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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA et al., Plaintiffs, v. INFINEON TECHNOLOGIES AG et al., Defendants.	Case No. C 06-4333 PJH Related to MDL No. 1486 Plaintiff States' Motion to Void Certain Defendants' Agreement (re: Settlement) Date: November 14, 2007 Time: 9:00 A.M. Courtroom: 3

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on November 14, 2007, at 9:00 A.M., or as soon thereafter as the matter may be heard by the above entitled court, in Courtroom 3 of the United States Courthouse located at 450 Golden Gate Avenue, San Francisco, California 94102, the State Plaintiffs in the above-captioned action will present this motion to the Court.

The State Plaintiffs will move and hereby do move for an order voiding an agreement among certain defendants to this action that has the effect of restricting reasonable efforts to achieve settlement.

This motion is based upon this Notice of Motion and accompanying Memorandum of Points and Authorities and declarations, the complete files and records in this action, oral argument of counsel, and such other and further matters as this Court may consider.

I. INTRODUCTION – ISSUES TO BE DECIDED

Plaintiffs' case charges a group of sellers with horizontally agreeing to limit the terms under which they would sell their products – criminal behavior that many of them have already admitted. Ironically, many of these same sellers have now horizontally agreed to limit the terms under which they will negotiate and enter into settlements to reimburse their victims.

The States have been able to review parts of that agreement among certain defendants, and the portions they have seen clearly show that the agreement contravenes public policy concerning settlements of complex class actions. Specifically, the signatory defendants have agreed that, if one of them enters into a settlement that does not contain certain terms highly favorable to all defendants (and therefore unfavorable and undesirable to plaintiffs), that settling defendant will suffer some unknown but clearly significant liability to the other

defendants that are party to the agreement. For convenience, in this motion the agreement among certain defendants will be referred to as the Defendants' Agreement.

The Defendants' Agreement inhibits settlement and otherwise defies public policy in numerous ways, including the following:

- It makes settlement negotiations with fewer than all signatory defendants virtually impossible, and it strongly inhibits anything other than a global settlement divided according to defendants' pre-determined percentages
- It removes the incentive for a defendant to cooperate with plaintiffs in exchange for a favorable settlement.
- It delays the settlement process, as any settlement offer to a signatory defendant must be reviewed by the other signatories.
- It saddles any signatory who does not hold out for a settlement agreeable to all signatories with continuing liability to the other signatories, meaning that a defendant cannot achieve peace by settling on terms that any other defendant does not accept.
- It allows defendants, not the court, to set the terms under which they will suffer legal penalties imposed by statute.

Thus, the entire thrust of the Defendants' Agreement is to make settlement in this case much more difficult and to thwart the purpose of the applicable statutes. The Court can and should declare the agreement void, to uphold the strong policy of encouraging, and not discouraging, settlement, and of imposing penalties in proportion to a defendant's culpability.

II. THE KNOWN CONTENT OF THE DEFENDANTS' AGREEMENT

The States do not have a copy of the Defendants' Agreement and have not been permitted to view it in its entirety. However, through an informal agreement pursued in lieu of discovery, without a waiver of the States' claim of a right to discovery or defendants'

claim of a right to non-disclosure, a representative of the States was allowed to view portions of the agreement. Varanini Decl. at ¶ 2; Gordon Decl. at ¶ 2. From that limited review, the States are able to make the following assertions about the Defendants' Agreement.

The parties to the Defendants' Agreement are as follows: Infineon Technologies AG; Infineon Technologies North America Corp.; Micron Technology, Inc.; Hynix Semiconductor, Inc.; Hynix Semiconductor America, Inc.; Hynix Semiconductor Manufacturing America, Inc.; NEC Corporation; NEC Electronics Corporation; NEC Electronics America, Inc.; Elpida Memory, Inc.; and Elpida Memory (USA) Inc.[1] Gordon Decl. at § 3.

