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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	Case No. MDL 3:07-md-1827 SI
This document relates to: ALL DIRECT PURCHASER CLASS ACTIONS	**CLASS ACTION** **NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT WITH THE TOSHIBA DEFENDANTS** Date: September 14, 2012 Time: 9:00 a.m. Place: Courtroom 10, 19th Floor The Honorable Susan Illston

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 7, 2012, at 9:00 a.m., in the Courtroom of the Honorable Susan Illston, United States District Judge for the Northern District of California, located at 455 Golden Gate Avenue, San Francisco, California, the Direct Purchaser Class Plaintiffs will and hereby do move the Court, pursuant to Federal Rule of Civil Procedure 23(e), for the entry of an Order:

1. Preliminarily approving the settlement with Toshiba Corporation, Toshiba Mobile Display Co., Ltd., Toshiba America Electronic Components, Inc., and Toshiba America Information Systems, Inc.;

2. Directing distribution of notice of the proposed settlement to the Class; and

3. Setting a schedule for the final approval process.

The grounds for this motion are that the proposed Class settlement is within the range of being finally approved as fair, reasonable, and adequate.

This motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, the accompanying Declaration of Bruce L. Simon, the TFT-LCD Direct Purchaser Class–Toshiba Settlement Agreement, any papers filed in reply, the argument of counsel, and all papers and records on file in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Rule 23 of the Federal Rule of Civil Procedure, Direct Purchaser Class Plaintiffs ("Plaintiffs") hereby move this Court for an order preliminarily approving a class settlement reached with defendants Toshiba Corporation, Toshiba Mobile Display Co., Ltd., Toshiba America Electronic Components, Inc., and Toshiba America Information Systems, Inc. (collectively "Toshiba"). Under the terms of the settlement, Toshiba will pay a total of $30,000,000 (thirty million dollars) (the "Settlement Fund") in exchange for a release of the class members' claims. Final approval of the Toshiba and AUO settlements will resolve the Direct Purchaser Class Action in its entirety.

As the Court recently granted preliminary approval to the AUO settlement, and notice has not yet issued, Plaintiffs request that the Court set a schedule to allow a joint notice of, and final approval process for, the Toshiba and AUO settlements. Toshiba and AUO agree with this proposal.

The question at the preliminary approval stage is not whether the settlement is fair, reasonable and adequate. Rather, the question is whether the settlement is within the range of possible approval to justify sending and publishing notice of the settlement to class members and scheduling final approval proceedings. The settlement here was reached after extensive arm's length negotiations between experienced and informed counsel, and easily meets the standards for preliminary approval.

Plaintiffs also respectfully request that the Court approve the proposed forms of notice submitted herewith, allow no further opt outs from the proposed settlement, and schedule a final approval hearing.

II. PROCEDURAL HISTORY

This multidistrict litigation arises from a conspiracy to fix the prices of Thin Film Transistor-Liquid Crystal Display ("TFT-LCD") panels. *See* Declaration of Bruce L. Simon in Support of Motion for Preliminary Approval of Class Settlement with the Toshiba Defendants

("Simon Decl."), ¶ 3. The first cases were filed in December 2006. *Id.* The Judicial Panel on Multidistrict Litigation in April 2007 granted a motion for pretrial coordination pursuant to 28 U.S.C. § 1407 and transferred all actions to this Court. 483 F. Supp. 2d 1353 (J.P.M.L. 2007).

Because of the criminal investigation by the U.S. Department of Justice ("DOJ"), this Court on September 25, 2007, partially stayed discovery. 2007 WL 2782951 (N.D. Cal. Sept. 25, 2007). Plaintiffs were not allowed access to the documents the Defendants had produced to the DOJ, to take any depositions, exchange initial disclosures, or propound any discovery requests regarding the conspiracy's operations, participants, and effects. Plaintiffs were only permitted to propound limited interrogatories to determine the amount of Defendants' sales and to identify their officers and executives. Simon Decl., ¶ 3. On May 27, 2008, the Court continued the stay of merits document discovery until January 9, 2009. (Doc. No. 631.)

