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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' Reply in Support of Motion to Void Certain Defendants' Agreement (re: Settlement) Date: November 14, 2007 Time: 9:00 A.M. Courtroom: 3

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I. INTRODUCTION

The persistent theme of defendants' defense of their Agreement is that they have banded together and mutually limited their settlement options to avoid settlements that they consider unduly draconian. They want to avoid settlements that are "grossly disproportionate." Opp. at 1. They want to "limit[] Plaintiffs' ability to manipulate settlements" or to "wield arbitrary power in the settlement process." Opp. at 3.

There is, of course, a partial truth behind defendants' exaggerations. For example, defendants cite testimony of a plaintiff's attorney before a Senate committee to the effect that plaintiffs take small settlements early on and larger settlements later on. Opp. at 3 n. 3, citing *Hearings Before the United States Senate Committee on the Judiciary on the Antitrust Equal Enforcement Act*, S. 995, 97th Cong., 1st and 2nd Sessions (1982). But that same committee at the same hearing was told by another plaintiff's attorney that it was not true that settlements have been excessive extortionate," and that "I do not think that any defendant I know of that has gone to trial has had to pay a substantially higher burden than the damage he caused." *Id.* at 106, 483. The regime that Congress created and the Supreme Court declined to alter – joint and several liability without a right to claim contribution against co-defendants – increases the pressure on defendants to settle. *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981). Defendants have found that if they join together to limit the terms under which they will settle, they will lessen the pressure they are under to settle.

When defendants agree to such restrictions, the trade-off is that many of the possible doors to settlement are shut. The question before the Court is whether defendants' choice of settlement doors to shut – seemingly far more extensive than in any reported discussion of previous judgment sharing agreements – runs afoul of the strong federal policy in favor of encouraging settlement, and should therefore be voided.

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

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

Defendants' main defense of their Agreement proceeds as a fairly simple syllogism. Defendants assert: 1) a few trial courts have upheld, and a few commentators have spoken in favor of, agreements that were called "judgment sharing agreements"; 2) defendants have an agreement they call a "Judgment Sharing Agreement"; 3) therefore, this Court should uphold Defendants' Agreement.

There are two obvious flaws with this reasoning. The first is that, to the extent any of defendants' authorities disclose the terms of the judgment sharing agreements under scrutiny, it is apparent that Defendants' Agreement is far more restrictive and a far greater impediment to settlement than the agreements upheld by other court. The second is that other authority, including in particular Ninth Circuit authority, strongly indicates that agreements like defendants' should not be allowed.

Defendants characterize their agreement, and the other agreements they lump under the single description of "judgment sharing agreements," as merely creating a right of contribution, which they feel for their own purposes is sorely needed in antitrust cases. ("They create a contractual right of contribution to mitigate the harsh and coercive effects of joint-and-several liability." Opp. at 1.) For reasons discussed in the Motion and below, the creation of a contribution right in and of itself is sufficient ground to void the Agreement.

But Defendants' Agreement does not merely create a right of contribution among the participating defendants. Instead, it openly interferes with the settlement process. It obligates a settling signatory defendant, on pain of uncertain later financial consequences, to refuse any settlement that does not meet two criteria – 1) permitting all signatory defendants to settle on the same terms, with the amount of settlement allocated by a secret

formula predetermined by the signatory defendants, and 2) reducing any non-settling signatory defendants' liability by a percentage predetermined by the signatory defendants.

Thus, defendants cite a law review article that is somewhat blandly tolerant of contribution among antitrust defendants. Cavanaugh, *Contribution, Claim Reduction, & Individual Treble Damage Responsibility*, 40 Vand. L. Rev. 1277 (1987), cited at Opp. at 4. But the same article takes a more critical view when claim reduction, which Defendants' Agreement contemplates, is added to the mix:

> Claim reduction alone may diminish a nonsettling defendant's damage exposure and thereby weaken deterrence. The combination of contribution and claim reduction may significantly impair deterrence and undermine the private antitrust damage remedy.

Id. at 1322.