The Defendants' Agreement ostensibly provides that any party may settle any DRAM claim on any terms at any time:

> **Settlements**. Any Party may settle any DRAM claim on any terms at any time. However, if, and only if, a Party settles a DRAM Claim consistent with the paragraphs [omitted] below, will that Party have no liability to the other Parties on account of a Judgment on that DRAM Claim . . .

Gordon Decl. at ¶ 4. The Defendants' Agreement, nevertheless, in fact severely restrains the ability of any signatory to settle a DRAM claim. Specifically, the Defendants' Agreement requires that any settlement of a DRAM claim not consistent with both provisions below, will impose on a settling party continuing liability to the other signatories. To avoid liability to the other signatories, a settling party must satisfy the following:

1. The party must first negotiate a proposed settlement of the DRAM claim that includes all the parties ("Joint Settlement"), which provides that each party will be

[1]Apparently, only the Nanya defendants and the Mosel Vitelic defendants are not parties to the Defendants' Agreement.

responsible for its Sharing Percentage of the Joint Settlement. If the Joint Settlement is not accepted by all Parties within 30 days of its presentation to all Parties, then any party (or parties) may subsequently satisfy this condition by settling that DRAM claim for an amount equal to or greater than its (or their) Sharing Percentage times the Joint Settlement amount and on the other terms and conditions that are no more favorable to the settling Party than those offered to the other parties in the Joint Settlement.

2. The party settling a DRAM Claim after one or more parties have declined the Joint Settlement must include in the settlement agreement a provision that any recovery from any other party sought on a Judgment by the claimant or group of claimants with which it settled will be reduced by the settling party's Sharing Percentage.

Gordon Decl. at ¶ 4.

The States do not know the "Sharing Percentage" of any of the parties to the Defendants' Agreement. The shares apparently, though, are a proportional distribution, preagreed among the parties to the agreement, of the amount of liability that each will suffer.

Thus, the Defendants' Agreement puts two severe restraints on any party to the agreement and thereby makes settlement all but impossible. The first is that a defendant negotiating settlement must insist that the settlement first be offered to all parties to the agreement in proportion to their Sharing Percentages. The second is that, if not all of the parties to the Defendants' Agreement elect to enter into the settlement, then the settlement agreement must include a provision that any recovery against a non-settling party will be reduced by the Sharing Percentage of the settling parties.

The States do not know what other oppressive terms might be in the Defendants' Agreement. It is entirely possible that the agreement contains other provisions that offend

the law or public policy.[2] The States are informed that the Defendants' Agreement includes terms commonly found in a "judgment sharing agreement." Varanini Decl. at ¶ 3. The States understand this to mean that the agreement requires that, in the event of a judgment in favor of plaintiffs in this action, the signatory defendants will allocate responsibility for satisfying that judgment among themselves according to a predetermined percentage allocation.

Even this limited review of the Defendants' Agreement's terms demonstrates beyond question that it uniquely inhibits settlement and violates public policy in numerous ways:

- It allocates liability according to defendants' whim, regardless of the merits of the litigation, making settlement negotiations with fewer than all defendants all but impossible.
- It necessarily requires disclosure of settlement negotiations with one defendant to all defendants, and delays any settlement agreement for an additional 30 days to allow all defendants to confer and consider it. (Interestingly, in contrast, defendants refuse to provide the States documentation regarding their settlements with other parties.)
- It disallows any settlement with one defendant that does not reduce every other defendant's liability by an arbitrary amount predetermined by defendants as a whole.
- It saddles any defendant trying to settle on its own with an unknown future liability, removing the primary incentive any party has for settling – certainty about the future.
- It makes settlement with individual defendants all but impossible, which makes cooperation by individual defendants all but impossible.

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[2]If the Court were to determine that the precise content of the agreement is important to resolution of this motion, it could require the signatory defendants to produce it for *in camera* review.

- It allows defendants guilty of profiting from an agreement in restraint of trade to profit from a corresponding agreement in restraint of settlement.

