printing* and their claims must be dismissed as a matter of law.

3 **B. Plaintiffs Have Not Proven the Necessary Corporate Relationships Among the**
4 **Separate Corporate Defendants Necessary to Establish Direct-Purchaser**
5 **Standing for the Panels Class Plaintiffs**

6 Plaintiffs have also failed to offer sufficient evidence that they purchased LCD panels
7 from a co-conspirator or a “division or subsidiary” of a co-conspirator as required by *Royal*
8 *Printing*. This failure of proof invalidates Dr. Leamer’s damages analysis as it relates to the
9 Panels class.

10 In calculating his damages estimate for the Panels class, Dr. Leamer included panel sales
11 from the following entities: (1) AU Optronics; (2) Chi Mei Corp.; (3) CMO (4) CMO Japan; (5)
12 Epson Electronics America; (6) non-Defendant Tottori SANYO Electric Co., Ltd.; (7) HannStar
13 Display Corp.; (8) Hitachi Display Ltd.; (9) non-Defendant Hitachi Electronic Devices; (10) non-
14 Defendant IPS Alpha; (11) LG Displays Co. Ltd.; (12) non-defendant Samsung Group; (13)
15 Sharp Corp.; (14) non-defendant Sharp Microelectronics of the Americas; (15) Chunghwa Picture
16 Tubes, Ltd.; (16) Toshiba America Electronic Components, Inc.; and (17) Toshiba Matsushita
17 Display. *See* Ex. 745; Leamer Test., Trial Tr. at 2277:13-16. Plaintiffs can satisfy their
18 directness requirement only by offering evidence that either (i) these entities joined the single,
19 overarching conspiracy, or (ii) these entities were either “a division or a subsidiary of a co-
20 conspirator.” *Royal Printing*, 621 F.2d at 326. They have not done so.

21 Except for the small amount of sales information submitted by the Panels class
22 representative Texas Digital Systems — sales which fall outside the Crystal Meeting conspiracy
23 period (*see, supra*, § I.A.) — Plaintiffs have offered no evidence that they purchased LCD panels
24 from any entity. As explained more fully below, there is no evidence in the record that many of
25 these entities participated in *any* anticompetitive conduct, much less joined a single, overarching
26 conspiracy to fix the prices of LCD panels. Although Dr. Leamer purported to include sales data
27 from these 17 entities, the only sales evidence in the record is from Texas Digital Systems’
28 purchases from non-defendant Sharp Microelectronics of the Americas. This lack of proof is fatal

1 to the Plaintiffs' damages calculations. For this reason alone, Toshiba is entitled to judgment as a
2 matter of law.

3 **1. Chi Mei Corporation**

4 As explained in section IV.A.1., *supra*, Plaintiffs have offered no evidence either that (i)
5 Chi Mei Corp. knowingly joined a single, overarching conspiracy or, in fact, the Crystal Meeting
6 conspiracy, or (ii) that Chi Mei Corp. is a division or subsidiary of any co-conspirator. Plaintiffs'
7 evidence regarding the relationship between Chi Mei Corp. and Crystal Meeting participant CMO
8 fail as a matter of law. Plaintiffs have offered insufficient evidence that their panel purchases (if
9 any) from Chi Mei Corp. qualify as purchases from a "division or subsidiary" of a conspirator;
10 therefore, this Court must dismiss as a matter of law any claims that Plaintiffs may have based on
11 the purchase of Chi Mei Corp. panels, and any Chi Mei Corp. panel sales included in Dr.
12 Leamer's damages calculation must be excluded.

13 **2. Epson Electronics America and Non-Defendant Tottori SANYO** 14 **Electric Co., Ltd.**

15 Plaintiffs have failed to connect their purchases from any Epson entity (if any) to a co-
16 conspirator. A single Epson entity, Epson Imaging Devices Corp. ("EID"), pleaded guilty to
17 violating the U.S. antitrust laws in connection with their sale of LCD panels to one opt-out entity,
18 Dell. *See* Trial Tr. at 1723:13. There is no evidence that EID or any other Epson entity
19 participated in the Crystal Meetings.

20 EID manufactured LCD panels for small mobile devices (cellular phones and smart
21 phones) and sold them to another Epson entity, Epson Electronics America, Inc. ("EEA"). *See*
22 Ex. 3002 (Hodowski Dep. at 27:25-28:1, 28:21-29:4, 29:22-30:4, 30:12-13). EEA sold these
23 panels to Motorola, Apple, and Research in Motion. *See* Ex. 3002 (Hodowski Dep. at 51:19-21,
24 51:23-52:3). The panels manufactured by EID and sold by EEA are custom products specified by
25 EEA's customers. *See* Ex. 3002 (Hodowski Dep. at 76:22-77:6, 137:12-15, 137:17). EEA does
26 not utilize resellers, brokers, distributors or any other intermediaries between itself and its
27 customers. *See* Ex. 3002 (Hodowski Dep. at 79:18-21). Mobile device panels and finished
28 products are not included in any of the direct purchaser classes. *See* Class Cert. Order at 34-35.