Similarly, defendants cite an article that says that the right of contribution does not impair settlement. Opp. at 4, 15, citing *Report of the Section on Proposed Amendment to the Clayton Act to Permit Contribution in Damage Actions*, 49 Antitrust L. J. 291 (1980). But that article actually endorsed a legislative proposal that, in stark contrast to Defendants' Agreement, would have allowed a defendant to avoid all future liability and all contribution claims merely by settling with plaintiffs. *Id.* at 298. The article explained:

> To make certain that contribution rights do not discourage settlements, it is essential to permit a party to settle a case once and for all. A powerful policy in the law favors even a partial settlement of antitrust litigation, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 346-47 (1971), and a defendant is less likely to settle with the plaintiff if he knows that, settlement notwithstanding, he may remain liable for contribution to the other defendants. Experience in other areas has demonstrated the soundness of this rule.

Id. at 300.

Defendants' spin on their Agreement is that it does not hamper settlement, but actually encourages it. ("The pro-settlement bias of the provision is obvious . . . " Opp. at 1.) Their theory, apparently, is that, by requiring the signatories to insist that any settlement offer must in the first instance include all signatories, the agreement increases the chance that all of

these defendants will settle simultaneously.

A moment's reflection reveals the fallacy behind this assertion. In the vast universe of possible settlements, a tiny subset consists of those settlements including all signatory defendants and allocating their shares by the Agreement's predetermined percentages. If such a settlement makes sense to the parties, it is available regardless of whether there is an agreement among defendants. There are also, however, very many other settlements possible with individual defendants or with smaller groups of defendants. In particular, there can be many reasons why the States would not want to enter into a single settlement that allocates liability among defendants according to a pre-set formula – not the least of which could be that, under the evidence, the defendants' relative culpability does not correlate to the percentages defendants agreed to among themselves.

All but the few settlements that fit defendants' narrow parameters are rendered extremely unlikely, if not impossible, by Defendants' Agreement. Any signatory entering into such an agreement faces unknown liability to its fellow signatories down the road. Since the principal reason any party enters a settlement is certainty about the future, most possible settlements are taken off the table by Defendants' Agreement.

Defendants' Agreement tolerates very few possible settlements but does not, strictly speaking, "forbid" all others. It just makes the other settlements hazardous and painful to the settling defendant, to a degree that cannot be determined at the time of settlement. Consequently, it is difficult to say where a disincentive ends and a prohibition begins.

Defendants predictably rely most heavily on the fig-leaf phrase in their Agreement to the effect that any Party may settle any DRAM claim on any terms at any time. Opp. at 1, 2, 6 n. 5, 7, 14. Lest any signatory take this reassurance too seriously, though, the next

sentence of the Agreement begins with the word "however"[1] and then proceeds to set out the very narrow allowable terms for a settlement agreement that will permit the settling defendant to escape an unknown future liability. Thus, the whole point of Defendants' Agreement is to *prevent* the signatories from settling any DRAM claim on most terms.

Curiously, defendants also rely on the recent Samsung and Winbond settlements to argue that their Agreement does not create a problem. Opp. at 8-9. These two defendants were not signatories to the Agreement. Plaintiffs' success in eliminating them from the case in individual settlements, while the signatory defendants refuse to negotiate with the States on an individual basis (Foote Decl. ¶¶ 6-7), is a clear indication of Defendants' Agreement has halted progress in the settling of this case.

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[1]In two footnotes, Defendants erroneously assert that the States violated the terms under which they were allowed to view portions of Defendants' Agreement, by quoting language from that Agreement. Opp. at 7 n. 6, 11 n. 9. Although defendants complaints are inapposite to this Motion, the States note that they lived up to both the letter and the spirit of their agreement with defendants. Defendants proposed that the States agree "that you will not quote any specific language from the judgment sharing agreement in any document." Sanders Decl. Ex. B at 1-2. The States rejected this proposal and instead agreed "not to quote specific language *as such* in any document." *Id.* at 1 (emphasis added). Accordingly, the States presented an accurate version of the language in the Motion, but always characterized it as representing Defendants' Agreement "in substance and effect." Defendants' Opposition itself was the first publication of the fact that the language stated in the Motion could also be regarded as a quotation of the Agreement.

