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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	Master File No. 3:07-md-01827 SI MDL NO. 1827
This Document Relates To: DIRECT PURCHASER CLASS ACTION	**TOSHIBA ENTITIES' TRIAL BRIEF IN SUPPORT OF THEIR MOTION FOR JUDGMENT AS A MATTER OF LAW** Date: [TBD] Time: [TBD] Place: Courtroom 10, 19th Floor Judge: Hon. Susan Illston

TABLE OF CONTENTS

Page

INTRODUCTION 1

SUMMARY OF RELEVANT FACTS AND LAW 1

ARGUMENT 4

I. PLAINTIFFS HAVE FAILED TO PROVE CLASS-WIDE IMPACT AND DAMAGES THROUGH THEIR THEORY OF A SINGLE, OVERARCHING CONSPIRACY SPANNING THE ENTIRE CLASS PERIOD 5

A. The Crystal Meeting Conspiracy Was a Self-Contained Conspiracy in Which Toshiba Did Not Participate 6

B. Plaintiffs Have Offered No Evidence of Anticompetitive Agreements in the Period Prior to September 2001 8

i. Plaintiffs Have Offered No Evidence that Anticompetitive Agreements Were Reached at the 1998 Taiwan Golf Course Meeting 9

ii. Plaintiffs Have Offered No Evidence that Anticompetitive Agreements Were Reached at the "Tiger Cub" Meeting 10

iii. Plaintiffs Remaining Evidence from the Pre-September 2001 Period Does Not Demonstrate the Alleged Conspiracy 12

iv. The Birth of the Crystal Meetings Indicates that There Had Been No Prior Conspiracy 13

B. Plaintiffs' Have Not Demonstrated That the Crystal Meeting Conspiracy Continued to Be Effective After 2005 14

C. Plaintiffs Have Not Linked the Japanese Guilty Pleas to the Alleged Conspiracy 15

D. In the Absence of Proof of a Single, Overarching Conspiracy, Plaintiffs' Claims Must Fail 16

II. PLAINTIFFS HAVE FAILED TO INTRODUCE EVIDENCE TENDING TO EXCLUDE THE POSSIBILITY THAT TOSHIBA ACTED INDEPENDENTLY 21

A. The Proffered Circumstantial Evidence in This Case Does Not Rebut Toshiba's Showing of a Legitimate Business Purpose for Its Conduct 22

B. Plaintiffs Have Failed to Demonstrate that Toshiba Agreed to Join the Crystal Meeting Conspiracy through Contacts with H.B. Suh 24

C. Plaintiffs' Alternative Theories Fail to Demonstrate that Toshiba Agreed to Join the Alleged Conspiracy Linked to the Crystal Meetings 27

D. Plaintiffs' Circumstantial Evidence of Alleged Consciousness of Guilt is Inadequate 32

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Amerinet, Inc. v. Xerox Corp.,
972 F.2d 1483 (8th Cir. 1991) 16, 19

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan,
203 F.3d 1028 (8th Cir. 2000) 31

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 17, 18

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 21

Cement Mfrs. Protective Ass'n v. United States,
268 U.S. 588 (1925) 29

Deaktor v. Fox Grocery Co.,
475 F.2d 1112 (3d Cir. 1973) 16, 19

Dickson v. Microsoft Corp.,
309 F.3d 193 (4th Cir. 2002) 7

Edgerly v. City and Cnty. of S.F.,
599 F.3d 946 (9th Cir. 2010) 4

Farley Transp. Co., Inc. v. Santa Fe Trail Transp. Co.,
786 F.2d 1342 (9th Cir. 1985) 19

Farmington Dowel Prods. Co. v. Forster Mfg.,
421 F.2d 61 (1st Cir. 1969) 19

In re Baby Food Antitrust Litig.,
166 F.3d 112 (3d Cir. 1999) ..... passim

In re Citric Acid Litig.,
191 F.3d 1090 (9th Cir. 1999) ..... passim

In re Citric Acid Litig.,
996 F. Supp. 951 (N.D. Cal. 1998) ..... passim

In re Hydrogen Peroxide Antitrust Litig.,
552 F.3d 305 (3d Cir. 2008) 18

In re Iowa Ready-Mix Concrete Antitrust Litig.,
768 F. Supp. 2d 961 (N.D. Iowa 2011) 7

In re New Motor Vehicles Canadian Export Antitrust Litig.,
632 F. Supp. 2d 42 (D. Me. 2009) 18

In re Optical Disk Drive Antitrust Litig.,
No. 3:10-md-2143 RS, 2011 WL 3894376 (N.D. Cal. Aug. 3, 2011) 7

Krehl v. Baskin-Robbins Ice Cream Co.,
664 F.2d 1348 (9th Cir. 1982) 9

Liu v. Amerco,
677 F.3d 489 (1st Cir. 2012) 11, 31

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 10, 21

MCI Commnc'ns Corp. v. Am. Tel. & Tel. Co.,
708 F.2d 1081 (7th Cir. 1982) 20

Monsanto Co. v. Spray-Rite Serv. Corp.,
465 U.S. 752 (1984) 5, 21

Paddack v. Dave Christensen, Inc.,
745 F.2d 1254 (9th Cir. 1984) 17

Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd.,
No. 08-CV-42, 2011 WL 7053807 (E.D.N.Y. Jan. 4, 2011) 7

United States v. 0.59 Acres of Land,
109 F.3d 1493 (9th Cir. 1997) 17

United States v. Am. Airlines, Inc.,
570 F. Supp. 654 (N.D. Tex. 1983), *rev'd on other grounds*,
743 F.2d 1114 (5th Cir. 1984) 31

United States v. Sargent Elec. Co.,
785 F.2d 1123 (3d Cir. 1986) 6, 8

United States v. U.S. Gypsum Co.,
438 U.S. 422 (1978) 28

United States v. Wilshire Oil Co.,
427 F.2d 969 (10th Cir. 1970) 7

United States v. Zemek,
634 F.2d 1159 (9th Cir. 1980) 5, 6

Weisgram v. Marley Co.,
528 U.S. 440 (2000) 18

Wilcox v. First Interstate Bank of Ore.,
815 F.2d 522 (9th Cir. 1987) 21, 22

FEDERAL RULES

Fed. R. Civ. P. 50 ..... 4, 18, 21

Fed. R. Evid. 703 17

INTRODUCTION

The opinions proffered by Plaintiffs' experts for establishing antitrust impact and damages are predicated upon the existence of a single, overarching conspiracy spanning the entire class period (January 1, 1999 to December 31, 2006) and including all sales of various named Defendants and co-conspirators in that period (the "Alleged Conspiracy"). But Plaintiffs have not presented a legally sufficient evidentiary basis for a reasonable jury to find that there was a single conspiracy so sweeping in time and scope. Plaintiffs, in their case in chief, have presented evidence of disparate conduct but have failed to present a legally sufficient evidentiary basis for connecting that conduct into a single, overarching conspiracy and have otherwise left sizeable gaps in the period of the alleged conspiracy — most notably the period preceding the first Crystal Meeting on September 14, 2001 — and in the membership of the conspiracy. These gaps and omissions in the evidentiary record fatally undermine Plaintiffs' impact and damages methodology, which is predicated on proof of the Alleged Conspiracy, such that Plaintiffs cannot satisfy the elements of class-wide impact and a reasonable method for proving damages, which are essential to their claim.

Furthermore, Plaintiffs have failed to present a legally sufficient evidentiary basis for a reasonable jury to find that Toshiba joined the Alleged Conspiracy in any event. Plaintiffs do not have any direct evidence that Toshiba agreed to join any such conspiracy, and the circumstantial evidence Plaintiffs have introduced is insufficient under the special rules applicable in Sherman Act Section 1 cases, as Plaintiffs have not excluded the possibility that Toshiba acted independently.

SUMMARY OF RELEVANT FACTS AND LAW

Throughout this case, Plaintiffs have consistently defined the Alleged Conspiracy as a single, worldwide conspiracy spanning the entire duration of the class period. Third Am. DPPs' Consol. Compl. ¶ 4, Nov. 2, 2009 (ECF No. 1416); DPPs' Opp'n to Joint Mot. to Dismiss at 13, Jan. 30, 2009 (ECF No. 813) ("Plaintiffs allege a multifaceted, multinational price-fixing conspiracy organized at the highest level of the defendant organizations and carried out by both executives and subordinate employees."); DPPs' Reply in Supp. of Mot. for Class Certification at

8, Aug. 20, 2009 (ECF No. 1214) ("[D]efendants try to improperly rewrite plaintiffs' complaint — sustained by this Court — which alleges a single, overriding conspiracy spanning the entire Class Period.").

This Court relied upon Plaintiffs' allegation of a single conspiracy when it certified the DPP classes. *See* DPP Class Certification Order, at 13, Mar. 28, 2010 (ECF No. 1641) ("Class Cert. Order") ("[P]laintiffs have consistently alleged a single, overriding conspiracy spanning the entire class period."). Plaintiffs obtained certification of broad classes encompassing several years (1999-2006), consisting of all direct purchasers of LCD panels regardless of size, shape, resolution, or application from any of the alleged members of Alleged Conspiracy, as well as a class of all direct purchasers of finished notebook computers, monitors and televisions containing an LCD panel. In granting class certification, this Court expressly stated the burden that Plaintiffs would bear at trial in establishing antitrust injury across the class: "[p]laintiff[s] must be able to establish predominantly with generalized evidence, that all (or nearly all) members of the class suffered damage as a result of Defendants' alleged anticompetitive conduct." Class Cert. Order at 27 (alteration in original).