There is no evidence that EID sold TFT-LCD panels to any customers in the United States other than to EEA. There is no evidence that EEA participated in any conspiracy. EEA is not a division or subsidiary of EID. *See* Ex. 3002 (Hodowski Dep. at 35:8-11). Instead, from October 1, 2004 until December 27, 2006, EID (then known as Sanyo Epson Engineering Devices Corp.) was a joint venture formed by Seiko Epson Corp. and Sanyo Corp. *See* Ex. 3002 (Hodowski Dep. at 38:11-39:1). On December 28, 2006, Seiko Epson Corp. bought Sanyo Corp.'s share of the joint venture. *Id.* EEA is an indirect subsidiary of Seiko Epson Corp. *See* Ex. 3002 (Hodowski Dep. at 35:8-11). EEA and EID are affiliated companies who currently share a common parent company. There is no evidence that Seiko Epson Corp. participated in any conspiracy. And there is no evidence in the record regarding Tottori SANYO Electric Co.'s ("TSEC") corporate affiliation with any other entity in the case, much less EID.

In order for the Plaintiffs to fit their EEA and TSEC purchases (if any) into the *Royal Printing* exception to *Illinois Brick*, they must show that EEA and TSEC were either divisions or subsidiaries of EID. *See Royal Printing*, 621 F.2d at 326. Because no evidence suggests any such relationship, this Court must dismiss as a matter of law any claims that Plaintiffs may have based on the purchase of EEA and TSEC panels, and EEA and TSEC's sales must be excluded from any damages calculation.

3. Hitachi Displays, Ltd., Non-Defendant Hitachi Electronic Devices, USA, and Non-Defendant IPS Alpha

Plaintiffs have failed (i) to connect HDL to any purchases by Plaintiffs, (ii) to appropriately connect HDL to non-defendant Hitachi Electronics Devices, USA (“HEDUS”), and (iii) to provide sufficient evidence to prove the corporate relationship between IPS Alpha and any co-conspirator.

The parties have stipulated that HDL pleaded guilty to violating the U.S. antitrust laws in connection with their sale of LCD panels to one opt-out, Dell. *See* Trial Tr. at 1722:7-1723:11. There is no evidence that any Hitachi entity participated in the Crystal Meetings. It is HDL, *i.e.*, the only Hitachi entity attached to any conspiracy, to which Plaintiffs must connect their purchases. They have not.

1 HDL manufactured and sold LCD panels for notebook computers until around 2005. *See*
2 Ex. 3003 (Yamada Dep. at 59:15-21). There is no evidence that HDL sold LCD panels directly
3 into the United States. Instead, HDL sold LCD panels to HEDUS. *See* Trial Tr. 1564:17-25.
4 There is no evidence that HEDUS participated in any conspiracy. HEDUS is not a subsidiary of
5 HDL. *See* Trial Tr. at 1565:1-6. The most that could be inferred from Plaintiffs' evidence is that
6 HDL and HEDUS are affiliated companies that share a common parent company, Hitachi Ltd.,
7 although neither company was a direct subsidiary of Hitachi Ltd. There is no evidence that
8 Hitachi Ltd. participated in any conspiracy.

9 In order for Plaintiffs to fit their HEDUS purchases (if any) into the *Royal Printing*
10 exception to *Illinois Brick*, they must show that HEDUS was a division or subsidiary of HDL.
11 *See Royal Printing*, 621 F.2d at 326. Because no evidence suggests any such a relationship, this
12 Court must dismiss as a matter of law any claims that the Plaintiffs may have based on the
13 purchase of HEDUS panels, and HEDUS panel sales must be excluded from any damages
14 calculation.

15 Finally, the only evidence of joint venture IPS Alpha's corporate posture came from the
16 deposition testimony of Tadashi Yamada. He testified that "[i]nitially, Hitachi Displays did own
17 50 percent of IPS Alpha." Ex. 3003 (Yamada Dep. at 58:13-18). Mr. Yamada also testified that,
18 at the time of the deposition, HDL owned "in the neighborhood of 20 to 30 percent." Ex. 3003
19 (Yamada Dep. at 58:13-59:4). This evidence is insufficient as a matter of law to prove that the
20 IPS Alpha joint venture was a division or subsidiary of HDL; therefore, this Court must dismiss
21 as a matter of law any claims that Plaintiffs may have based on the purchase of IPS Alpha panels,
22 and IPS Alpha's sales should be excluded from any damages calculation.