A horizontal agreement among defendants to hang together on settlement and to punish any signatory defendant that settles individually has an enormous chilling effect on the resolution of any litigation. Plaintiffs commonly settle with a defendant on more favorable terms in exchange for that defendant's cooperation in the litigation – cooperation that serves the laudable purpose of bringing into the litigation evidence that otherwise would be difficult or impossible to obtain. The settlement between the States and the Samsung defendants in this action is a good example of this type of agreement. With the Defendants' Agreement, though, defendants have mutually committed not to enter into settlements that favor a cooperating defendant. They have also agreed to punish any of their fellows who break rank and enter into an individual settlement that would be favorable to that defendant and that would aid the plaintiffs in bringing additional evidence before the Court.

For the reasons explained below, these known provisions are more than sufficient ground for the Court to invalidate the agreement.

III. THE LIMITED AUTHORITY CONCERNING JUDGMENT SHARING AGREEMENTS ILLUSTRATES WHY THE DEFENDANTS' AGREEMENT SHOULD BE VOIDED

A. Background – Judgment Sharing Agreements as a Means of Limiting the Incentive to Settle

Although there does not appear to be any precedent for the Defendants' Agreement's all-out assault on the parties' options in settling the case, defendants in other cases have attempted for some time to use more limited judgment sharing agreements to reduce the pressure they might otherwise feel to settle an antitrust case.

Generally, antitrust defendants have used judgment sharing agreements to create a right of contribution among themselves. The impetus for such agreements was the Supreme Court's decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981), which held that, in enacting the antitrust laws, "Congress neither expressly nor implicitly intended to create a right to contribution." *Id.* at 640. A judgment-sharing agreement under which defendants agree how ultimate liability will be allocated takes the place of this absent right to contribution. Such a judgment-sharing allocation is an apparent but secondary provision of the Defendants' Agreement in this action.

To state the obvious, an agreement that discourages settlement violates public policy and unfairly prejudices other parties:

> It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true 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.

There is an "overriding public interest in settling and quieting litigation." *Van Bronkhorst v. Safeco Corp.,* 529 F.2d 943, 950 (9th Cir. 1976). The Ninth Circuit is "committed to the rule that the law favors and encourages compromise settlements." *MWS Wire Industries, Inc. v. California Fine Wire Co., Inc.,* 797 F.2d 799, 802 (9th Cir. 1986); *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977). Even more to the point, "the general policy of federal courts to promote settlement before trial is even stronger in the context of large-scale class actions." *In re Exxon Valdez,* 229 F.3d 790, 795 (9th Cir. 2000); accord, *Van Bronkhorst*, 529 F.2d at 950 .

Clearly, allowing antitrust defendants to manufacture a right of contribution against each other strongly impedes both the settlement and the efficient litigation of a complicated class action. In *In re Corrugated Container Antitrust Litigation,* 84 F.R.D. 40 (D.C. Tex.

1979), a pre-*Texas Industries* case in which a defendant claimed a right to contribution from its co-defendants, the court observed: "[A] policy of allowing contribution would complicate litigation procedurally, frustrate settlements, and inhibit joint defense efforts to such an extent that this type of litigation would be virtually impossible to manage." *Id.* at 41.

Because the Defendants' Agreement is a contrived restraint on settlement – much more so than the usual judgment sharing agreement – the Court should invalidate it.

B. The Available Precedent Indicates the Defendants' Agreement Should Be Voided

There is only very limited authority addressing the validity of agreements bearing any resemblance to the Defendants' Agreement in this case. So far as the States have been able to determine, only three unpublished district court opinions consider the validity of judgment sharing agreements. Some of these cases tolerated judgment sharing agreements, but the agreements addressed in those decisions were far less restrictive than the Defendants' Agreement.

The agreement most resembling the one in the present case arose in *In re San Juan Dupont Plaza Hotel Fire Litigation*, 1989 WL 996278 (D. Puerto Rico 1989). In that mass tort litigation, defendants had entered into a "Judgment/Settlement Sharing Agreement" that, like the Defendants' Agreement, "establishes a formula by which the signatories will proportionately pay for any eventual judgments, dispenses with any contribution claims the signatories may have among themselves and provides a rigid and exclusive settlement mechanism for the participants." *Id.* at *1.