In opposing summary judgment, Plaintiffs re-confirmed that the single conspiracy they alleged was "tied to the Crystal Meetings." DPPs' Opp'n to Toshiba's Mot. for Summ. J. at 6 n.3, Oct. 3, 2011 (ECF No. 3803) (acknowledging that Plaintiffs have asserted "a single, overarching price-fixing conspiracy tied to the Crystal Meetings"). In their opening statement, Plaintiffs again confirmed their allegation that there was "one conspiracy here." Plaintiffs' Opening, Trial Tr. at 216.

Plaintiffs were of course free to plead their case in the fashion of their choosing, but there were substantial consequences to that choice. Plaintiffs' approach may have offered the prospect of significant damages, but Plaintiffs thereby took on the burden of proving the existence of such a broad conspiracy and class-wide impact on all (or nearly all) of the members of that broad class. *See* Class Cert. Order at 27. Plaintiffs' arguments in support of class certification (including common impact among "all or nearly all" class members), and now, more importantly, the damages theories (both fact and amount) of Plaintiffs' experts at trial, rest upon the assumption of

a single, overarching conspiracy linked to the Crystal Meetings. *See* Class Cert. Order at 28 ("Dr. Flamm's report assumes that there was a conspiracy among TFT-LCD manufacturers as plaintiffs have alleged.").

While the evidence undoubtedly establishes the existence of a conspiracy surrounding the Crystal Meetings, there is insufficient evidence as a matter of law to establish that other conduct — such as conduct prior to September 14, 2001, or conduct of Toshiba — was part of the same conspiracy. Plaintiffs' own witnesses have testified uniformly that the Crystal Meetings originated in September 2001 among the Korean and Taiwanese LCD suppliers, without any linkage to pre-existing conduct. Those same witnesses testified that, while there was consideration of inviting certain Japanese manufacturers to the Crystal Meetings, such consideration did not result in the participation of any Japanese companies, including Toshiba, in the Crystal Meetings. Indeed, there is no evidence that Toshiba was invited to attend the Crystal Meetings. When the evidence is viewed as a whole, it reveals not a single, overarching conspiracy from 1999 to 2006, but hardcore cartel activity associated with the Crystal Meetings from September 2001 to 2005 among the Korean and Taiwanese suppliers, with separate episodic instances of information exchange that Plaintiffs have failed to connect into the alleged single, overarching conspiracy.

Plaintiffs' experts on impact and damages, Dr. Kenneth Flamm and Dr. Edward Leamer, respectively, based their conclusions on certain facts regarding the membership and duration of the Alleged Conspiracy, but the evidence presented at trial does not provide an evidentiary basis for these facts. For example, Dr. Flamm proceeded on the basis that the Alleged Conspiracy began no later than 1998, but the evidence does not provide a foundation for any such finding. Likewise, Dr. Leamer assumed that every single sales transaction by every specified co-conspirator, regardless of panel size, resolution or application included an illegal overcharge, from 1999 through 2006. In both cases, the conclusions of these experts were dependent upon proof of the alleged duration and scope of the Alleged Conspiracy.

Plaintiffs' failure of proof as to impact or antitrust injury caused by the Alleged Conspiracy can be illustrated by the facts surrounding the sales to the sole panel class

representative, Texas Digital Systems, Inc. Texas Digital's LCD Panel purchases all predated the very first Crystal Meeting, and all of Texas Digital's purchases were made from Sharp. Trial Ex. 2121. The evidence at trial is insufficient to establish either the existence of the Alleged Conspiracy prior to the first Crystal Meeting, or the involvement of Sharp in any such conspiracy. Texas Digital's claim therefore must fail, and with it, the claims of the panel class that Texas Digital represents.

With respect to Toshiba specifically, the evidence introduced at trial reflects various competitor contacts, and whatever the legal significance of these contacts, Plaintiffs have offered no evidence linking such contacts to the broader Alleged Conspiracy. Indeed, the consistent testimony of actual Crystal Meeting participants at trial was that Toshiba was not invited to the Crystal Meetings, did not attend the Crystal Meetings and did not otherwise participate in the Alleged Conspiracy. There is an insufficient evidentiary basis to find that anyone at Toshiba even knew about the Crystal Meetings. Finally, as explained below, the testimony of H.B. Suh of Samsung is insufficient as a matter of law to link Toshiba to the Crystal Meetings even when all reasonable inferences are drawn in favor of Plaintiffs.

In short, Plaintiffs have not introduced a sufficient evidentiary basis to permit a reasonable jury to find either (i) that there was a single, overarching conspiracy spanning the entire class period, or (ii) that Toshiba joined such a conspiracy. For these separate and independent reasons, Toshiba is entitled to judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure.

ARGUMENT

Although this Court found that there were issues of material fact at the summary judgment stage, Plaintiffs have now presented their case in chief at trial, and the Court has a different evidentiary record, which must stand on its own. *See Edgerly v. City and Cnty. of S.F.*, 599 F.3d 946, 950-51 (9th Cir. 2010) ("In reviewing the district court's summary judgment ruling, we consider only the evidence submitted in connection with the parties' motions . . . . Conversely, in reviewing the district court's Rule 50(a) ruling, we consider only the evidence presented at trial."). The present evidentiary record, after Plaintiffs' case in chief, reflects a failure of proof on

various elements essential to Plaintiffs' claim, including antitrust impact and damages, as well as the basis for connecting Toshiba to the Alleged Conspiracy.

I. PLAINTIFFS HAVE FAILED TO PROVE CLASS-WIDE IMPACT AND DAMAGES THROUGH THEIR THEORY OF A SINGLE, OVERARCHING CONSPIRACY SPANNING THE ENTIRE CLASS PERIOD

Plaintiffs in their case in chief have presented evidence that is, at most, a legally sufficient basis for a reasonable jury to find disparate conspiratorial conduct. Plaintiffs, however, have failed to present a sufficient evidentiary basis for connecting that conduct into a single, overarching conspiracy spanning the entire class period. Therefore, Plaintiffs have failed to establish the essential elements of class-wide impact and a reasonable method for estimating damages.

Plaintiffs have certainly presented evidence that constitutes a legally sufficient basis for a reasonable jury to find a conspiracy among the attendees of the Crystal Meetings, which began on September 14, 2001 and concluded by 2006. That evidence took the form of testimony and extensive meeting notes from various attendees, including Brian Lee of Chunghwa (who testified live), as well as the convictions of various Crystal Meeting attendees and their employers. But that Crystal Meeting evidence is not a sufficient evidentiary basis for finding a conspiracy any broader than the one among the Crystal Meeting participants.

A reasonable jury also would not have a legally sufficient basis to graft together various episodes of distinct conduct — such as the Crystal Meetings, product-and customer-specific guilty pleas and separate bilateral communications among Japanese manufacturers — into a "single, overarching conspiracy" as Plaintiffs seek. In short, Plaintiffs have failed to offer a sufficient evidentiary basis that each of the participants in the Alleged Conspiracy manifested a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Indeed, the record is devoid of any evidence of an "overall agreement" among all of the alleged conspirators. *See United States v. Zemek*, 634 F.2d 1159, 1167 (9th Cir. 1980) ("The general test [for determining whether

separate acts are part of a single conspiracy] is whether there was 'one overall agreement' to perform various functions to achieve the objectives of the conspiracy.").

Plaintiffs' bald and conclusory assertion that the Alleged Conspiracy was based on a common goal of "stabilizing the price" of LCD panels from 1999 through 2006 is inadequate to prove the existence of an overarching agreement. Plaintiffs' Opening, Trial Tr. at 187. *See United States v. Sargent Elec. Co.*, 785 F.2d 1123, 1127 (3d Cir. 1986) (holding that "the common purpose" of eliminating price competition "is not alone sufficient to establish a violation of section 1 of the Sherman Act"); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 133 (3d Cir. 1999) (finding that, if the defendants' alleged motive was to increase prices, "then every company in every industry would have such a 'motive'"); *see also In re Citric Acid Litig.*, 996 F. Supp. 951, 954 (N.D. Cal. 1998) (granting summary judgment for Cargill even where its prices "generally followed those of the conspirators").

A. The Crystal Meeting Conspiracy Was a Self-Contained Conspiracy in Which Toshiba Did Not Participate

The evidence from Plaintiffs' case in chief is uniform in establishing that the Crystal Meetings were highly structured affairs among a common group of six Taiwanese and Korean manufacturers, conducted on a monthly basis, with agendas, various "tiers" of individual participants (including CEOs and Presidents) and an unmistakable focus on mainstream, commodity products. *See, e.g.*, Trial Ex. 3008 (Cho. Dep. at 30:19-23, 39:13-40:11) (attended vice-president level and other meetings once per month from 2001 to May 2005); Lee Test., Trial Tr. at 1385:19-24 (CEO-level meetings occurred once per quarter); Lee Test., Trial Tr. at 1437:1-15 (Crystal Meetings followed a formal structure); Lee Test., Trial Tr. at 1385:12-1386:9 (Crystal Meetings related to "mainstream" products).

The Crystal Meeting conduct is fundamentally different from the other conduct alleged in this case, as discussed in more detail below. These fundamental differences in the nature of the conduct, structure of the interactions, identity of the participants and other surrounding circumstances preclude as a matter of law any finding by a reasonable jury that the conduct constituted a single conspiracy. *See, e.g.*, *Zemek*, 634 F.2d at 1167-70; *Baby Food*, 166 F.3d at

119 ("There was no organized system to secure the information; it was obtained sporadically, verbally, and informally in conversations among the representatives."); *Citric Acid*, 996 F. Supp. at 959 (declining to infer participation in a conspiracy based on meetings with conspirators: "these meetings have even less probative value when viewed in light of the way the conspiracy admittedly functioned," through formal meetings involving top executives from the conspiring companies); *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-md-2143 RS, 2011 WL 3894376, at *9 (N.D. Cal. Aug. 3, 2011) (granting motion to dismiss and finding that three separate instances of bid-rigging, even if proven, were "a far cry from establishing plausibility for a broad six year continuing agreement among all defendants to fix the prices of all ODDs sold through innumerable other channels"); *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 768 F. Supp. 2d 961, 972 (N.D. Iowa 2011) (granting motion to dismiss where "plaintiffs fail[ed] to allege any facts that could tie together the specific, discrete incidents of admitted misconduct and the overarching all-defendant four-plus-year conspiracy that the plaintiffs wish to prosecute").