Defendants moved to dismiss the complaint, twice jointly and several times separately. Simon Decl., ¶ 4. The Court granted and denied in part the first wave of motions. 586 F. Supp. 2d 1109 (N.D. Cal. 2008). After Plaintiffs re-pled certain aspects of their claims, the Court denied in total the second wave. 599 F. Supp. 2d 1179 (N.D. Cal. 2009).

While the Defendants' motions to dismiss were litigated, Plaintiffs propounded and responded to written discovery. Plaintiffs also met and conferred with each Defendant about discovery issues, litigated discovery motions, and successfully opposed a writ petition by the Toshiba Defendants filed with the Ninth Circuit Court of Appeals. Plaintiffs also obtained information and documents from third-parties and consulted with experts. Simon Decl., ¶ 5.

On January 9, 2009, upon the expiration of the discovery stay, Defendants began producing documents to Plaintiffs they had produced to the DOJ and/or the grand jury. *Id.*, ¶ 6. The Defendants' document productions have taken place on a rolling basis. Many of the documents were in Korean, Japanese, and Chinese, and were loaded into a database, translated, and analyzed. In addition to the review of documents produced to the grand jury, Plaintiffs propounded separate production requests and interrogatories to all Defendants. Plaintiffs received from Defendants more than 7.8 million documents, totaling over 40 million pages, which they

loaded onto the electronic database. *Id.* A team of Plaintiffs' counsel reviewed these documents in preparation for trial.

On September 17, 2009, Plaintiffs commenced merits depositions. Plaintiffs took more than 110 depositions of various Defendants' employees, officers, and corporate designees. *Id.*, ¶ 7. Plaintiffs took depositions of 23 Toshiba witnesses and reviewed 431,433 documents Toshiba produced. *Id.*

Plaintiffs filed their motion for class certification on April 3, 2009. On March 28, 2010, the Court certified the two Direct Purchaser classes, one for panel purchasers and the other for finished product (televisions, notebooks, and monitors) purchasers. 267 F.R.D. 291 (N.D. Cal. 2010) On June 17, 2010, the Ninth Circuit denied Defendants' petition to appeal under Rule 23(f) of the Federal Rules of Civil Procedure. Simon Decl., ¶ 8.

Direct Purchasers and Defendants completed the exchange of expert reports. In May 2011, Direct Purchasers served three reports, those of Dr. Ed Leamer, Dr. Ken Flamm, and Dr. Adam Fontecchio. Defendants deposed all three. Defendants' experts served four rebuttal reports in late July 2011. Plaintiffs deposed the Defendants' experts in August of 2011. Direct Purchasers then served their experts' reply reports, and Defendants served three sur-rebuttal reports in September 2011. Simon Decl., ¶ 9.

While all other Defendants settled with Plaintiffs in advance of trial, Toshiba did not. The parties selected a jury on May 14, 2012, and trial against Toshiba began on May 21, 2012. During the six week trial, 25 witnesses testified live, and 20 witnesses provided sworn testimony by deposition. In addition, the parties introduced more than 330 exhibits. Simon Decl., ¶ 10. On July 3, 2012, the jury returned a verdict finding that: (1) Toshiba knowingly participated in a conspiracy to fix TFT-LCD panel prices; (2) class members were injured as a result of the conspiracy in which Toshiba knowingly participated; and (3) as a result of their injuries, class members suffered a total of $87,000,000 in damages. (Doc. No. 6061.) After the trial, Toshiba filed a motion to set off the damages award against the prior settlement amounts, which was scheduled to be heard on August 24, 2012. (Doc. No. 6133.) As a result of reaching the proposed

settlement, Toshiba has withdrawn its motion without prejudice. (Doc. No. 6509.)

This is the fifth motion for preliminary approval of settlements that has been filed in this case. The Court first granted preliminary approval of settlements with Defendants Epson and Chunghwa in 2010. (Doc. Nos. 1686 and 2078.) Notice issued in conjunction with those settlements and with respect to the certification of the litigation classes, and the period to opt-out expired on January 4, 2011. Simon Decl., ¶ 11. On February 18, 2011, the Court granted final approval of the settlements with the Epson and Chunghwa defendants. (Doc. Nos. 2475 and 2476.)