The court found it necessary to scrutinize the agreement carefully:

> Although damages sharing agreements may serve a legitimate purpose, "they may have the effect – and often the purpose – of preventing any partial settlement, and may discourage the introduction of evidence indicating the

> liability on the part of co-defendants." Manual for Complex Litigation Second, § 23.23, p. 172.

Id.

The defendants in *San Juan Dupont Plaza* argued that "the document promotes settlements with plaintiffs and the extrajudicial resolution of the contribution claims between defendants." *Id.* The court was not persuaded. It readily perceived that the agreement was "a conscious effort by the signatories to impede the ongoing settlement process in this case." *Id.*

Particularly egregious, in the Court's view, was the provision limiting the signatory defendants' power to settle the case individually. That provision originally stated:

> This Agreement provides the only method by which the Participants shall settle the claims asserted against them in this Litigation. In no event shall any participant negotiate a separate settlement with the Plaintiffs, or any other party to the Litigation.

Id. at *2. The court had no trouble determining that "the real purpose behind the allegiance, . . . is, to prevent resolution of plaintiffs' claims using the armor of a defense cooperation." *Id.* The parties to the agreement sought to save it by modifying it "to purportedly allow for individual settlements, with limitations which are far from clear." *Id.* at *3. The modification appears quite similar to the Defendants' Agreement's cosmetic provision that asserts that "any party may settle any DRAM claim on any terms at any time," Gordon Decl. at ¶ 4, while simultaneously severely restricting the ability of the signatories to do so. In *San Juan Dupont Plaza* the court was not misled; it held that this obfuscatory language

> appears to be an artless attempt to jettison one of the most troublesome provisions of the Agreement in the hope of saving the others. But the provisions of the Agreement are not severable because of what we feel is the improper underlying motive and potential ill effects of the entire document.

Id.

Other unpublished district court decisions have tolerated more limited judgment sharing agreements, but the agreements they addressed are easily distinguished from the Defendants' Agreement. In *Cimarron Pipeline Const., Inc. v. National Council on Compensation Ins.,* 1992 WL 350612 (W.D. Okla. 1992), the court found no evidence that the judgment sharing agreement had disrupted settlement. *Id.* However, it distinguished the agreement in that case from the agreement in *San Juan Dupont Plaza,* which, much like the Defendants' Agreement in the present case, "forbade any individual settlement by a signatory and stated that any settlement offer on behalf of all the participants to the sharing agreement must be determined by a majority vote of those participants." *Id.* (Under the Defendants' Agreement, a defendant attempting to settle individually will be subject to liability to the other defendants unless it demands first that plaintiffs agree to a global settlement on terms specified in the Defendants' Agreement, which settlement the other defendants can accept or reject.)

In *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 221853 (N.D. Ill. 1995), the court addressed plaintiffs' motion to declare unlawful a judgment sharing agreement that contained some of the provisions of the Defendants' Agreement. Specifically, in that case, the agreement allocated liability among defendants who received adverse judgments, and it imposed on a settling defendant liability to the other defendants for judgments attributable to the settling defendants' sales, unless the settlement agreement excluded this amount from plaintiffs' claims against the non-settling defendants. *Id*. at *1. The court saw this as proper because it limited the possibility of "coerced settlements." *Id.* at *4.

This rationale, of course, makes no sense. All settlements are, by definition, "coerced" to some degree, in that they are the means by which the parties avoid even less

desirable alternatives. Plaintiffs are "coerced" into settling by the threat that defendants will achieve a lesser or zero judgment in summary judgment proceedings or at trial; defendants are "coerced" into settling by the threat that plaintiffs will receive a greater judgment at trial. A party does not improperly "coerce" a settlement where it merely asserts powers it has under applicable law. *Trans-Sterling, Inc. v. Bible,* 804 F.2d 525, 529 (9th Cir. 1986).