23 In his damages analysis, Dr. Leamer apparently includes sales from HDL. *See* Ex. 745.
24 As explained above, however, the only conspiratorial conduct for which Plaintiffs have provided
25 sufficient evidence is the conduct described in HDL's plea agreement. *See* Trial Tr. at 1722:7-
26 1723:11. These sales were to Dell, an opt-out. *See* Trial Tr. at 1722:7-1723:11, 2621:21-
27 2622:19. Therefore, Plaintiffs have presented no evidence of HDL joining a conspiracy that
28 covered any products sold to the Plaintiffs. For this additional reason, this Court must dismiss as

1 a matter of law any claims that Plaintiffs may have based on the purchase of HDL panels, and
2 HDL's sales should be excluded from any damages calculation.

3 **4. Sharp Corp.**

4 Claims based on purchases of Sharp Corp. panels should be dismissed as a matter of law
5 because the Plaintiffs failed to prove that Sharp Corp. joined a single, overarching conspiracy.
6 The only Sharp Corp. conspiratorial evidence in the record relates to its sales to Dell, Apple, and
7 Motorola (*see* Trial Tr. at 1720:15-1722:13), all of which are opt-outs (*see* Trial Tr. at 2621:21-
8 2622:19); therefore, Plaintiffs have presented no evidence of Sharp Corp. joining a conspiracy
9 that covered any products sold to the Plaintiffs. For this reason, this Court must dismiss as a
10 matter of law any claims that Plaintiffs may have based on the purchase of Sharp Corp. panels,
11 and Sharp Corp.'s sales should be excluded from any damages calculation.

12 **5. Sharp Microelectronics of the Americas**

13 Plaintiffs have offered no evidence that Sharp Microelectronics of the Americas
14 participated in any conspiracy or was a division or subsidiary of any co-conspirator. The only
15 references to SMA in the entire evidentiary record are (1) regarding SMA's panel sales to Panels
16 class representative Texas Digital Systems (*see* Ex. 611), and (2) as an entity listed by Dr. Leamer
17 in Ex. 745 as a "defendant entit[y] that produced transactional records showing sales to the class"
18 (Leamer Test., Trial Tr. at 2277:13-16). SMA, however, is not a defendant. Plaintiffs offered no
19 evidence whatsoever regarding the corporate relationship between SMA and any other Sharp
20 entity. This lack of proof is fatal to the claims of Texas Digital Systems and every other Panels
21 class member (*see, supra*, § I.A.). Because Plaintiffs failed to prove that SMA was a division or
22 subsidiary of a co-conspirator, this Court must dismiss as a matter of law any claims based on
23 panel purchases from SMA, and any SMA sales included in Dr. Leamer's damages calculation
24 must be excluded.

25 **6. Toshiba America Electronic Components, Inc. and Toshiba** 26 **Matsushita Display**

27 Plaintiffs have offered no evidence that Toshiba America Electronic Components, Inc.
28 ("TAEC") or Toshiba Matsushita Displays ("TMD") is a division or subsidiary of a co-

1 conspirator that joined the Crystal Meeting conspiracy. As explained more fully in the Motion
2 for JMOL, Plaintiffs have offered insufficient evidence as a matter of law that any Toshiba entity,
3 including TAEC or TMD, joined a single, overarching conspiracy; therefore, this Court must
4 dismiss as a matter of law any claims that Plaintiffs may have based on the purchase of TAEC or
5 TMD panels, and their sales should be excluded from Dr. Leamer's damages calculation.

6 **V. INSUFFICIENT EVIDENCE OF DAMAGES**

7 Plaintiffs have offered no evidence in support of damages at trial other than the expert
8 testimony of Dr. Leamer. Dr. Leamer's work was methodologically flawed (*see* Motion to Strike
9 Expert Testimony of Dr. Edward Leamer, June 27, 2012 (ECF No. 6014)), and has insufficient
10 factual support. For example, Dr. Leamer's work rests on an HHI variable, but Dr. Leamer did
11 not define the relevant product markets; therefore, his HHI analysis was applied without
12 evidentiary support. Toshiba has also previously noted Dr. Leamer's aggregation of damages and
13 the fact that Dr. Leamer's overcharge model gives the jury no basis on which to award damages
14 without all factual predicates upon which Dr. Leamer relies being proven. *See* Motion for JMOL
15 at 16-20. The fact that the certified classes include purchases from named defendants and named
16 co-conspirators but which are not among Dr. Leamer's twelve firms for damages also means that
17 Dr. Leamer's work cannot provide a basis for establishing class-wide damages. *Compare* Third
18 Amended Direct Purchaser Plaintiffs' Consolidated Complaint, Dec. 2, 2009 (ECF No. 1407)
19 (listing, *e.g.*, Panasonic Corp. as co-conspirator) *and* Class Cert. Order, Mar. 28, 2010, at 34 (ECF
20 No. 1641 (including purchases from "any named co-conspirator") *with* Ex. 745 (excluding
21 Panasonic and many other Defendants and co-conspirators).

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CONCLUSION

For the foregoing reasons, Toshiba's motion for judgment as a matter of law should be granted.

Respectfully submitted,

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WHITE & CASE

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