Plaintiffs rely largely on LG and Samsung's interactions with non-Crystal Meeting members in an attempt to prove the Alleged Conspiracy; but the same party may participate in separate price-fixing conspiracies, even with respect to the same product. *United States v. Wilshire Oil Co. of Tex.*, 427 F.2d 969, 977-78 (10th Cir. 1970) (finding that the same defendant participated in separate conspiracies to fix the price of liquid asphalt in adjoining states, with "no connecting link" between the two conspiracies, based on testimony that group meetings in each state never related to deliveries in the other state); *Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd.*, No. 08-CV-42, 2011 WL 7053807, at *27-28 (E.D.N.Y. Jan. 4, 2011) (dismissing allegations of a "single global conspiracy" to fix freight rates because of nothing "more than overlap" among certain defendants involved in separate conspiracies and dismissing allegations of regional conspiracies because plaintiffs failed to establish that conspiracies were "connected by common goals, methods or actors"); *see also Dickson v. Microsoft Corp.*, 309 F.3d 193, 203 (4th Cir. 2002) (affirming dismissal of class action suit alleging a single "rimless wheel" antitrust conspiracy in which "various defendants enter[ed] into separate agreements with a common defendant, but where the defendants have no connection with one another, other than the

common defendant's involvement in each transaction" because such a conspiracy constitutes "not a single, general conspiracy but instead amounts to multiple conspiracies between the common defendant and each of the other defendants").

Competitor contacts involving Toshiba, in contrast to the Crystal Meeting conduct, were informal, usually occurred among employees with little or no pricing authority and were focused generally on other panel products. *See, e.g.*, Chiba Test., Trial Tr. at 570:12-14 ("Q. During your time as the head of sales for mobile products, did you have any pricing authority over those products? A. I did not have complete pricing authority."); Amano Test., Trial Tr. at 903:25-904:3 ("Q. Now, the person who was in charge of sales . . . they had pricing authority for LCD panels. Correct? A. No, they did not."). Moreover, the evidence Plaintiffs have presented against Toshiba is limited to communications with other LCD suppliers, the overwhelming majority of which concern custom-made projects for customers with rigorous supplier qualification standards, including Apple, Motorola and Dell. Plaintiffs cannot demonstrate that Toshiba participated in Crystal Meeting conduct, much less the Alleged Conspiracy, when Plaintiffs' evidence relates entirely to information exchanges concerning niche projects for specific opt-out customers and other customers who are not even in this case. *See Sargent*, 785 F.2d at 1127 ("An agreement to rig bids 'wherever and whenever possible' is meaningless for Sherman Act purposes unless there are in the real world of the marketplace some 'whens' and 'wheres.'").

B. Plaintiffs Have Offered No Evidence of Anticompetitive Agreements in the Period Prior to September 2001

Plaintiffs have not presented a sufficient evidentiary basis to permit a reasonable jury to find the existence of a single, overarching price-fixing conspiracy predating the Crystal Meetings, which began in September 2001. The instances of contact among competitors during this period represent, at best, a smattering of competitor interactions that are unconnected both to one another and to the regular, systematic cartel meetings that began with the Crystal Meetings. In fact, Plaintiffs' evidence only tends to *disprove* the existence of a conspiracy in the period from 1998 to September 2001, as the evidence consists primarily of suppliers' complaints that there was *fierce competition* throughout the pre-Crystal Meeting period.

i. Plaintiffs Have Offered No Evidence that Anticompetitive Agreements Were Reached at the 1998 Taiwan Golf Course Meeting

H.S. Kim of Samsung, who testified by video at trial, is the only witness in this case who attended the 1998 Taiwan golf meetings that Plaintiffs have described as the "birth" of the conspiracy. *See* Plaintiffs' Opening, Trial Tr. at 190. Mr. Kim testified that there was no discussion about pricing at these meetings, and that no agreements were reached on pricing. Trial Ex. 3009 (Kim Dep. at 384:11-385:19) ("Q. . . . But just to be clear, there was no such agreement reached at the 1998 meetings, correct? [A.] I agree."). In fact, Mr. Kim testified that it would have been "hard to have that kind of conversation [about price-fixing agreements] *at that time*." Trial Ex. 3009 (Kim Dep. at 385:11-12) (emphasis added). And yet, it is precisely "at that time" that Plaintiffs, and their expert Dr. Flamm, maintain the collusion began. Plaintiffs' Opening, Trial Tr. at 194 ("[The conspiracy] evolved from a meeting on a golf course into everything you see on the time line happening all at once, all together."); Flamm Test., Trial Tr. at 2098:18-2099:10 ("Q. But you don't know when it started exactly? . . . . A. The best date that I found would have been the golf course meeting, back in 1998 . . . .").

The attendees at the Taiwan golf course meetings were locally dispatched employees who were not "in the position to talk about how much the headquarters were willing to put out as the entire production." Trial Ex. 3009 (Kim Dep. at 386:4-15). Therefore, no agreements could have been reached, even on production. There is no evidence that Mr. Kim had pricing authority at the time of the 1998 meetings. Trial Ex. 3009 (Kim Dep. at 27:3-12) (testifying that he had pricing authority after he accepted a position as Senior Manager of Worldwide Sales in Korea in 1999). *Baby Food*, 166 F.3d at 125 ("Evidence of sporadic exchanges of shop talk among field sales representatives who lack pricing authority is insufficient to survive summary judgment.") (citing *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982)).

The information exchanged at the first Taiwan golf course meeting consists of a chart of the attendees' *aggregate* sales volumes *in the Taiwan market* for 1997 and the first two quarters of 1998. Trial Ex. 186 ("Taiwan TFT-LCD" chart); Trial Ex. 3009 (Kim Dep. at 47:8-48:10). Mr. Kim did not know how the other attendees "came up" with the numbers they entered in the

chart. Trial Ex. 3009 (Kim Dep. at 49:4-25). The chart does not identify sales volumes for specific panel sizes, resolutions or applications; the information it contains is purely aggregate. Trial Ex. 186. Perhaps not surprisingly, Mr. Kim did not believe that the information in the chart indicated "something very clear." Trial Ex. 3009 (Kim Dep. at 53:13-18); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (holding that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case").

As Mr. Kim explained, the only "consensus" that the LCD suppliers reached based on the information in the chart was "something to the effect of, 'Wow, the competition is going to be fierce.'" Trial Ex. 3009 (Kim Dep. at 55:9-20). Mr. Kim testified that a follow-up meeting occurred a few months later, where "the sales plan" of each attendee was again discussed. Trial Ex. 3009 (Kim Dep. at 60:21-61:9). At no point did Mr. Kim testify that agreements were reached at either of the two 1998 meetings. There is no evidence of a third meeting among the Taiwan golf course attendees.

Plaintiffs theorize that as a result of these meetings, the LCD suppliers agreed to "do something about" the fierce competition in the Taiwan market. Plaintiffs' Opening, Trial Tr. at 189. But Plaintiffs have not offered a sufficient evidentiary basis to support a finding that these meetings affected any company's decisions concerning production levels or pricing. Moreover, Mr. Amano has offered unrebutted testimony that Toshiba's strategy was to run its factories at 100% of capacity at all times in order to recoup investment costs. *See* Amano Test., Trial Tr. at 1081:18-23; Leamer Test., Trial Tr. at 2356:4-17 ("Provided the price exceeds the marginal costs — exceeds the operating costs, you have an incentive to operate at full capacity.").

ii. Plaintiffs Have Offered No Evidence that Anticompetitive Agreements Were Reached at the "Tiger Cub" Meeting

Plaintiffs' remaining evidence of a pre-September 2001 conspiracy is similarly inadequate for a jury to find a single, overarching conspiracy spanning the entire class period. Plaintiffs rely heavily on Trial Exhibit 109, a January 18, 2000 report drafted by LG, concerning a bilateral meeting between LG and Sharp. Although Plaintiffs maintain that an LCD cartel had been formed nearly two years before the date of this document, Trial Exhibit 109 indicates that Sharp

survived a period of oversupply in 1998 by "quickly shift[ing] to small sizes in advance" of a new wave of demand for small- and medium-sized panels, not by colluding, as Plaintiffs allege. Trial Ex. 109-4 ("Sharp is planning to continuously create new markets on their own.").

Plaintiffs fixate on a section of the document concerning comments made by Sharp regarding a "Need for mutual support among businesses." Trial Ex. 109-5. However, the very use of the term "need" in the document indicates that there was a *lack* of mutual support among LCD suppliers at the time the document was written. LG's parenthetical commentary in the document, "(Even though we should avoid even an unofficial cartel problem)," further demonstrates that, if Sharp had made LG an offer to collude, that offer was not accepted. *See, e.g.*, *Liu v. Amerco*, 677 F.3d 489, 493 (1st Cir. 2012) ("Section 1 of the Sherman Act, however, does not condemn an attempt to conspire, nor a solicitation to conspire . . . ."). This statement also indicates that no cartel problem existed at the time this document was written. Dr. Flamm's speculation that technology-licensing relationships between the Japanese and nascent Taiwanese suppliers constituted a means of coordination is not evidence; moreover, it is unsupported by Trial Exhibit 109 itself, which implies, if anything, a lack of coordination between the Japanese suppliers and the Taiwanese "tiger cub," which was colorfully depicted as a full-grown tiger in Plaintiffs' demonstrative.

