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September 13, 2012

VIA HAND DELIVERY & ECF

The Honorable Susan Illston
United States District Court
Northern District of California
Courtroom 10, 19th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Re: In Re: TFT-LCD (Flat Panel) Antitrust Litigation
Case No.: MDL 3:07-md-1827 SI

Your Honor:

On behalf of Direct Purchaser Class Plaintiffs ("Plaintiffs"), we write to respond to the letter of September 12, 2012 by counsel for opt-out plaintiff Dell Inc. ("Dell") requesting that the Court delay its hearing on Plaintiffs' motion for preliminary approval of their settlement with the Toshiba defendants from September 14, 2012 until October 12, 2012. (Doc. No. 6699.) Dell seeks delay so that it may object to the provision of the settlement that would require the Court to vacate and set aside the special verdict returned by the jury in Plaintiffs' trial against Toshiba. (Doc. No. 6675-3, ¶ 11(c).)

Having opted out of the class action, and having refused and objected to compensating the Class for the enormous benefits Dell already has received from the efforts of Class counsel throughout the case, Dell now seeks to obstruct the settlement approval process. Dell previously disavowed needing any help from the Plaintiffs and claimed to be able to prosecute its case on its own. Now, Dell has done a complete about-face by seeking the benefits of a verdict in an action to which, by its own choice, it is not a party. Dell's position would prevent the small businesses and consumers in the Class from obtaining the value of their own claims. For the reasons explained below Dell's request to modify the Class schedule should be denied.

First, Dell excluded itself from the Class more than two years ago. It has no standing to object to the Class settlement. *See* Fed. R. Civ. P. 23(e)(5) (providing "any class member may

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object" to a proposed settlement); *Mayfield v. Barr,* 985 F.2d 1090, 1092 (D.C. Cir. 1993) (holding "[t]hose who are not class members, because they are outside the definition of the class or have opted out" lack standing to object to class settlement); *Jenson v. Continental Finance Corp.,* 591 F.2d 477, 482 n. 7 (8th Cir. 1979) ("Opt-outs ... are not members of the class and hence are not entitled to the protection of Rule 23(e)."); *In re Wachovia Corp. "Pick-A-Payment" Mortg. Mktg. & Sales Practices Litig.*, 5:09-MD-02015-JF, 2011 WL 1877630, at *4 n.3 (N.D. Cal. May 17, 2011) ("Class members who opt out lack standing to object to a settlement.").

Second, the proposed settlement satisfies the standard for preliminary approval. At preliminary approval, the Court need only find that the settlement falls within "the range of reasonableness," such that notice should be disseminated to Class members for their comments. 4 Newberg of Class Actions § 11.25 (4th ed. 2002). *See also The Manual for Complex Litigation* (Fourth) (2004) § 21.632. The proposed settlement, which tracks the previous settlements approved by the Court in this case, is clearly within the range of reasonableness. As to the vacatur of the jury verdict, Plaintiffs explained in their motion papers that courts have approved settlements with identical provisions to the one that Dell finds objectionable under analogous circumstances to those here. *See, e.g., In re Vitamins Antitrust Litig.*, No. 99-mc-0197 (TFH), ECF No. 4752 (D.D.C. Nov. 30, 2004) (vacating and setting aside jury's verdict in approving antitrust class action settlement reached after the jury returned a verdict but before entry of judgment or resolution of post-trial motions) (attached as Exhibit B to the Declaration of Bruce L. Simon in Support of Motion for Preliminary Approval of Class Settlement with Toshiba Defendants (Doc. No. 6675-4)). Not only does Dell lack standing to complain now and at final approval, but its objection has no merit.

Third, Dell's authority is inapplicable as it pertains only to the vacatur of judgment, not a jury verdict before the entry of judgment. *See U.S. Bancorp Mortg. Co v. Bonner Mall P'ship*, 513 U.S. 18, 29 (1994) ("We hold that mootness by reason of settlement does not justify vacatur of a *judgment* under review.") (emphasis added). Here, there is no judgment, let alone one that is under review by an appellate court, because the parties reached the current settlement after the jury issued its verdict but before the Court entered judgment. Moreover, the Ninth Circuit has held that *Bonner Mall* only applies at the appellate level when an appellate court reviews a lower court's judgment; it does not apply where, as here, a district court vacates its *own* decision. *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1168 (9th Cir. 1998) ("Ninth Circuit decisions after *Bonner Mall* support the reading … that a district court may vacate its own decision in the absence of extraordinary circumstances.").

Fourth, granting Dell's request would cause needless delay and expense to the Class, as it would require publication of separate notices for the Toshiba and AUO settlements and prevent these settlements from being considered on a single approval schedule. It is unfair to make the

Class and AUO wait for the Court to consider the Toshiba settlement before it gives final consideration to the AUO settlement.

Fifth, Dell's position violates the longstanding judicial policy favoring settlement. Dell prefers that the Class and Toshiba litigate post-trial motions and appeals for years, while the actual parties wish to resolve the matter finally. As a third-party, Dell is not in any position to opine on parties' settlement decisions. After years of saying that it wanted nothing to do with the Plaintiffs' case, Dell now wants to prevent this Court from bringing a significant part of this massive MDL to a close.

Plaintiffs respectfully request that the Court deny Dell's request and hold the preliminary approval hearing on September 14, 2012 at 9:00 a.m., as scheduled.

Very truly yours,

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