On October 4, 2011, the Court preliminarily approved settlements with Defendants Chi Mei, Hannstar, Hitachi, LG Display, Mitsui, Samsung, Sanyo and Sharp. (Doc. No. 3817.) The Court approved the form of notice to the class members, and notice of the settlements was subsequently issued. The Court found that because the class members were already given an opportunity to opt out, another opportunity to opt out was not necessary. The Court also set the deadline of November 28, 2011 for the filing of any written objections to the proposed settlements. Simon Decl., ¶ 12. On November 19, 2011, the Court heard the Direct Purchaser Class Plaintiffs' Motion for Final Approval of the Settlements with Chi Mei, Hannstar, Hitachi, LG Display, Mitsui, Samsung, Sanyo and Sharp. (Doc. No. 4275.) On that same day, the Court also heard Direct Purchaser Class Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Incentive Awards. *Id.*, ¶ 12.

Those settlements were finally approved by the Court on December 27, 2011, and the Court entered final judgment of dismissal with prejudice as to Defendants Chi Mei, Hannstar, Hitachi, LG Display, Mitsui, Samsung, Sanyo and Sharp. (Doc. No. 4438.) The motion for attorney' fees and costs was also granted on December 27, 2011. (Doc. No. 4436.) The Court also overruled the two objections that were filed regarding the settlements and attorneys' fees. (Doc No. 4437.) Simon Decl., ¶ 13.

On August 10, 2012, the Court preliminary approved a settlement with the AUO defendants. (Doc. No. 6437.) The Court approved the form of notice and directed that notice be

given to the class by September 10, 2012. *Id.*, ¶¶ 6-7. Again, the Court declined to allow class members an additional opportunity to exclude themselves from the class. *Id.*, ¶ 8. The Court set October 24, 2012 as the deadline for class members to comment on or object to the proposed settlement with AUO, and scheduled a fairness hearing for November 28, 2012 at 3:30 p.m. *Id.*, ¶¶ 4, 10. Simon Decl., ¶ 14.

III. SUMMARY OF SETTLEMENT NEGOTIATIONS

Settlement discussions in this case with Toshiba commenced as early as January 2011. Settlement discussions resumed at various times between September 2011 and July 2012, with a settlement agreement in principle being reached in August 2012. The negotiations which resulted in the settlement at issue consisted of an initial court-mediated mediation session on January 13, 2011 in San Francisco, conducted by Professor Eric Green, and attended by all Defendants, including Toshiba. This was followed by episodic in-person, telephonic and email communications between or among Plaintiffs, Toshiba, and Professor Green, all conducted on an arm's-length and non-collusive basis among counsel who are experienced in antitrust law and class actions. Simon Decl., ¶ 15. Professor Green has been very effective in assisting the parties in coming to a fair and equitable resolution of this matter with Toshiba despite the strong positions taken by counsel and their clients. *Id*. The parties ultimately agreed to resolve this matter in connection with the mediator's proposal, and the parties then notified the Court immediately. *Id.*

IV. TERMS OF THE SETTLEMENT

The terms of the proposed class settlement are set forth fully in the Settlement Agreement. Simon Decl., ¶ 16, Exh. A. The Toshiba defendants have agreed to pay $30,000,000 in exchange for their dismissal with prejudice and a release of claims. Upon final approval of the settlement, Plaintiffs and class members will release all claims they have against Toshiba "concerning the purchase, manufacture, supply, distribution, marketing, sale or pricing of TFT-LCD Products up to the date of execution" of the Agreement. *Id.*, ¶ 14. However, the release does not include claims arising from the sale of TFT-LCD Products by other defendants, or any subsidiary, affiliate, or their co-conspirators. *Id.* Further, the release does not include claims for product defect, personal

injury, or breach of contract. *Id.*, ¶ 16. The settlement is also conditioned upon this Court vacating and setting aside the jury verdict. *Id.*, ¶ 11(c). District courts have approved this condition of settlement in similar circumstances. *See, e.g., In re Vitamins Antitrust Litig.*, No. 1:99-mc-00197-TFH, ECF No. 4783 (D.D.C. May 4, 2005) (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). Simon Decl., ¶ 17; Exh. B, ¶ 4(g).

V. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

A. Class Action Settlement Procedure.

A class action may not be dismissed, compromised, or settled without the approval of the Court. Judicial proceedings under Federal Rule of Civil Procedure 23 have led to a defined procedure and specific criteria for class action settlement approval. The Rule 23(e) settlement approval procedure includes three distinct steps:

1. Preliminary approval of the proposed settlements;

2. Dissemination of notice of the settlements to all affected class members; and

3. A formal fairness hearing, also called the final approval hearing, at which class members may be heard regarding the settlements, and at which counsel may introduce evidence and present argument concerning the fairness, adequacy, and reasonableness of the settlements. This procedure safeguards class members' due process rights and enables the Court to fulfill its role as the guardian of class interests. *See* 4 Newberg on Class Actions §§ 11.22, et seq. (4th ed. 2002) ("Newberg").

By way of this motion, the parties request that the Court take the first step in the settlement approval process and preliminarily approve the proposed settlement. As the Court previously certified the classes which are now being settled, and appointed representative plaintiffs and class counsel, it need not certify settlement classes or make any appointments.

B. Standards For Settlement Approval.

Rule 23(e) requires court approval of any settlement of claims brought on a class basis. "[T]here is an overriding public interest in settling and quieting litigation . . . particularly . . . in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense." *Van Bronkhorst v. Safeco Corp*., 529 F.2d 943, 950 (9th Cir. 1976); see also *Churchill Village, L.L.C. v. General Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *In re Pacific Enter. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). The purpose of the Court's preliminary evaluation of the proposed settlement is to determine whether it is within "the range of reasonableness," and thus whether notice to the class of the terms and conditions of the settlement, and the scheduling of a formal fairness hearing, are worthwhile. Preliminary approval should be granted where "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval." *In re NASDAQ Market Makers Antitrust Litigation*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). Application of these factors here support an order granting the motion for preliminary approval.

The approval of a proposed settlement of a class action is a matter of discretion for the trial court. *Churchill Village, supra*, 361 F.3d at 575. In exercising that discretion, however, courts recognize that as a matter of sound policy, settlements of disputed claims are encouraged and a settlement approval hearing should "not be turned into a trial or rehearsal for trial on the merits." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied sub nom. Byrd v. Civil Serv. Comm'n*, 459 U.S. 1217 (1983). Furthermore, courts must give "proper deference" to the settlement agreement, because "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and the settlement, taken as a

whole, is fair, reasonable and adequate to all concerned." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988) (quotations omitted).

To grant preliminary approval of this class action settlement, the Court need only find that the settlement falls within "the range of reasonableness." *Newberg* § 11.25. *The Manual for Complex Litigation* (Fourth) (2004) ("*Manual*") characterizes the preliminary approval stage as an "initial evaluation" of the fairness of the proposed settlement made by the court on the basis of written submissions and informal presentation from the settling parties. *Manual* § 21.632. The *Manual* summarizes the preliminary approval criteria as follows:

> Fairness calls for a comparative analysis of the treatment of the class members vis-à-vis each other and vis-à-vis similar individuals with similar claims who are not in the class. Reasonableness depends on an analysis of the class allegations and claims and the responsiveness of the settlement to those claims. Adequacy of the settlement involves a comparison of the relief granted to what class members might have obtained without using the class action process.

Manual § 21.62. A proposed settlement may be finally approved by the trial court if it is determined to be "fundamentally fair, adequate, and reasonable." *City of Seattle*, 955 F.2d at 1276. While consideration of the requirements for *final* approval is unnecessary at this stage, all of the relevant factors weigh in favor of the settlement proposed here.[1] Therefore, the Court should allow notice of the settlements to be disseminated to the class.

C. <u>The Proposed Settlement Is Within The Range Of Reasonableness.</u>

The proposed settlement with Toshiba meets the standards for preliminary approval. These settlements are entitled to "an initial presumption of fairness" because they are the result of arm's-length negotiations among experienced counsel. *Newberg* § 11.41. The monetary consideration—$30,000,000 in cash—is substantial, particularly in light of the damages awarded by the jury and the numerous risks in collecting these damages.