Plaintiffs' arguments concerning the conspiratorial nature of Trial Exhibit 109 are further undermined by the video testimony of LG's J.K. Lee, who was present at the meeting referenced in this exhibit and wrote the minutes. Mr. Lee testified that Sharp and LG did not reach any agreements concerning pricing, production or investment in additional capacity at the meeting referenced in Trial Exhibit 109, that there was no further contact between Sharp and LG regarding the topics discussed at this meeting, and that Sharp never suggested the formation of a cartel at this meeting. Trial Tr. at 1917:9-11 (Lee Dep. 158:4-8, 159:11-160:18, 166:12-23).

Finally, Trial Exhibit 109 refers to comments made by Sharp that JEIDA, a Japanese trade association, was "not meaningful or effective without including Korean businesses." Trial Ex. 109-5. On its face, this statement suggests the absence of cartel activity, particularly as Plaintiffs have offered no documentary or testimonial evidence that JEIDA played a role in facilitating

conspiracy. *See Citric Acid*, 996 F. Supp. at 957 ("Plaintiffs have not produced any admissible evidence that ECAMA was a 'sham and nothing but a pretext to monitor the conspiracy.'"). Therefore, the only reasonable inference that a jury could draw from this statement is *there was no collusion* among the Japanese and Korean suppliers at the time it was written.

iii. Plaintiffs' Remaining Evidence from the Pre-September 2001 Period Does Not Establish the Alleged Conspiracy

Plaintiffs' remaining evidence from the pre-September 2001 period is equally insufficient. For instance, Plaintiffs rely on Trial Exhibit 3, an email containing the agenda for the "*1st* LCD vender [*sic*] conference," held on June 27, 2000. Trial Ex. 3-5 (emphasis added). The very title of the document indicates that such a "conference" had never been held before, and the author of the agenda expressed uncertainty that any further "conferences" were to follow. See Trial Ex. 3-5 ("By this chance, *I hope we can start* such un-official meeting with open-mind base and periodically.") (emphasis added). Trial Exhibit 3 is not evidence of a single, overarching conspiracy; it is evidence of the absence of such a conspiracy.

Trial Exhibit 115 similarly provides no basis for a reasonable jury to infer an overarching conspiracy in the period prior to the Crystal Meetings. Trial Exhibit 115 is purportedly a "consultation report" compiled by LG based on information obtained from various sources. Plaintiffs focus on a report summarizing a September 4, 2001 consultation between LG and Toshiba, where Toshiba shared its long-term view that cutthroat competition would reduce suppliers' margins nearly to zero in the following year. Trial Ex. 115-4 ("2[-inch] for mobiles: 5.5~5.8k yen. 4k yen expected early next year. It's expected it'll be *difficult for any company to go to or below the variable costs level* of 3.9~4k.") (emphasis added). Again, Plaintiffs have presented evidence of competition, not conspiracy.

Finally, the testimony of H.B. Suh and Michael Hanson of Samsung that they began having contacts with competitors in 1998 is also an insufficient evidentiary basis for finding the existence of a single, overarching conspiracy. Mr. Hanson expressly disavowed reaching agreements with Toshiba; his testimony therefore offers no basis for inferring a conspiracy of any type. Hanson Test., Trial Tr. at 2218:14-18. Although Mr. Suh testified that he reached

"consensus" on prices with competitors, he never testified as to when those "consensuses" occurred or what was their scope. Moreover, as discussed in more detail below, Mr. Suh lacked pricing authority, Suh Test., Trial Tr. at 260, and, as fully discussed herein, his use of the term "consensus" is ambiguous at best and does not support an inference that price-fixing agreements were reached, much less that a single, overarching conspiracy was operating in the period prior to the Crystal Meetings. Finally, Mr. Suh and Mr. Hanson both testified to exchanging information concerning pricing and volumes to specific customers. Such testimony is an insufficient evidentiary basis for a reasonable jury to find that the alleged single, overarching conspiracy occurred.

iv. The Birth of the Crystal Meetings Indicates That There Had Been No Prior Conspiracy

Brian Lee of Chunghwa testified that the idea for what would become the Crystal Meeting conspiracy was hatched during a period of oversupply in February 2001, when the LCD market was intensely competitive. Lee Test., Trial Tr. at 1381:4-10 ("There was an oversupply in the market, and the price kept dropping."). In response to this competitive environment, Samsung contacted Chunghwa in an attempt to coordinate an "alliance among the TFT manufacturers *in Taiwan*, in order to prevent the further drop of the price." Lee Test., Trial Tr. at 1382:14-16 (emphasis added).

Mr. Lee's testimony on these events makes no reference to the Japanese LCD suppliers who allegedly would have been already participating in the Alleged Conspiracy with Samsung and LG. Moreover, Mr. Lee's notes from the initial meeting with Samsung confirm that Samsung and Chunghwa planned only to arrange a forum so that the Taiwanese suppliers could coordinate "with one another," not with outside firms. Trial Ex. 8 (Brian Lee's notes from the February 1, 2001 meeting: "Director Lee [of Samsung] hopes that the *Taiwanese* LCD makers can coordinate *with one another* . . . .") (emphasis added). Mr. Lee further understood that the cartel activities would begin among the Taiwanese suppliers, with Samsung to join at a later time. Lee Test., Trial Tr. at 1384:4-14. (testifying: "the Taiwanese makers, if they wanted to take strictly concerted actions, *Samsung wanted to join the group* to stabilize the price") (emphasis added).

The testimony of the individuals who attended the Crystal Meetings further confirms that they were not related to prior collusive activity. Stanley Park, who attended 40 Crystal Meetings on behalf of LG, testified that the "first time" that he met with competitors "for the purpose of agreeing with them as to what price would be charged" was in 2001, when Chunghwa invited LG to join the Crystal Meetings. Trial Ex. 3005 (Park Dep. at 20:4-24). Harry Cho of Samsung, another regular Crystal Meetings attendee, was transferred to Taiwan in 2000. Trial Ex. 3008 (Cho Dep. at 25:13-16) (testifying that Cho was transferred to Taiwan in 2000). However, Mr. Cho's "first meeting with competitors of Samsung in Taiwan" did not occur until the Crystal Meetings began in September 2001. Trial Ex. 3008 (Cho Dep. at 28:15-17).

There is therefore no factual basis to support Plaintiffs' contention that the Crystal Meetings were a continuation of prior anticompetitive conduct. In fact, all of the evidence concerning the origins of the Crystal Meetings demonstrates that the Crystal Meetings were a separate, self-contained conspiracy.

B. Plaintiffs Have Not Demonstrated That the Crystal Meeting Conspiracy Continued to Be Effective After 2005

The evidence presented by Plaintiffs indicates that the Crystal Meeting conspiracy ceased to operate as an effective cartel by mid-2005. The early Crystal Meetings were attended by individuals with pricing authority but, by 2005, the Crystal Meetings had become a desultory affair attended by mid-level employees with no authority to control pricing. The beginning of the end of the Crystal Meetings' viability came in late 2004, when Samsung's D.H. Lee issued a directive forbidding Samsung employees from meeting with competitors. Suh Test., Trial Tr. at 356-57 ("Q. And he told you in late 2004 to stop talking to competitors. Correct? . . . [A.] Yes. . . . Q. Well, in fact, you did stop communicating with competitors in late 2004 or early 2005. Correct? A. Yes."). Following D.H. Lee's order, Samsung, whom Plaintiffs characterize as the "ringleader" of the cartel, effectively dropped out of the conspiracy. *See* Plaintiffs' Opening, Trial Tr. at 203. Harry Cho, the Samsung Vice President who attended "most" of the early Crystal Meetings, stopped attending in May 2005. Trial Ex. 3008 (Cho Dep. at 40:1-11). H.S. Kim of Samsung, an attendee of the CEO-level meetings, stopped having contacts with

competitors around the same time, when press reports about the DRAM antitrust investigation began to circulate. Trial Ex. 3009 (Kim Dep. at 107:17-108:21). Senior representatives from other suppliers stopped attending the Crystal Meetings soon after Samsung's withdrawal. Stanley Park of LG stopped attending in mid-2005 expressly because Samsung and AUO had stopped sending senior managers to the meetings. Trial Ex. 3005 (Park Dep. at 41:1-11). Bock Kwon of LG also stopped attending in 2005. Trial Ex. 3004 (Kwon Dep. at 76:5-10). Brian Lee of Chunghwa stopped attending during the third quarter of 2003, and he did not even know if the Crystal Meetings continued regularly after he left. Lee Test., Trial Tr. at 1431:5-10 ("Likewise, I stopped attending the Crystal Meetings regularly after the third quarter of 2003. So, whether the Crystal Meetings were held regularly during 2003, I have no idea."). As Stanley Park explained, when the suppliers who participated in the Crystal Meeting conspiracy began to send "the working level, like manager or assistant manager," he could no longer "get much from the crystal meeting," Trial Ex. 3005 (Park Dep. 41:1-11), and the Crystal Meetings ceased to have an effect on price.