It is not at all clear what defendants thought the States would do or think the States should have done. The States made no secret of the fact that they intended to bring a motion about the Agreement. The States might have created paraphrases of the Agreement for their Motion, with the inevitable result that much of the fight would have been over the accuracy of the paraphrases. Defendants do not actually seem to have any problem with the Court reviewing the Agreement. Opp. at 1 n. 1. The States offered to file their Motion with a sealing motion, so that the content of the Agreement would be published only to the Court, but defendants declined.

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

Defendants assert that "[f]ederal courts have routinely and repeatedly upheld JSAs similar to the ones at issue here." Opp. at 1. A closer examination of the authorities shows this is not the case.

None of the decisions defendants cite suggests that the agreement under scrutiny had settlement restrictions as far-reaching as those appearing in Defendants' Agreement. Defendants cite four district court decisions – the two unpublished opinions cited in the Motion, one perfunctory order, and one transcript in which a decision was announced from the bench. In none of these instances did the court tolerate the type of far-reaching restraint defendants have crafted here.

1. *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 221853 (N.D. Ill. 1995).

In *Brand Name*, 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 decision contains no suggestion that the agreement under scrutiny required a settling defendant to insist that a settlement be offered to all defendants in the first instance on a predetermined percentage allocation.[2]

2. *Cimarron Pipeline Const., Inc. v. National Council on Compensation Ins.,* 1992

[2]Defendants criticize the States for distinguishing *Brand Name Prescription Drugs* on this basis, because the court "did not represent that it had set out the entirety of the JSA at issued in that case in its opinion." Opp. at 6 n. 5. Nothing in the decision suggests that the court left out anything important when it described the agreement. Ironically, though, notwithstanding the possibility that the courts might have left out key provisions in their descriptions, defendants do not hesitate to represent that the cases they cite are instances in which courts have "upheld JSAs similar to the one at issue here." Opp. at 1.

WL 350612 (W.D. Okla. 1992).

The decision discloses only that "the primary provision in the Defendants' sharing agreement . . .requires that any judgment against the Defendants in the litigation which might result from the litigation be allocated as prescribed by the Defendants," and that "the Plaintiffs claim that the agreement makes settlements more difficult by requiring that certain specific terms be met." It does not suggest the agreement contained any restrictions on settlement. *Id.* at *1, *2.

3. *In re Industrial Gas Antitrust Litigation*, Sanders Decl. Ex. D.

The order that defendants present reveals absolutely nothing except that the court declined to void something that it called "defendants' sharing agreement."

4. *In re Workers' Compensation Insurance Antitrust Litigation*, Sanders Decl. Ex. C.

Defendants present the transcript of a motion hearing in which the agreement is described in some detail. At first glance, it appears that the agreement under discussion might, like Defendants' Agreement here, require a settling defendant to insist that the settlement be offered to the other defendants, and to insist that the liability of non-settling defendants be reduced in a proportionate amount. *Id.* at 26:6-15.[3] However, perhaps recognizing that such terms would improperly impede settlement and render the agreement vulnerable to attack, the defendants in that matter actually built in an escape hatch that negated these restrictions. Specifically, any defendant that wanted to settle individually, free of these restrictive provisions, need only provide the other signatories a short advance notice of its intention to do so. *Id.* at 26:3-7. The court explored this fact in detail:

> THE COURT: To what extent, if at all, does this agreement allow a nonsettlor to veto or pressure you from making your agreement to get out?

[3]The page numbers given for the transcript in this Reply are of necessity the ECF page numbers assigned to the pages of the exhibits to the Sanders Declaration. The page numbers appearing on the reproduced transcript pages are non-unique and are therefore not suitable for citations, an no other page numbers appear on the document.

> [DEFENSE COUNSEL]: In no way at all. The only thing that I have to do . . . the other way to engage individual settlement negotiations is to get a so-called ten-day notice terminating the effect of the provisions that require that any deal that I reach with the plaintiffs must be offered generally to everybody else. If I give that ten-day notice and I wait that ten days, I can speak to [plaintiffs], and I can make a deal with them that they don't have to offer to everyone else, and there's no way my confreres can stop me from doing that. That's the way the agreement was built to make sure that we each had the right to enter into an individual settlement.

Id. at 31:1-12.