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[1] Plaintiffs will address in detail each of the factors required for final settlement approval in their Motion for Final Approval of the Settlement, to be submitted following the issuance of notice to the class.

Plaintiffs' damage expert, Dr. Edward Leamer of UCLA, testified at trial that he calculated damages of $867,000,000. In contrast, Toshiba's experts, Dr. Dennis Carlton and Dr. Barry Harris, testified that Toshiba did not participate in the subject conspiracy, that any conspiracy was ineffective and unsuccessful, and that the damages were very low or non-existent. While the jury found that Toshiba had participated in the conspiracy, it awarded compensatory damages of only $87,000,000, or approximately 10 percent of the amount that Plaintiffs' expert had attributed to the conspiratorial conduct. Following trial, Toshiba moved to set off the trebled compensatory damages award from Plaintiffs' prior settlements with the other Defendants, which exceeded $443,000,000. Toshiba's considerable arguments created a substantial risk that the class would not recover any compensatory damages, despite the verdict in its favor.

In addition, any award of damages or potential recoupment by the class of attorneys' fees and litigation costs from Toshiba was threatened by Toshiba's anticipated motions for judgment notwithstanding the verdict and its likely appeal. Toshiba's motions for judgment as a matter of law filed during trial previewed these grounds to vacate or overturn the verdict. Toshiba could be expected to challenge: Plaintiffs' evidence of conspiracy, class-wide impact and damages; Plaintiffs' Article III standing; Plaintiffs' evidence satisfying the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a; and Plaintiffs' evidence demonstrating the corporate relationships of the co-conspirators to confer direct purchaser standing under *Royal Printing v. Kimberly Clark Corp.*, 621 F.2d 323 (9th Cir. 1980). (Doc. Nos. 5959, 6035.) Any ruling in Toshiba's favor would be likely to diminish the recovery for the class. The settlement eliminates these risks and ensures recovery from Toshiba for the class.

Finally, the settlement will resolve this litigation in its entirety and allow for the prompt distribution of settlement proceeds to the class following final approval, without the potential for years of delay during post-trial motions and appellate practice. For all the aforementioned reasons, the proposed settlement is within the range of obtaining final approval as fair, reasonable, and adequate.

VI. PROPOSED NOTICE PLAN

Rule 23(e)(1) states that, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Notice of a proposed settlement must inform class members of the following: (1) the nature of the pending litigation; (2) the general terms of the proposed settlement; (3) that complete information is available from the court files; and (4) that any class member may appear and be heard at the fairness hearing. *See Newberg* § 8.32. The notice must also indicate that the court will exclude from the class any member who requests exclusion, that the judgment will bind all class members who do not opt-out, and that any member who does not opt-out may appear through counsel. Fed. R. Civ. P. 23(c)(2)(B).

A. The Notice Plan Is The Same One Used To Notify The Class Of The Previous Settlements Herein.

Plaintiffs propose that the Court order a combined notice of the AUO and Toshiba settlements. The notice plan should be the same as the Court ordered for the AUO settlement:

1. direct notice given by mail or email to each class member identified by reasonable effort;

2. a summary notice published in the national edition of The Wall Street Journal;

3. the posting of both forms of notice on a public website maintained by the notice provider; and

4. a formal fairness hearing, also called the final approval hearing, at which class members may be heard regarding the settlements, and at which counsel may introduce evidence and present argument concerning the fairness, adequacy, and reasonableness of the settlement.

This is the same plan of notice that the Court approved for notifying the Classes of the class certification and settlements with Epson and Chunghwa, the settlements with Chimei, Hannstar, Hitachi, LG Display, Mitsui, Samsung, Sanyo and Sharp, and the recent settlement with

AUO. Simon Decl., ¶ 22. Moreover, Plaintiffs now have a list of class members used for the previous notices which will make dissemination of the notice easier this time. Furthermore, many class members registered on-line with the Claims Administrator, allowing email notification.