C. Plaintiffs Have Not Linked the Japanese Guilty Pleas to the Alleged Conspiracy

Plaintiffs' only direct evidence of anticompetitive conduct undertaken by Epson, Hitachi and Sharp consists of the guilty pleas entered by each manufacturer during DOJ's criminal investigation of the LCD industry. However, each of the Japanese suppliers' plea agreements are limited to admissions of price-fixing for specific products, sold to specific customers, during specific time periods. *See* Sharp Plea Agreement, Trial Ex. 556 at ¶ 4 (pleading to a conspiracy to fix the prices of LCD panels sold to: (1) Dell from on or about April 1, 2001, until December 1, 2006, for use in computer monitors and laptops; (2) Apple from on or about September 1, 2005, until December 1, 2006, for use in iPod music players; and (3) Motorola from the fall of 2005 until the middle of 2006 for use in Razr mobile phones); Hitachi Plea Agreement, Trial Ex. 555 at ¶ 4 (pleading to a conspiracy to fix the prices of LCD panels sold to Dell from on or about April 1, 2001, until March 31, 2004, for use in notebook computers); Epson Plea Agreement, Trial Ex. 553 at ¶ 4 (pleading to a conspiracy to fix the prices of LCD panels sold to Motorola from fall of

2005 until the middle of 2006 for use in Razr mobile phones). Plaintiffs have offered no evidence linking the Japanese suppliers' guilty pleas to the Alleged Conspiracy. Nor have Plaintiffs offered sufficient proof to support a finding that the Japanese suppliers participated in the Alleged Conspiracy through the smattering of evidence regarding these suppliers that Plaintiffs have introduced.

Further, Plaintiffs have offered virtually no evidence of Mitsui's involvement in anticompetitive conduct. The evidence offered against NEC appears to consist solely of its attendance at the 1998 Taiwan golf course meetings, where no anticompetitive agreements were reached. Accordingly, Plaintiffs have failed to provide a sufficient evidentiary basis to support a finding that these alleged conspirators participated in the Alleged Conspiracy at all, let alone throughout the entire class period.

D. In the Absence of Proof of a Single, Overarching Conspiracy, Plaintiffs' Claims Must Fail

Plaintiffs' "impact" expert, Dr. Flamm, based his opinion that "nearly all" prices of panels in the class period were impacted by the Alleged Conspiracy, Trial Tr. at 1865:24-25, entirely on the assumption that the Alleged Conspiracy existed throughout the entire class period. *See* Class Cert. Order at 28 ("Dr. Flamm's [class certification] report assumes that there was a conspiracy among LCD manufacturers as plaintiffs have alleged."); Flamm Test., Trial Tr. at 1761:4-20 (testifying that collusion among LCD producers began "certainly no later than 1998" and that "fully-effective collusion" ended "around the first quarter of 2006"). Dr. Flamm's conclusions rested on the same evidence discussed above, which is insufficient as a matter of law. Thus, Dr. Flamm's "impact" analysis was ultimately predicated upon the counterfactual assumption that the single, overarching conspiracy existed throughout the entire class period of 1999 through 2006.

Plaintiffs' failure to demonstrate the participation of each conspirator in the Alleged Conspiracy over the entire span of the class period (1999-2006) is fatal to Plaintiffs' claims. To prevail, Plaintiffs must prove "an antitrust violation, the fact of damage or injury, a causal relationship between the violation and the injury, and the amount of damages." *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1991); *Deaktor v. Fox Grocery Co.*, 475 F.2d 1112,

1116 (3d Cir. 1973) ("In order to recover under the antitrust laws, however, a plaintiff must, in addition to demonstrating an antitrust violation, prove: (1) a causal relationship between the antitrust violation and the alleged injury, and (2) measurable damage to his business or property.").

Dr. Flamm cannot rescue Plaintiffs from their insufficient evidentiary basis, because his testimony about inadmissible materials — such as Samsung's Interrogatory Responses and other unadmitted hearsay — also cannot shore up the evidentiary record. *See* Flamm Test., Trial Tr. at 1769:13-1776:20 (testimony regarding the inadmissible Samsung interrogatory responses), 1763:6-1764:22 (LG document). Dr. Flamm's testimony about these documents does not make the documents — or their contents — admissible evidence. *See Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1261-62 (9th Cir. 1984) ("Rule 703 merely permits such hearsay, or other inadmissible evidence, upon which an expert properly relies, to be admitted to explain the basis of the expert's opinion. . . . It does not allow the admission of the reports to establish the truth of what they assert.") (internal citations omitted). Indeed, Plaintiffs' counsel has conceded on the record that the Samsung Interrogatory Responses are not in evidence. Trial Tr. at 2256:2-13 ("It's not in evidence, clearly.").

Even if Dr. Flamm's testimony about the contents of certain inadmissible documents could, perhaps, provide a stated basis for his opinion, it cannot act as a substitute for the facts not properly admitted into the evidentiary record. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them."); *see also* Fed. R. Evid. 703, Advisory Committee Notes to 2000 amendment ("The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert."); *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1497 (9th Cir. 1997) ("When inadmissible evidence used by an expert is admitted to illustrate and explain the expert's opinion, however, it is 'necessary for the court to instruct the jury that the [otherwise inadmissible] evidence is to be considered solely as a basis for the expert opinion and not as substantive evidence.'") (internal

citation omitted). "Inadmissible evidence contributes nothing to a 'legally sufficient evidentiary basis.'" *Weisgram v. Marley Co.*, 528 U.S. 440, 453-54, 457 (2000) (quoting Fed. R. Civ. P. 50 and *Brooke Group*, 509 U.S. at 242) (holding that directing a judgment as a matter of law was proper when "on excision of [expert opinion] testimony erroneously admitted, there remains insufficient evidence to support the jury's verdict").

Because there is an insufficient evidentiary basis as a matter of law for a reasonable jury to find a single, overarching conspiracy spanning the entire class period, Plaintiffs' case fails to establish class-wide antitrust impact. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) ("[T]o prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation."); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 632 F. Supp. 2d 42, 56 (D. Me. 2009) ("the plaintiffs must nevertheless establish that *all* class members paid a higher price . . . they cannot show that every member of the putative class was in fact injured by paying a higher transaction price than he or she would have paid without the restraint.") (emphasis in original). The gaps and omissions in Plaintiffs' proof render Dr. Flamm's "impact" opinion untenable. Plaintiffs, therefore, have failed to satisfy the requisite element of class-wide antitrust impact. Stated differently, Plaintiffs have failed to carry the burden they took on when they succeeded in winning certification of the broad classes in this action.

In addition, Plaintiffs' expert on the amount of damages, Dr. Leamer, assumed a single, overarching conspiracy running unbroken from January 1, 1999 through March 31, 2006 and involving various LCD manufacturers (including even manufacturers Mitsui and NEC, as to whom Plaintiffs have offered minimal evidence), as well as all sizes and resolutions of LCD panels, regardless of application.

Dr. Leamer testified that his assignment for trial was to "determine what prices would have been . . . in the marketplace, had these conspirators not shaken hands with each other . . . ." Leamer Test., Trial Tr. at 2271:22-2272:6. Dr. Leamer explained that the conspiracy he assumed for his analysis included 12 companies — "Chunghwa, Mitsui, Epson, Toshiba, NEC, HannStar, Sharp, Hitachi, LG, Tatung, Chi Mei, and Samsung" — that conspired effectively and

continuously on every LCD product they manufactured and sold to customers in the United States from 1999 until 2006. Leamer Test., Trial Tr. at 2325:15-23 (identifying the twelve (12) companies), 2346:23-2347:12 (explaining that his damages model measures the illegal overcharge "as if the [twelve conspiring] firms are merged into a single firm" beginning on January 1, 1999, and ending on March 31, 2006), 2408:9-13 (testifying that his overcharge model "assumes the participation by all identified companies . . . as to all of the LCD panels they made throughout the entire Class Period.").

The assumptions underlying Dr. Leamer's methodology do not square with the evidence, and his methodology thus does not provide the jury with any reasonable basis to assess damages. *Farley Transp. Co., Inc. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1351 (9th Cir. 1985) (finding that the damages study did not provide a reasonable basis for the jury to calculate damages where expert "had merely assumed" that lost profits were due to defendants' illegal activities and thus "failed to show any nexus between the alleged conspiracy and the damages"); *see also Amerinet*, 972 F.2d at 1490 (holding that the amount of antitrust damages "must be capable of reasonable ascertainment and must not be speculative or conjectural"); *Deaktor*, 475 F.2d at 1117 n.4 ("In this regard, it is appropriate to note that plaintiffs' failure to satisfy their burden of proving the amount of damages 'was so only because [they] chose to rely almost entirely on one expert witness and one lay witness for [their] proof of damages. Any inadequacy which may have resulted should be attributed to [plaintiffs'] own presentation of [their] case rather than to the law or the court's application of it here.'") (quoting *Farmington Dowel Products Co. v. Forster Mfg. Co.*, 421 F.2d 61, 83-84 (1st Cir. 1969)). As explained above, Dr. Leamer's assumptions — such as the assumption that the Japanese companies who pleaded guilty to narrower price-fixing participated in the Alleged Conspiracy throughout the class period — are not supported by the evidence. Plaintiffs simply failed to provide the jury with a legally sufficient evidentiary basis to find a single, overarching, 12-company conspiracy unbroken in time or effectiveness from January 1, 1999, to March 31, 2006.

Dr. Leamer, in fact, explained to the jury that knowing "when the conspiracy began and when did it end" was of critical importance to his damages analysis. Leamer Test., Trial Tr. at

2285:9-2286:2 ("Well, there are lots of questions, but I thought these were the four critical ones. First, you've got to know when the conspiracy began, and when did it end."). Dr. Leamer expressly admitted that an incorrect assumption about the time frame of the conspiracy would result in a "mistake in estimating damages." Leamer Test., Trial Tr. at 2285:9-2286:2. As the evidence has shown, Dr. Leamer relied on an inaccurate measure of when the conspiracy started and ended, thus rendering his damages model mistaken and unreliable.