The only "coercion" that a judgment sharing agreement avoids is the threat to defendants that they will suffer liability that Congress has imposed upon them under the antitrust laws. The Supreme Court invited Congress to take action if it thought that the pressure placed on them by joint and several liability in the absence of a right to contribution was unacceptable. *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. at 646. Congress has responded by taking no action at all. The effect of a judgment sharing agreement, therefore, is simply to remove some of the settlement pressure that Congress created and has, for over 25 years, declined to limit.

In any event, the judgment sharing agreement at issue in *Brand Name Prescription Drugs* was far less disruptive of settlement than the Defendants' Agreement in this case. In particular, the *Brand Name* agreement did not, as the Defendants' Agreement does, forbid a defendant to settle on any terms that plaintiffs do not offer to all defendants. Consequently, the case offers the Court no guidance on how to evaluate the Defendants' Agreement.

The limited available authority related to judgment sharing agreements strongly supports the conclusion that the Defendants' Agreement should be voided, and lends no support to the conclusion that it should be tolerated.

IV. THE NINTH CIRCUIT HAS RECOGNIZED IN OTHER CONTEXTS THAT THE RESTRAINTS EMBODIED IN THE DEFENDANTS' AGREEMENT MUST BE PROHIBITED

As is discussed above, the general motivation behind judgment sharing agreements is to create for defendants the right of contribution that Congress chose not to put into the antitrust laws, while retaining joint and several liability for antitrust defendants. The Defendants' Agreement in this action does this and more; it also puts very strong restraints on defendants' ability to settle individually, and dictates that any parties to the agreement who do not limit their settlements will face further uncertain liability to the non-settling defendants.

The federal courts have wrestled with similar problems in the field of securities law, and they have come down strongly against these types of restraints on settlement. The securities laws, unlike the antitrust laws, carry an express statutory right to contribution among jointly and severally liable defendants. 15 U.S.C. § 77k(f). Recognizing that the right to contribution is an unacceptable impediment to individual settlement, the courts (including the Ninth Circuit) have frequently approved the entry of "bar orders" that bar the assertion of contribution rights against settling defendants.

One court explained this trend as follows:

> Modern class action settlements increasingly incorporate settlement bar orders such as the one at issue in this case. The reason for this trend is that bar orders play an integral role in facilitating settlement. Defendants buy little peace through settlement unless they are assured that they will be protected against codefendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation. . . . In short, settlement bar orders allow settling parties to put a limit on the risks of settlement.

In re U.S. Oil and Gas Litigation, 967 F.2d 489, 494 (11th Cir. 1992) (citations omitted); *accord*, *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 160 (4th Cir. 1991).

In this case, the Defendants' Agreement goes far beyond the mere right to contribution that bar orders are designed to circumvent. The Defendants' Agreement also makes settling defendants liable to non-settling defendants unless settlements are confined within narrow parameters. A court order voiding the anti-settlement effect of the Defendants' Agreement is therefore particularly appropriate. "[One] reason to adopt settlement bar rules is that they further . . . strong federal policies of encouraging settlement, by insulating the settling defendant from further indeterminate liability . . . ." *South Carolina Nat. Bank v. Stone,* 749 F.Supp. 1419, 1431 (D.S.C. 1990); *In re Atlantic Financial Management Securities Litigation*,718 F.Supp. 1012, 1016 (D. Mass. 1988), citing *Donovan v. Robbins*, 752 F.2d 1170, 1177 (7th Cir. 1985).

The Ninth Circuit has specifically endorsed the use of bar orders to encourage settlement of securities cases by limiting the future liability of settling defendants to non-settling defendants:

> In spite of its attractiveness, obtaining a settlement in multi-party litigation may be quite complex. . . . In such cases, settling defendants cannot obtain finality unless a "bar order" is entered by the court. In essence, a bar order constitutes a final discharge of all obligations of the settling defendants and bars any further litigation of claims made by nonsettling defendants against settling defendants.