Plaintiffs propose that the Class Notice approved by the Court just a few weeks ago for the AUO settlement be revised to include the terms of the Toshiba settlement as well. This will reduce the notice costs and eliminate the possibility of confusion to class members who otherwise would receive two similar notices of related class settlements within a short time-frame. The content of the proposed Class Notice, which consists of a summary notice and a long form notice, fully complies with due process and Rule 23. (The proposed summary and long form notices are attached to the Simon Decl. as Exhibits C and D.) It provides the definition of the class, describes the nature of the settlement, explains the procedure for making comments and objections, and contains contact information to pose any questions. The Class Notice describes the terms of the settlement with Toshiba (as well as the prior settlement with AUO), and informs class members of the proposed plan of distribution. The Class Notice provides the date, time, and place of the final approval hearing, and informs class members that they may enter an appearance through counsel. The Class Notice also informs class members how to exercise their rights, including to comment on or object to the settlements, and make informed decisions regarding the proposed settlement, and that the judgment will be binding upon them. Finally, the Class Notice informs the class that Class Counsel will request payment of Plaintiffs' attorneys' fees and costs, and may seek incentive awards of up to $5,000 for each class representative who attended the trial.

B. The Form Of Notice Should Be Approved.

The form of notice is "adequate if it may be understood by the average class member." *Newberg* § 11.53. Notice to the class must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997). Publication notice is an acceptable method of providing notice where the identity of specific class members is not reasonably available. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal.

2007) (citing *Manual* § 21.311). The Notice here, which is modeled on the previously-approved Notices, is understandable. Notices having already been sent twice, and the Class members' addresses are as updated and verified as possible.

C. The Class Members Should Not Be Given Another Opportunity To Opt Out.

As the Court has previously ruled (Doc. No. 3817, ¶ 8; Doc. No. 6437, ¶ 8), there is no need for another opt-out period. Rule 23(e) states that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval." Fed. R. Civ. P. 23(e). The Rule states "[i]f the class action was previously certified under Rule 23(b)(3), the court *may* refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." Fed. R. Civ. P. 23(e)(4) (emphasis added). However, Rule 23(e)(4)'s plain language is permissive and courts including this one have regularly found that class members do not have to be afforded successive opportunities to opt out of settlements if they have had a previous chance to opt out but not done so. As a condition of this settlement, all Class Members will be bound by the terms of the Settlement Agreement without an additional opportunity for exclusion. *See* Simon Decl., Exh. A, ¶ 11(b).

"In a class action, once the district court certifies a class under Rule 23, all class members are bound by the judgment unless they opt out of the suit." *McElmurry v. U.S. Bank Nat. Ass'n*, 495 F.3d 1136, 1139 (9th Cir. 2007). Once a court has conducted a fairness hearing and entered a judgment approving a settlement agreement, any class members, who did not opt out by the initial opt out date, are legally bound to the terms of the settlement. Fed. R. Civ. P. 23(e)(2). Of course, "[a]ny class member may object to the proposal if it requires court approval under this subdivision (e)." Fed. R. Civ. P. 23(e)(5).

The Ninth Circuit has held that an objection based on the settlement agreement not allowing class members a second chance to opt out is insufficient to disrupt the settlement. In *Officers for Justice v. Civil Serv. Comm'n of City & County of San Francisco*, the Ninth Circuit held, that neither Rule 23(b)(3) nor due process required a second opt out period. 688 F.2d 615

(9th Cir. 1982).

> . . . we have found no authority of any kind suggesting that due process requires that members of a Rule 23(b)(3) class be given a second chance to opt out. We think it does not. [Objector's] rights are protected by the mechanism provided in the rule: approval by the district court after notice to the class and a fairness hearing at which dissenters can voice their objections, and the availability of review on appeal. Moreover, to hold that due process requires a second opportunity to opt out after the terms of the settlement have been disclosed to the class would impede the settlement process so favored in the law. "(A)llowing objectors to opt out would discourage settlements because class action defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims, with those having stronger claims opting out to pursue their individual claims separately." *Kincade v. General Tire & Rubber Co*., 635 F.2d 501, 507 (5th Cir. 1981).

Officers for Justice, supra, 688 F.2d at 635. Aside from disrupting the ability of parties to settle, requiring successive opt out periods for each settlement would undermine the finality of class certification.