Furthermore, Dr. Leamer's analysis has not been presented in any disaggregated form, meaning that it does not allow the jury to make adjustments to align with findings that deviate from Plaintiffs' allegations of a single, overarching conspiracy, including all of the alleged participants and spanning the entire class period. Dr. Leamer testified unequivocally that his damages model was not adjustable, *i.e.*, there was no way to recalculate his damages amount to account for a finding that any of the 12 alleged conspirators did not in fact participate in the Alleged Conspiracy over the entire class period. Leamer Test., Trial Tr. at 2397:9-16 (explaining that his overcharge amount could change if some companies were found not to be part of the conspiracy, and his analysis reports the overcharge amount without any further disaggregation by individual companies). Dr. Leamer further testified that his overcharge calculation was dependent upon the assumption that the conspiracy ran from 1999 until 2006. Leamer Test., Trial Tr. at 2397:17-25 (testifying that the conspiracy time period was not adjustable: "I didn't compute another interval of time"), 2398:16-25 (stating that he did not provide calculations for a different period).

Thus, Plaintiffs' failure to provide sufficient evidence to demonstrate that each alleged co-conspirator participated fully in the conspiracy over the entire class period renders Dr. Leamer's model unworkable and his overcharge unfounded. Without Dr. Leamer's overcharge, Plaintiffs have completely failed to provide the jury with any reasonable basis for determining damages. *See, e.g.*, *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1166 (7th Cir. 1983) (rejecting plaintiff's damages analysis because (i) it was premised on the illegality of conduct that, at trial, was unproven, and (ii) plaintiff offered no evidence on the adjustment of the damage award to reflect the evidence at trial).

II. PLAINTIFFS HAVE FAILED TO INTRODUCE EVIDENCE TENDING TO EXCLUDE THE POSSIBILITY THAT TOSHIBA ACTED INDEPENDENTLY

For Plaintiffs to survive a motion for judgment as a matter of law in an antitrust case, they must present "direct or circumstantial evidence that reasonably tends to prove that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Wilcox v. First Interstate Bank of Ore.*, 815 F.2d 522, 525 (9th Cir. 1987) (quoting *Monsanto*, 465 U.S. at 764). Plaintiffs have failed to introduce any legally sufficient evidentiary basis, direct or circumstantial, for a reasonable jury to find that Toshiba agreed to join any single, overarching conspiracy involving the Crystal Meetings. The Ninth Circuit has explained that dispositive motions in antitrust cases are to be analyzed under a burden-shifting based on the Supreme Court's holding in *Matsushita*. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1094 (9th Cir. 1999) ("Based on *Matsushita*, this circuit has outlined a two-part test to be applied *whenever a plaintiff rests its case entirely on circumstantial evidence*.") (emphasis added); *see also Matsushita*, 475 U.S. at 585-97; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("[t]he standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ."). Under the Ninth Circuit's two-part test, a defendant can "rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice." *Citric Acid*, 191 F.3d at 1094. "The burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not engaging in permissible competitive behavior." *Id*. (citing *Wilcox*, 815 F.2d at 525 (applying Rule 50)). Antitrust law thus "limits the range of permissible inferences from ambiguous evidence." *Matsushita*, 474 U.S. at 588.

In this case, Plaintiffs have offered only circumstantial evidence, consisting primarily of testimony and documents relating to information exchanges with competitors, in an attempt to support their contention that Toshiba participated in the Alleged Conspiracy "off the record." Plaintiffs' Opening, Trial Tr. at 211. Toshiba, however, has proffered legitimate procompetitive explanations for its conduct. Toshiba has presented evidence that it exchanged information with competitors to verify information received from customers, to price according to supply contracts

in which Toshiba's prices were to be based on competitors' prices, and to undercut market prices and win market share. *See, e.g.*, Amano Test., Trial Tr. at 968:5-11 ("In this time, in particular, the information that we were getting from Dell Purchasing was really at considerable variance with what we knew. Now, according to the contract, we had to offer the cheapest price. But when the information was clearly off, and out of line, we would do a re-check with competitors before we put in our bid."). General market information obtained from competitors was only one source of data among many that Toshiba occasionally considered in reaching independent pricing decisions. *See, e.g.*, Chiba Test., Trial Tr. at 755:12-18 ("There was information from market research companies. There was also information from manufacturers of parts. There was information from customers. And also, directly from competitors. So, there were various routes for obtaining information."). Given these legitimate, independent and potentially procompetitive justifications for the conduct of Toshiba employees, Plaintiffs must come forward with rebuttal evidence that "tend[s] to exclude the possibility" that Toshiba acted independently. *See Citric Acid*, 191 F.3d at 1096-97 ("The requirement that a plaintiff who relies solely on circumstantial evidence of conspiracy . . . must produce evidence tending to exclude the possibility that defendants acted independently . . . is, as we have explained, well-established.").

Plaintiffs cannot meet this burden and, under Ninth Circuit law, judgment as a matter of law should be awarded to Toshiba. *See Wilcox*, 815 F.2d at 528 (affirming judgment for defendants where plaintiffs failed to present evidence supporting an "inference of conspiracy").

A. The Proffered Circumstantial Evidence in This Case Does Not Rebut Toshiba's Showing of a Legitimate Business Purpose for Its Conduct

All of the direct evidence in this case demonstrates that Toshiba was *not* involved in the Alleged Conspiracy, either directly, or "off the record," as Plaintiffs allege. Plaintiffs themselves conceded that Toshiba did not attend the Crystal Meetings and Plaintiffs' own witnesses have confirmed that fact. *See, e.g.*, Trial Ex. 3005 (Park Dep. at 68:18-21) ("Q. Now, at any of . . . the 40 meetings you had on a monthly basis, did any Japanese manufacturer attend? A. Never. No Japanese ever."). Indeed, the testimony of Plaintiffs' live witness Brian Lee of Chunghwa, who pleaded guilty based on his participation in the Crystal Meetings, closely parallels the testimony

of admitted conspirator Hans Hartmann in the *Citric Acid* case, whose "direct testimonial evidence" that "no one from Cargill attended any of the meetings at which the conspirators allocated market share, and that he never received sales figures from Cargill" was deemed "most persuasive" evidence of Cargill's non-involvement in the conspiracy. *Citric Acid*, 996 F. Supp. at 955; *see also Citric Acid*, 191 F.3d at 1106 ("We note that all four major citric acid manufacturers admitted to conspiring to fix prices but none identified Cargill as a co-conspirator."). Mr. Lee testified that Toshiba never attended the Crystal Meetings and that he had no knowledge of attempts to coordinate with Toshiba off the record. *See* Lee Test., Trial Tr. at 1413:25-1414:18, 1425:9-16 ("Q. And you are not aware of anyone else reporting to Toshiba about the outcome of the Crystal Meetings. Correct? . . . A. Correct.").

Plaintiffs have not presented a sufficient evidentiary basis to link Toshiba to the Alleged Conspiracy through the brief references to "the Japanese" that appear in the early Crystal Meeting minutes. The Crystal Meeting participants who drafted these minutes have testified that Crystal Meeting participants merely discussed the possibility of coordinating with the Japanese, but that Toshiba was never brought into the fold.

Plaintiffs relied in their opening statement on Stanley Park's minutes from an October 5, 2001 Crystal Meeting, which contain language indicating only that it might have been "*possible* to cooperate with Japanese companies like Fujitsu, Toshiba, and Mitsubishi either openly or off the record." *See* Plaintiffs' Opening, Trial Tr. at 198; Trial Ex. 118 (emphasis added). Trial Exhibit 118 also contains a purported reference to Toshiba prices for a single product, 14.1" XGA notebook panels; however, there is no evidence that this stray information — apparently the only reference to Toshiba pricing in the entirety of the Crystal Meeting minutes — was obtained directly from Toshiba. *See Citric Acid*, 191 F.3d at 1103 ("Although the possession of competitor price lists is consistent with conspiracy, it does not, at least in itself, tend to exclude legitimate competitive behavior."). Moreover, the evidence as a whole shows that, at the time of the October 5, 2001 Crystal Meetings, the conspirators were still discussing whether or not the Japanese suppliers should even be invited to join the cartel. Brian Lee's minutes from the October 30, 2001 Crystal Meeting contain an agenda item for discussion at a CEO-level meeting

scheduled for the next month: "How to contact Japanese makers in the industry to synchronize the stabilization of price." Trial Ex. 31; Lee Test., Trial Tr. at 1450:4-21.

At the next Crystal Meeting, on November 15, 2001, the participants covered that agenda item by discussing a "private notification method" whereby certain Crystal Meeting participants would attempt to coordinate with Hitachi, IBM and Mitsubishi. Trial Ex. 33; Lee Test., Trial Tr. at 1451:15-24. None of these suppliers agreed, however, to coordinate with the cartel. Lee Test., Trial Tr. at 1409:10-1410:15. More importantly, no one was assigned to coordinate with Toshiba. Lee Test., Trial Tr. at 1452:3-4; *see also* Trial Ex. 3008 (Cho Dep. at 67:1-68:2) ("no such recollection" of anyone from the Crystal Meetings discussing contacts with Japanese suppliers); Trial Ex. 3005 (Park Dep. at 174:7-12) ("Q. To your knowledge, did anyone ever advi[s]e the Japanese about the results of these meetings? A. I don't know whether. Q. . . . Who was supposed to advi[s]e the Japanese companies? A. That was not decided."); Trial Ex. 3004 (Kwon Dep. at 160:5-160:21) ("I don't remember [that] any manufacturer contact directly with Japanese manufacturers.").

For all of the meticulous record-keeping that occurred at the Crystal Meetings, the Crystal Meeting minutes barely mention Toshiba at all. *See, e.g.*, DPPs' Mot. for Class Certification at 5, April 3, 2009 (ECF No. 933) (describing the alleged conspiracy as "one of the most . . . well documented price-fixing conspiracies ever"). The "utter lack of any direct evidence" that Toshiba was involved in the Crystal Meeting conspiracy should be regarded as "quite probative" of Toshiba's non-involvement. *See Citric Acid*, 996 F. Supp. at 956.