Even though the *Workers' Compensation* agreement, unlike Defendants' Agreement in this case, was "built to make sure that [defendants] each had the right to enter into an individual settlement," the court's acceptance of it was, at best, lukewarm. The court took a wait-and-see approach, and did not void the agreement immediately, but it reserved the power to do so if the agreement proved problematic:

> I remain at the present time . . . satisfied that the parties are either considering resolutions short of trial or fairly proceeding toward a trial in a case in which they believe they may have no liability, or fairly balancing the risks to them inherent in such liability as they themselves perceive they may have. And on that basis, I do not deem it appropriate at this time to inveigh myself as the Court into the reasoned efforts of competent counsel.
>
> I have indicated that I regard there as being a temporal aspect to this order, and that means I guess I will take a look at this, either on my own or on invitation. . . . [I]f I am convinced, as I observe things, that my observations have been incorrect, and the parties are not, have built stone walls around themselves such as they are unable to deal with each other, these matters may be revisited.
>
> . . .
>
> On that basis, the motion is denied. For the present.

Id. at 40:18-41:19.

The court also recognized that a different result might be reached for a more restrictive agreement:

> I can imagine a situation where an agreement, particular agreement might be so onerous on its terms or so limiting that it might well make reasoned discussion inconceivable, but that would be a specific agreement, and this is a specific agreement, and this in my mind the likelihood of this agreement being more than a general model or based on more than a general model is

minimal.

Id at 40:10-17.

The court was far less equivocal in *In re San Juan Dupont Plaza Hotel Fire Litigation*, 1989 WL 996278 (D. Puerto Rico 1989), when it struck down an agreement "Judgment/ Settlement Sharing Agreement" because it impeded settlement. Defendants attempt to distinguish the decision on the ground that it was not an antitrust case. Opp. at 6. Why this should make a difference, they do not say. Presumably, the policy favoring settlement is at least as strong in an antitrust case as it is in a tort case.

Additionally, defendants attempt to distinguish *San Juan Dupont Plaza* on the ground that the agreement there flatly prohibited individual settlements. Opp. at 6. In the present case, the Agreement imposes uncertain but significant liability on any signatory that enters into an individual settlement. *San Juan Dupont Plaza* is similar – defendants there modified their agreement "to purportedly allow for individual settlements, with limitations which are far from clear." 1989 WL 996278 at *3. The court realized that this was a distinction without a difference and still struck down the agreement, as this court should do here. *Id.*

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

The other reason that defendants' citation provide little guidance to the court is that other authority, particularly from the Ninth Circuit, strongly indicates that the courts should void contribution rights among defendants, even those created by statute, where they create an unacceptable impediment to settlement. This development is not addressed or ever even considered in the unpublished district court orders on which defendants rely.

Defendants do not dispute that many courts, including the Ninth Circuit, now endorse the voiding of statutory contribution rights against settling defendants in securities actions, precisely because those contribution rights are a strong disincentive to settlement. And defendants repeatedly characterize their own agreement as creating a "contractual right of

contribution." Opp. at 1, 6, 12. This is apparently the case (although it is certainly an understatement, because Defendants' Agreement also imposes numerous other restraints.) But defendants then recoil at the notion that many courts, including the Ninth Circuit, now recognize the right of contribution itself as an impediment to settlement that must give way in the face of the federal policy of encouraging settlement.

The Ninth Circuit's view is shared by some of the commentators on whom defendants rely. One article, which defendants cite for the proposition that antitrust defendants do not like to be the last to settle (Opp. at 3-4), also says:

> [I]f defendants are risk averse a rule of no contribution, by making litigation riskier, makes settlement relatively more attractive than it would be under a contribution rule. Thus, by increasing the settlement rate, no contribution reduces the costs of administering the antitrust laws, since settlements are less costly than trials.

Easterbrook, Landes, & Posner, *Contribution Among Antitrust Defendants: A Legal & Economic Analysis*, 23 J. L. & Econ. 331, 367 (1980). The authors conclude by recommending that the rule of no contribution be retained in antitrust cases, particularly for price-fixing claims. *Id.* at 367-68.