Franklin v. Kaypro Corp., 884 F.2d 1222, 1225 (9th Cir. 1989).

In *Franklin*, the Ninth Circuit expressly recognized that creating a right of some non-settling defendants to recover from settling defendants after trial (which is what the Defendants' Agreement expressly does) makes individual settlements all but impossible. It noted that, if contribution rights are not resolved before trial, then:

> partial settlement of any federal securities question before trial is, as a practical matter, impossible. Any single defendant who refuses to settle, for whatever reason, forces all others to trial. Anyone foolish enough to settle without barring contribution is courting disaster. They are allowing the total damages

> from which their ultimate share will be derived to be determined in a trial where they are not even represented.

Id. at 1229, quoting *In re Nucorp Energy Securities Litigation,* 661 F.Supp. 1403, 1408 (S.D. Cal.1987).

Thus, the Ninth Circuit, like other federal courts that have considered the matter, has strongly endorsed settlement bar orders in securities actions. By precisely the same reasoning, the Defendants' Agreement in this action *a fortiori* should be invalidated. In securities actions, Congress created the right of contribution, and this right has been found to be so antithetical to the policy favoring settlement that the courts have affirmatively restricted it. In the antitrust context, Congress *did not* create a right of contribution, and defendants have attempted to limit settlement by filling that void on their own with the Defendants' Agreement. In fact, defendants have gone much farther than merely creating a right to contribution, and have put narrow limits on the terms on which the parties to the agreement may settle, on pain of continuing liability to the other signatories.

In *Franklin*, the Ninth Circuit did tolerate one aspect of contribution, but even this type of restriction should not be allowed to exist here. Specifically, the court held that, at trial, the jury should allocate culpability among all defendants, and that the liability of the non-settling defendants should be reduced by the proportion of fault represented by the settling defendants. 884 F.2d at 1231. A somewhat analogous provision of the Defendants' Agreement requires a settling defendant, on pain of future liability, to include in any settlement a reduction of non-settling defendants' liability on a subsequent judgment – although not according to culpability determined by the jury as in *Franklin*, but according to some arbitrary "sharing percentage" that defendants agreed to. Gordon Decl. at ¶ 4.

Even this more limited restraint should not be permitted here. The reason the Ninth Circuit tolerated even this restraint on recovery is that it satisfies the equitable concerns behind contribution, and contribution (for the securities laws but not for the antitrust laws) is a congressionally-created right. Because Congress has chosen not to make contribution an attribute of antitrust recovery, defendants in this case should not be allowed to create even this more limited restraint.

In short, the Ninth Circuit and other courts have strongly disapproved the type of restraints that defendants created in the Defendants' Agreement, even where they were created by Congress and not by a group of self-serving defendants. The paramount policy of encouraging settlement, particularly settlement of multi-party class actions, can be served only by striking down the Defendants' Agreement.

V. THE DEFENDANTS' AGREEMENT VIOLATES PUBLIC POLICY BY ARBITRARILY ALLOCATING CIVIL PENALTIES

Unlike every case in which judgment sharing agreements have been addressed, this litigation is not just an action for compensatory damages. Equally important are the public law enforcement claims for civil penalties the States have brought. This Court has the power and duty to entertain these penalty claims as part of its jurisdiction over the States' state-law claims. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 906 F.2d 432, 465 (9th Cir. 1990).

The civil penalties at issue in this case are substantial. The California statute can serve as an example. For example, under California Business and Professions Code section 17206(a), each defendant is liable for a civil penalty of $2500 for "each violation" it committed. In this case, in which each defendant admittedly committed thousands of acts that would amount to a violation of law, the civil penalties could run into millions of dollars.

Ultimately, it is for the Court to decide what civil penalty will be assessed against each defendant if the case goes to trial. The Court must impose a civil penalty for each violation. Cal. Bus. & Prof. Code § 17206(b). The statute sets forth the criteria by which the Court is to be guided:

> In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

Id.