B. Plaintiffs Have Failed to Demonstrate that Toshiba Agreed to Join the Crystal Meeting Conspiracy through Contacts with H.B. Suh

Plaintiffs will undoubtedly argue that the testimony of Samsung's H.B. Suh constitutes direct evidence that Toshiba agreed to join the Crystal Meeting conspiracy. "Direct evidence" in this case, however, would be evidence that establishes explicitly, without the drawing of any inferences, that Toshiba agreed to join the Crystal Meeting conspiracy. *See Citric Acid* 191 F.3d at 1094 ("Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires

no inferences to establish the proposition or conclusion being asserted.") (quoting *Baby Food*, 166 F.3d at 118).

Mr. Suh's testimony, in contrast, would require several layers of inference to support a finding that Toshiba participated in the Alleged Conspiracy, and even then it would be fatally defective. At no point did Mr. Suh testify that he reached price-fixing "agreements" with Toshiba, and Plaintiffs studiously and conspicuously avoided raising the issue with their cooperating witness. At most Mr. Suh testified that he reached "consensus" on pricing with Toshiba employees, and his use of that term was itself equivocal. *See* Suh Test., Trial Tr. at 339-40 (responding "maybe; maybe not" when asked if his use of the term "consensus" meant that his interactions with Toshiba simply allowed him to speculate about Toshiba's prices). Moreover, Mr. Suh lacked pricing authority, and Plaintiffs have offered no evidence demonstrating that Mr. Suh's interactions with Toshiba had any effect on Samsung or Toshiba's pricing. Trial Ex. 3009 (Kim Dep. at 211:7-212:12) (Samsung executive with pricing authority testifying that H.B. Suh "hardly ever provided me with competitors' information"); *see also Baby Food*, 166 F.3d at 125 ("[T]o survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions.").

Further, Mr. Suh did not personally attend any Crystal Meetings, but he testified that Harry Cho of Samsung asked him to "convey" Crystal Meeting information to the Japanese suppliers "so that they can follow in suit." Suh Test., Trial Tr. at 299. Mr. Suh testified only that he "tried" to accomplish this task, Suh Test., Trial Tr. at 299, but there is no evidence of whether he succeeded. At no point did Plaintiffs ask Mr. Suh if he reached consensus or agreement with Toshiba with respect to agreements reached at the Crystal Meetings.

Mr. Suh testified that he received reports from the Crystal Meetings, but he also testified that he did not even know "exactly" whether price-fixing agreements were reached at the Crystal Meetings. Suh Test., Trial Tr. at 298 ("Q. Do you know whether or not agreements were reached about prices that the companies who were involved in the meetings would charge customers? A. I don't know exactly."). Nor was Mr. Suh sure if the reports contained the details of the pricing discussions at the Crystal Meetings. Suh Test., Trial Tr. at 298 ("Q. And did those reports

provide some detail about the discussions on pricing. A. I think so probably."). Mr. Suh further testified that he shared Crystal Meeting information with Toshiba on, at best, an *ad hoc* basis. Suh Test., Trial Tr. at 302 ("Q. And did you pass on to the representative of Toshiba the information you received about the pricing discussions in the Crystal Meetings? A. Sometimes I did. Sometimes I didn't."). Mr. Suh could not recall a single specific instance when he shared Crystal Meeting information with Toshiba, nor did he explain, when asked, why he would have shared Crystal Meeting information with Toshiba. Suh Test., Trial Tr. at 302 ("Q. And when you did, why did you do that? A. When I did, I don't have any particular memory about it.").

Finally, Mr. Suh testified that he once raised the subject of "the meeting in Taiwan" at a dinner with Mr. Chiba and Mr. Someya of Hitachi. Suh Test., Trial Tr. at 307 ("Q. . . . It was not a meeting, per se. Correct? A. It was a dinner."). However, Mr. Suh was not sure if the dinner occurred before or after the Crystal Meetings began. Suh Test., Trial Tr. at 299 ("Q. And can you tell us approximately when that dinner meeting took place? A. Actually, I don't remember exactly when it was, but it was *probably* after such meeting took place in Taiwan.") (emphasis added). Mr. Suh testified that, at the dinner, he *jokingly* suggested that Toshiba participate in group meetings with other LCD suppliers in Japan. Suh Test., Trial Tr. at 300-301; *see also* Suh Test., Trial Tr. at 310 ("Q. [T]ell me, please, whether or not you made a joke at this dinner about the Japanese panel makers getting together. A. I did."). Mr. Chiba flatly rejected Mr. Suh's facetious suggestion, responding that they should not do that because it would be against the law. Suh Test., Trial Tr. at 310 ("Q. And, sir, in response to that joke, Mr. Chiba said that you shouldn't do it, because it's against the law. Correct? A. Yes.").

This testimony closely parallels evidence in *Citric Acid* where price-fixing activity was (non-jokingly) suggested but rejected; the Ninth Circuit held that such evidence could not support an inference of wrongdoing: "It would not be reasonable to infer that Cargill engaged in illegal activities merely from evidence that an illegal course of action was suggested but immediately rejected." 191 F.3d at 1098.

Mr. Suh's vague testimony in no way forecloses the fact that Toshiba acted independently. *See Baby Food*, 166 F.3d at 127 (holding that "the single use of the term ['truce']

in a highly competitive business environment and in the face of continuing fierce competition is as consistent with independent behavior as it is with price-fixing"). Nor does it establish that Toshiba learned about the price-fixing agreements at the Crystal Meetings and agreed to "follow suit." Instead, Mr. Suh's testimony closely parallels the testimony of Barrie Cox in the *Citric Acid* case, who testified to having discussions with a Cargill employee "regarding the bidding price for specific citric acid accounts." *Citric Acid*, 191 F.3d at 1105. There, the Ninth Circuit found that Mr. Cox's "sporadic price discussions with one individual at Cargill" — much like Mr. Suh's discussions with Messrs. Chiba and Amano — were an insufficient factual basis to withstand summary judgment, and not "probative of the industry-wide conspiracy alleged." *Citric Acid*, 191 F.3d at 1105.

C. Plaintiffs' Alternative Theories Fail to Demonstrate That Toshiba Agreed to Join the Alleged Conspiracy Linked to the Crystal Meetings

Plaintiffs again fail to provide a sufficient evidentiary basis to support a finding that Mr. Chiba and Mr. Amano's contacts with Seishu Arai of Samsung and Kim Chang Han of LG created alternative routes for Toshiba to participate in the agreements reached at the Crystal Meetings. Toshiba's interactions with these Samsung and LG personnel, however, consisted solely of information exchanges; price-fixing agreements were never reached. *See Citric Acid*, 191 F.3d at 1103 ("Such meetings, at least in and of themselves, do not tend to exclude the possibility of legitimate activity."); *Baby Food*, 166 F.3d at 126 ("[C]ommunications between competitors do not permit an inference of an agreement to fix prices unless those communications rise to the level of an agreement, tacit or otherwise.") (internal quotes omitted). These contacts allowed Toshiba to obtain a better understanding of the market, which in turn allowed Toshiba to better position itself to win business through competition.

Information exchanges with other LCD suppliers were just one of many ways that Toshiba obtained market information — information that allowed Toshiba to independently calculate pricing based on actual market conditions. Chiba Test., Trial Tr. at 862:5-17 ("Q. Why did you feel the need to gather all this information from all these different sources? A. . . . It's not as though getting information directly from competitors was especially important. We got various

kinds of information from various kinds of places. And that enabled us to come up with our own policies and our own determination of prices."); Arai Test., Trial Tr. at 383-84 ("Q. And, sir, one purpose for information exchange with a competitor is to check to see if the customer's statement was accurate. Correct? A. Yes, that would be true."); *see also Citric Acid*, 191 F.3d at 1103 ("There are many legal ways in which Cargill could have obtained pricing information on competitors."); *Baby Food*, 166 F.3d at 126 ("In a highly competitive industry . . . intensely dependent on marketing strategy, it makes common sense to obtain as much information as possible of the pricing policies and marketing strategy of one's competitors.").

Toshiba frequently entered agreements with major customers whereby it agreed to meet or beat the prices of its competitors. *See, e.g.*, Amano Test., Trial Tr. at 1103:6-1104:5 (testifying about agreement with Dell to undercut other suppliers' prices by $5 for certain notebook panels) (discussing Trial Ex. 1119). Even when not contractually bound to offer the lowest price, Toshiba would frequently seek information from competitors in order to undercut them and gain market share. Amano Test., Trial Tr. at 1057:1-6 ("[W]e quickly cut the price to match Sharp's 285, or tried to undercut them, so as to get the share. I think that's why we reduced our prices.") (discussing Trial Ex. 282). *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16. (1978) ("The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed, such practices can in certain circumstances increase economic efficiency and render markets more, rather than less competitive.").

At the same time, Toshiba frequently received inaccurate or misleading information from its customers regarding market prices and demand expectations; under those circumstances, Toshiba sometimes verified information with competitors. *See, e.g.*, Amano Test., Trial Tr. at 968:5-970:6 (testifying that he had competitor contact with a "Senior Man of Sharp" when information received from opt-out Dell was "at considerable variance with what we knew"). *See Gypsum*, 438 U.S. at 448-49 (1978) ("[T]o protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, [defendants] exchanged price information as a means of protecting their legal rights from fraudulent

inducements to deliver more cement than needed for a specific job.") (discussing *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925)).