Defendants respond to the fact that the courts now frequently curtail contribution rights to facilitate settlement by asserting that "the practice of entering contribution bar orders in cases involving statutory or common law rights of contribution arises from a wholly different situation than contractual rights of contribution." Opp. at 9. The distinction they try to draw is that defendants subject to statutory contribution rights "face the prospect of continuing and uncertain liability should they settle," whereas the signatories to Defendants' Agreement supposedly "do not face uncertainty should a judgment be entered because their contribution percentage is set forth in the contract by agreement." Opp. at 9.

This is obviously incorrect. A settling defendant subject to contribution faces uncertainty on two fronts: the amount of liability judgments, if any, against other defendants, and the percentage of those judgments the settling defendant will be required to contribute.

The settling defendants' additional liability will be the product of these two amounts. Defendants' Agreement resolves the first uncertainty but not the second; a signatory that settles outside the narrow parameters of settlements blessed by Defendants' Agreement will know what percentage of any later judgment it is on the hook for, but this is small comfort because it will not know whether there will be a judgment and, if so, how much the judgment will be. The product of a known amount and an unknown amount is still an unknown amount. So a settling defendant is left with the possibility that it might be forced to pay a further unknown (and possibly quite large) sum before the litigation is over.

Defendants also note that, under their Agreement, a settling signatory can escape all future liability so long as it "satisfies the terms of its agreement." Opp. at 10. This is to say, the settling signatory will avoid future liability, and find comfort in settling, so long as it enters into one of the very limited types settlements that Defendants' Agreement allows. In contrast, if Defendants' Agreement is voided, just as if a bar order is entered, a settling defendant will know that simply by settling, on any terms at all, it will avoid future liability. This is why voiding Defendants' Agreement, just like entering a bar order in a securities case, will most certainly "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).

IV. THE DEFENDANTS' AGREEMENT VIOLATES PUBLIC POLICY BECAUSE IT DOES AFFECT THE ALLOCATION OF CIVIL PENALTIES

The States' Motion originally argued that Defendants' agreement violates public policy by arbitrarily allocating civil penalties, because that was the implication of the limited portion of the Agreement that the States were allowed to inspect. Motion at 15-16. After the motion was filed, defendants informed the States' counsel by letter that there was another

provision in the Agreement, previously not shown to the States, that addressed the issue of civil penalties. Sanders Decl. Ex. A. Defendants' letter offered the States the opportunity to view the additional language and requested that "you amend your motion to withdraw the argument on civil fines." *Id.*

States' counsel reviewed the additional language and filed an Addendum to their motion to alert the Court to this additional language and its implications. Defendants now object, asserting that the Addendum was "procedurally improper." Opp. at 11. The States, however, wanted to advise the Court of this additional provision and its possible implications, and they were not aware of any other means to accomplish this end. In fact, Defendants asked the States to make a further filing – to "amend your motion" – on the basis of the additional language they had disclosed. They cry foul now only because the further filing they asked the States to make did not reach the conclusion that Defendants wanted.

The States have not withdrawn in full their argument about the effect of Defendants' Agreement because it does not appear that the additional language solves all of the problems concerning civil penalties. The additional language provides that the definition of DRAM claims used in the agreement excludes (among other things) civil penalties. This might mean that the contribution right that the Agreement apparently creates (a provision the States have never seen) does not include contribution for civil penalty judgments.

The problem with civil penalties that remains even with this language, and the problem highlighted in the Addendum, concerns settlements. A settlement that buys peace between the States and a signatory defendant will necessarily resolve all issues of both compensatory damages and civil penalties. Defendants' Agreement purports to control only the compensatory damages part of the settlement. But the only figure of interest to any settling party is the total amount of money to change hands, whether for damages or penalties. Consequently, regardless of what the Agreement says on its face, its practical effect is to control the amount of any settlement for civil penalties.

Defendants purport not to understand the problem. Opp. at 11. They say that the States can avoid it merely by artful drafting of the settlement agreement. *Id.* But the problem cannot be avoided. Defendants' Agreement controls how the signatories will settle for compensatory damages. No party on either side will settle for compensatory damages alone and leave penalties to another day; the whole purpose of a settlement is to buy peace. Given 1) that all of a signatory defendant's liability, including compensatory damages and civil penalties, will be resolved in a single settlement, and 2) that the terms of any settlement that resolves compensatory damage claims will be limited by the narrow restrictions of Defendants' Agreement, it follows that the terms of any settlement will resolve civil penalty claims but, in doing so, will be limited by the narrow restrictions of Defendants' Agreement. Although defendants can talk about the fiction of pretending to allocate a settlement between compensatory damages and civil penalties, the reality is that there will only be a single settlement, and its terms will be framed by Defendants' Agreement.