> Neither due process nor Rule 23(e)(3) requires, however, a second opt-out period whenever the final terms change after the initial opt-out period. Requiring a second opt-out period as a blanket rule would disrupt settlement proceedings because no certification would be final until after the final settlement terms had been reached. As the Advisory Committee Notes make clear, 'Rule 23(e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles after a certification decision . . . .' Adv. Comm. 2003 Notes to Fed.R.Civ.P. 23(e)(3). However, the court is under no obligation to do so: The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion.

Denney v. Deutsche Bank AG, 443 F.3d 253, 271 (2d Cir. 2006) (citations and quotation omitted).

Therefore, although a judge may consider whether fairness merits allowing class members a second chance to opt out, neither the court nor the settling parties are required to provide such an opportunity. *See Klein v. O'Neal, Inc*., 705 F. Supp. 2d 632, 663 (N.D. Tex. 2010), judgment entered (June 18, 2010), as modified (June 14, 2010) ("Under Rule 23(e)(4), the decision whether to allow a second opt out is left to the court's discretion.") (citation and quotation omitted).

Because the class members here were previously given an opportunity to opt out, the Court should not allow an additional opportunity.

VII. ATTORNEYS' FEES AND COSTS

The Settlement Agreement states that Class Counsel may apply to the Court for an award of attorneys' fees, reimbursement of costs, and payment of incentive awards to class representatives, out of the settlement fund, and Toshiba has agreed not to oppose any such request. Simon Decl., Exh. A, ¶ 23(a). Prior to the final approval hearing, Plaintiffs and their counsel will move for an award of attorneys' fees to be paid from the Settlement Fund in an amount not to exceed one-third (33.33%) of the Settlement Fund's total value, as well as reimbursement of outstanding litigation costs not to exceed $4,000,000 from the combined settlements with Toshiba and AUO. The proposed notice will explain the forthcoming motion for attorneys' fees and reimbursement of costs so that class members will be aware of the proposed requests. The motion for attorneys' fees and reimbursement of costs will be filed a reasonable time before the date for objections. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 995 (9th Cir. 2010) (Plaintiffs must have adequate time to review motion for attorneys' fees before deadline for objections).

VIII. THE COURT SHOULD SET A FINAL APPROVAL HEARING SCHEDULE

The last step in the settlement approval process is the final approval hearing, at which the Court may hear all evidence and argument necessary to evaluate the proposed settlements. At that hearing, proponents of the settlements may explain and describe their terms and conditions and offer argument in support of settlement approval. Members of the Class, or their counsel, may be heard in support of or in opposition to the settlement. Plaintiffs propose the following schedule for final approval of the Toshiba and AUO settlements[2]:

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[2] On September 7, 2012, Plaintiffs filed a stipulation with AUO requesting that the Court vacate the final approval schedule that it had entered for the AUO settlement (Doc. No. 6652) to allow Plaintiffs to request a joint notice of, and final approval process for, the Toshiba and AUO settlements.

	Date	Action
1.	September 24, 2012	Mailing and publication of Class Notice
2.	October 8, 2012	Motion for fees and reimbursement of litigation expenses
3.	November 7, 2012	Deadline to comment on or object to settlement or fee and expense application
4.	November 30, 2012	Motion for final settlement approval
5.	December 14, 2012 at 9:00 a.m.	Final Settlement Approval Hearing/Fairness Hearing

IX. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant preliminary approval of the class settlement with Toshiba, and approve the proposed long and short form notice for the Toshiba and AUO settlements; establish a deadline for class members to submit any objections to the settlements; and set a final approval hearing date.

Respectfully submitted,

DATED: September 10, 2012

PEARSON, SIMON, WARSHAW & PENNY, LLP

By: */s/ by Aaron M. Sheanin*
BRUCE L. SIMON

Co-Lead Counsel for the Direct Purchaser Class Plaintiffs

DATED: September 10, 2012

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

By: */s/ by Eric B. Fastiff*
RICHARD M. HEIMANN

Co-Lead Counsel for the Direct Purchaser Class Plainiffs

ATTESTATION

Pursuant to General Order 45, Part X-B, the filer of this document attests that concurrence in the filing of this document has been obtained from the other signatory.

Dated: September 10, 2012

By: */s/ Aaron M. Sheanin*
AARON M. SHEANIN