Plaintiffs' own witnesses have testified that the "purpose" of their contacts with Toshiba was not price-fixing, but "information exchange." *See, e.g.*, Arai Test., Trial Tr. at 369 ("Q. What was the purpose of your discussions with Toshiba? A. Information exchange."). Mr. Arai had no pricing authority, and no knowledge of Samsung using the information he obtained from Toshiba to keep prices between the two companies similar. Arai Test., Trial Tr. at 381 ("Q. Speaking only from your standpoint, sir, did you understand the purpose of exchanging information with Toshiba was to keep the prices similar to each other? A. I don't know. I wasn't in a position to make decisions."), 381-82 ("Q. Now, sir, during the period of time that you just testified about, 2002 to 2005, you did not have pricing authority, correct? A. That's correct."). Mr. Arai therefore could not have reached price-fixing agreements with Toshiba.

A further conclusive basis for rejecting any attempt to connect Toshiba to the Crystal Meetings through Mr. Arai is that his product responsibilities at Samsung were limited to small panels, products that were never discussed at the Crystal Meetings. Arai Test., Trial Tr. at 362. In fact, Mr. Arai offered no testimony whatsoever on the subject of the Crystal Meetings or the Alleged Conspiracy.

Nor is there a sufficient evidentiary basis for finding that LG served as a link between Toshiba and the Crystal Meetings. Mr. Amano's contact at LG, Kim Chang Han, was a market analyst, based in Japan, who had no pricing authority and no responsibility for any of LG's customer accounts. Amano Test., Trial Tr. at 930:3-6, 1042:4-17 ("Q. And when you say 'marketing analyst' — was Mr. Kim Chang Han in sales? A. No. So far as I know, he was purely a market analyst. . . . Q. Okay. Do you understand that Mr. Kim Chang Han had pricing authority? A. No, he didn't."). Mr. Amano exchanged general information with Mr. Kim regarding market trends. Amano Test., Trial Tr. at 1015:11-24 ("I don't recall, specifically. But, what we generally thought about the market, this was something that we made presentations on to customers, and we did the same with competitors and parts makers. So, this would have been a general conversation.").

Mr. Amano's notes from a meeting with Mr. Kim, which indicated: "TMD has the role of being an intermediary between Samsung and LGP," similarly does not provide a sufficient evidentiary basis to support a finding that Toshiba participated in the Alleged Conspiracy. Trial Ex. 303. As Mr. Amano explained, this notation was based on the fact that Mr. Kim had no contacts at Samsung, so Mr. Kim asked Mr. Amano to share any information that Mr. Amano might obtain from Samsung. Amano Test., Trial Tr. at 946:5-11 ("Samsung and LG, as companies, might be having information exchange; but Kim Chang Han had no source individually. And so, really, it was nothing more than him saying to me if I individually knew something about it, he'd appreciate it if I'd pass it along."). Plaintiffs' view of this document — that Toshiba was acting as an intermediary in an overarching price-fixing scheme between Samsung and LG, both attendees of the Crystal Meetings — contradicts Plaintiffs' own theory of the case.

Plaintiffs' remaining evidence concerning Toshiba contacts with LG and Samsung similarly cannot support an inference that Toshiba participated in the Alleged Conspiracy. Plaintiffs seize upon language in Trial Exhibit 325, a December 20, 2003 email containing a report from Mr. Amano that Samsung had told him that "a price increase is planned on a par with TMD in 4Q [fourth quarter]." As Mr. Amano explained, however, Samsung's comments merely reflect the fact that Samsung had independently reached the same conclusion that TMD had about market conditions. Amano Test., Trial Tr. at 934:3-11 ("TMD had made a presentation to Samsung and LG about its own thinking on market prices. And this is a confirmation that they are thinking in the same sort of way."). No agreements were reached at this meeting. Amano Test., Trial Tr. at 934:22-935:6 ("Each side would present a rough market prices [sic]. It's not as though we're agreeing, 'Okay. This is what we're going to charge.' We are just confirming that we're thinking along the same lines, in terms of trend forecasting."). Such evidence, "as consistent with legitimate behavior as illegal behavior[,] cannot independently support an inference of conspiracy." *Citric Acid*, 191 F.3d at 1104.

The references to Sharp and Samsung's pricing in Trial Exhibit 314 cannot support an inference of an agreement to fix prices, because Toshiba had already offered its fourth quarter

pricing to Dell *seven weeks earlier*. *See* Trial Ex. 1885 (fourth quarter pricing proposal dated August 8, 2003); Amano Test., Trial Tr. at 1061:19-1062:13 ("Well, I mentioned this previously. Mr. Kanemori had attended the QBR meeting. And he had proposed prices for the 15.4-inch WUXGA for October through December. And this is a memo that is confirming those prices, I believe."). As Mr. Amano explained, the consensus referenced in the document related to Toshiba's negotiations *with Dell* on pricing for the first quarter of 2004. Amano Test., Trial Tr. at 1058:2-1059:7 ("In August, Mr. Kanemori had gone to visit Dell in Austin . . . . And there had been an agreement on the October-to-December quantities and prices for the various models; but prices and quantities had been proposed for January through March, but there had not been an agreement on those. That's what's been indicated here.").

Nor is Trial Exhibit 482, sufficient to support a finding that Toshiba participated in the Alleged Conspiracy. Trial Exhibit 482 is a March 7, 2005 internal Toshiba email concerning sales of 7" panels by Toshiba and LG to Chinese p-DVD manufacturers Xinke and Wanlinda. *See* Chiba Test., Trial Tr. at 796:19-797:7. Trial Exhibit 482 in fact establishes that at most a proposal was made to raise prices that was immediately rejected. *See* Trial Ex. 482 at 2 ("Although I asked [LG] whether they wouldn't raise the pricing together with us [in the $35-40 range] . . . they will counter Innolux [reportedly offering $29] and assure share by *continuing to handle pricing aggressively* in the future also.") (emphasis added). There is no basis for inferring anticompetitive activity from a purported solicitation to conspire that was never accepted. *See also Liu*, 677 F.3d at 493 ("Section 1 of the Sherman Act, however, does not condemn an attempt to conspire, nor a solicitation to conspire . . . ."); *Citric Acid*, 191 F.3d at 1098 ("It would not be reasonable to infer that [defendant] engaged in illegal activities merely from evidence that an illegal course of action was suggested but immediately rejected."); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1036 (8th Cir. 2000) (finding that a memorandum that listed prices, even if received by high-ranking corporate officials, was only an opportunity to conspire and did not prove the existence of a conspiracy); *United States v. Am. Airlines, Inc.*, 570 F. Supp. 654, 659 (N.D. Tex. 1983) ("This Court sees no sound legal or economic reason to

expand the theory of attempted joint monopolization to include a unilateral solicitation to increase prices."), *rev'd on other grounds*, 743 F.2d 1114, 1119 (5th Cir. 1984).

Nor does Trial Exhibit 228, minutes from an October 23, 2001 sales meeting which Plaintiffs introduced through Dr. Flamm, provide a sufficient evidentiary basis for a finding that Toshiba agreed to join the Alleged Conspiracy. Dr. Flamm has admitted that Trial Exhibit 228 relates to a sale of LCD panels from Sharp to Toshiba in a buyer/seller relationship, Trial Tr. at 1849:14-22, from which there is no basis to infer anticompetitive behavior. *See Citric Acid*, 996 F. Supp. at 959 (finding price discussions in the context of a sale of citric acid from admitted conspirator ADM to Cargill to be "innocuous"). The probative value of this document, if any, is greatly diminished by the fact that Plaintiffs have failed to demonstrate that collusive activity occurred through buyer/seller relationships.

D. Plaintiffs' Circumstantial Evidence of Alleged Consciousness of Guilt is Inadequate

In the absence of direct evidence that Toshiba entered price-fixing agreements linked to the Crystal Meetings, Plaintiffs have introduced documents and elicited testimony to suggest that Toshiba did something "wrong." However, Messrs. Chiba and Amano have both testified that they did not believe that exchanging information was wrong or illegal, so long as there was no agreement to fix prices. Plaintiffs argue that Toshiba attempted to conceal its contacts with competitors by arranging meetings in bars and restaurants. However, Mr. Chiba has testified that he most commonly met competitors at the office. Chiba Test., Trial Tr. at 629:25-630:4. Moreover, business is frequently conducted in bars and restaurants in Japan. To the extent that Mr. Chiba was cautious about meeting competitors, it was simply because he wanted to avoid creating false perceptions. Chiba Test., Trial Tr. at 640 (testifying regarding his instructions to Mr. Amano in Trial Exhibit 400 to avoid creating misperceptions when meeting with Epson and Sharp to exchange information about Apple's procurement practices, in light of press reports about a "backroom bid-rigging" investigation of the sewage industry in Japan); *see also* Chiba Test., Trial Tr. at 785:25-786:18 (Chiba testifying that he rebuked Mr. Nishikawa for sending an email in Trial Exhibit 354 that "could sound like price-fixing").

Moreover, the fact that Toshiba employees occasionally marked emails containing competitor information with the instructions such as "Destroy After Reading" is not an indication of guilt, as Toshiba's information security policy required Toshiba's employees to limit their distribution of potentially sensitive information on a "need to know" basis. *See* Amano Test., Trial Tr. at 1132:13-1333:12 (discussing Trial Ex. 1810); *see also* Chiba Test., Trial Tr. at 655 (explaining that documents bearing labels such as "Destroy After Reading" were sent "as a matter of course"); *Baby Food*, 166 F.3d at 119 (finding a supplier's possession of a competitor's internal memorandum regarding a future price increase marked "HIGHLY CONFIDENTIAL," did not create a triable issue).

Even when viewed as a whole, Plaintiffs evidence fails to provide a sufficient evidentiary basis for the Alleged Conspiracy, or for an inference that Toshiba participated in it. *See Citric Acid*, 191 F.3d at 1105-06 (considering "whether the evidence as a whole" supports an inference of conspiracy). Plaintiffs have not succeeded in filling the gaps of proof in the single, overarching conspiracy they have alleged.

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CONCLUSION

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

Respectfully submitted,

DATED: June 19, 2012

WHITE & CASE

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