V. DEFENDANTS CANNOT AVOID THIS MOTION ON RIPENESS OR STANDING GROUNDS

As something of a last-ditch effort to avoid the merits of this Motion, defendants argue that the controversy is not ripe, or that at least the States do not have standing to bring it before the Court. These arguments immediately run into the difficulty that a number of courts have reviewed judgment sharing agreements in similar circumstances – including all of the earlier decisions on which defendants rely – and none has ever hesitated on ripeness or standing grounds. See e.g., *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 221853 (N.D. Ill. 1995); *Cimarron Pipeline Const., Inc. v. National Council on Compensation Ins.,* 1992 WL 350612 (W.D. Okla. 1992); *In re Industrial Gas Antitrust Litigation*, Sanders Decl. Ex. D; *In re Workers' Compensation Insurance Antitrust Litigation*, Sanders Decl. Ex. C; *In re San Juan Dupont Plaza Hotel Fire Litigation*, 1989 WL 996278 (D. Puerto Rico 1989). Conceivably defendants neglected to raise the issue in those cases,

but standing and ripeness are matters of Article III subject matter jurisdiction; they therefore are never waived and must be raised by the court *sua sponte*. *Lang v. French* 154 F.3d 217, 222 (5th Cir. 1998); *Americopters, LLC v. F.A.A.,* 441 F.3d 726, 735 n. 7 (9th Cir. 2006).

A standing objection was raised, and rejected, in *Cimarron Pipeline Const., Inc. v. National Council on Compensation Ins.,* 1992 WL 350612 (W.D. Okla. 1992). Defendants try to distinguish that case on the ground that plaintiffs there "contend[ed] that the sharing agreement has had and will have certain discernible and measurable effects upon their case." Opp. at 13 n. 11, quoting *Cimarron* 1992 WL 350612 at *1. But that is exactly what the States contend here.

Defendants hang their jurisdictional objections on the assertion that the States have not even tried to settle individually with any of the signatories. This simply is not true. The States have always been willing to settle with defendants jointly or in groups, but they have been informed by defendants that individual settlements with the signatories to Defendants' Agreement are no longer possible. Foote Decl. ¶ 5-6. The States have observed firsthand that Defendants' Agreement is limiting the possibilities for settlement. Foote Decl. ¶¶ 5-7.

Ripeness is a matter of timing, to keep the courts from embroiling themselves in purely abstract disputes. *Neal v. Shimoda*, 131 F.3d 818, 825 (9th Cir. 1997), citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). In defendants' view, apparently, until the States wind up in trial without a settlement with any of the signatories, there will be no way to know that Defendants' Agreement is discouraging settlement. Under defendants' version of the ripeness doctrine, there could never be a prohibitory injunction until after defendant had injured plaintiff. This, of course, is not the law. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Id.*

Similarly, Article III standing arises where the complaining party will suffer some actual or threatened injury as a result of the defendants' conduct that can fairly be traced to

the challenged action and that is likely to be redressed by a favorable decision. *Fair v. U.S. E.P.A.* 795 F.2d 851, 853 (9th Cir. 1986). The States do not argue that they have rights under Defendants' Agreement that have been abridged. The States' ability to settle these cases has been impaired. Foote Decl. ¶¶ 5-7. This impairment is the direct result of certain defendants' entering into an agreement that is contrary to the policies of the federal courts, and that voiding the agreement will end this impairment. This is enough to confer standing.

VI. CONCLUSION

Defendants' Agreement has one purpose and one purpose only – to commit all the signatories to a mutual refusal to entertain any but a very narrow set of possible settlement arrangements. It does not make settlement impossible, but it makes settlement far more unlikely. This brings it into stark conflict with the strong federal policy of encouraging settlement. For this reason, the Court can and should void the Agreement.

Dated: October 31, 2007

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I, Charles Kagay, attest that concurrence in the filing of the document has been obtained from each of the other signatories.

/s/ Charles M. Kagay
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