Thus, the amount of penalties to be assessed is discretionary with the Court, although the imposition of penalties is mandatory. *People v. Beaumont Inv., Ltd.,* 111 Cal.App.4th 102, 127 (2003).

The Defendants' Agreement discards this statutory scheme and instead allows defendants to dictate a self-serving allocation of liability according to a privately agreed-to Sharing Percentage without regard to culpability. Thus, contrary to the will of the various state legislatures, the Defendants' Agreement mandates that defendants, not the Court, will determine how penalties are distributed. It thereby thwarts and repudiates the public purpose of civil penalties, which " are designed to penalize a defendant for past illegal conduct." *State v. Altus Finance, S.A.,* 36 Cal.4th 1284, 1308 (2005) (citations and quotation marks omitted). The Defendants' Agreement lets defendants, and not the Court, determine and administer the punishment that each merits.

An agreement that allows wrong-doers by private agreement to allocate punishment among themselves thwarts the public purpose of a penal statute. For this reason alone, the Defendants' Agreement should be voided.

VI. THE COURT CAN AND SHOULD VOID THE DEFENDANTS' AGREEMENT

As the foregoing discussion illustrates, the Defendants' Agreement imposes the types of restraints on settlement, and on law enforcement, that the courts have long decried.

Of course, the best indication that the Defendants' Agreement is a hindrance to settlement lies in the history of these consolidated actions. There have been numerous settlements with DRAM defendants to date outside the Defendants' Agreement. These cases obviously can be settled. But the Defendants' Agreement now severely limits the terms under which these actions can be settled and stands as a major impediment to any future resolution short of trial.

The State Attorneys General, as guardians of the public interest in their states, are particularly constrained by the Defendants' Agreement. The Attorneys General can and should take a multitude of factors into account in choosing the terms on which to settle with an individual defendant, including that defendant's degree of culpability; its willingness to settle early and avoid the drain on public resources (not to mention the resources of the Court) that protracted litigation will present; and its willingness to cooperate in the future course of the litigation. With the Defendants' Agreement though, defendants have decreed that liability will be allocated, if at all, on their terms, and that cooperation will be punished with future liability.

It is not surprising that federal trial courts can and do invalidate agreements undertaken by parties to litigation that restrict their ability to settle. For example, in the *San Juan Dupont Plaza* case, discussed above, the district court had no difficulty in striking down a judgment sharing agreement that, like the Defendants' Agreement, inhibited settlement. 1989 WL 996278 at *3.

Courts exercise the power to strike down agreements that limit settlement in other contexts, too. In *Sicor Ltd. v. Cetus Corp.,* 51 F.3d 848 (9th Cir. 1995), the district court on summary judgment had declared invalid an agreement that defendant had entered into, on the ground that it obligated defendant to litigate claims to judgment rather than settle. *Id.* at 859. The Ninth Circuit reversed summary judgment, but only on the ground that further factual determination was required; the Ninth Circuit did not disturb the holding that the agreement should be voided if it did indeed impede settlement. *Id.* at 859-60. Likewise, because they inhibit settlement, clauses in a contract between attorney and client which prohibit a settlement by the client without his attorney's consent are generally held to be unenforceable as against public policy and can be voided by the court. *Lewis v. S. S. Baune,* 534 F.2d 1115, 1122 (5th Cir. 1976); *Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp.,* 530 F.Supp. 910, 915 (D.C. Pa. 1981).

In this case, the Court can and should strike down the Defendants' Agreement so that the parties can settle the action on the basis of the relative strengths of their legal and factual positions, and not on the basis of defendants' decision to link arms and settle only on a basis that they have pre-determined will advantage themselves as a group.

VII. CONCLUSION

A group of defendants has taken it upon themselves by mutual agreement to severely limit the terms under which this case can settle, and to give each other a strong incentive not to settle individually. This agreement is at war with the strong federal policy in favor of settling disputes, particularly complex class actions, and it upends the important governmental purposes behind the civil penalties statutes. This Court can and should declare

the Defendants' Agreement void, and permit this action to proceed as Congress and the State Legislatures intended.

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