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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION This Document Relates to: All Indirect-Purchaser Actions	**Master File No. C07-1827 SI** **MDL No. 1827** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INDIRECT-PURCHASER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Date: October 1, 2009 Time: 4:00 p.m. Courtroom: 10, 19th Floor The Honorable Susan Illston

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I. INTRODUCTION

Since 2005, the Class Action Fairness Act ("CAFA")[1] permits state-law class actions, previously-venued in state courts, to proceed under applicable constitutionally-mandated, diversity-jurisdictional principles in federal courts. Thus, pending before this Court is this multi-state, antitrust/consumer-protection, indirect-purchaser class action alleging that the Defendants fixed prices of liquid crystal display ("LCD") panels used to make flat-screen TVs, computer monitors and laptop computers, among other electronic products.

These post-CAFA Indirect-Purchaser Plaintiffs ("Plaintiffs") now move this Court for an order certifying one 50-state Rule 23(b)(2)[2] injunctive relief class under Section 16 of the Clayton Act (15 U.S.C. § 26) to prevent Defendants from violating Section 1 of the Sherman Act (15 U.S.C. § 1). Plaintiffs also seek certification of 23 separate state-wide classes based on each state's antitrust/consumer protection class action precedent, some of which are damage claims (*i.e.*, 23(b)(3) type classes), others of which are equitable restitutionary claims (*i.e.*, 23(b)(2) type classes). Because these 23 separate state-wide classes are venued before this federal Court on constitutional diversity jurisdiction, the rule long ago enunciated by the Supreme Court in *Erie R.R. Company v. Tompkins*, 304 U.S. 64 (1938), and its progeny, must be followed.

As Plaintiffs demonstrate below, their federal injunctive class, along with their state law, state-wide, equitable restitutionary classes, should be certified under Rule 23(b)(2), as well as their state-law, state-wide damage claims under Rule 23(b)(3).

II. ISSUES TO BE DECIDED

Indirect-Purchaser Plaintiffs ("Plaintiffs"),[3] alleging violations of federal antitrust laws, as well as various state antitrust, unfair competition and consumer protection laws, respectfully move to certify the following classes:

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[1] 119 Stat. 4, Pub. L. 109-2.
[2] Unless otherwise noted, all references to "Rules" refer to the Federal Rules of Civil Procedure.
[3] Plaintiffs are listed in Appendix A to this motion.

(1) A Nationwide Class for injunctive relief under Rule 23(b)(2) of the Federal Rules of Civil Procedure:

> All persons and entities residing in the United States as of the date notice is first published, who indirectly purchased in the United States between January 1, 1999 and the present LCD panels incorporated in televisions, monitors and/or laptop computers, from one or more of the named Defendants[4], for their own use and not for resale. Specifically excluded from this Class are the named Defendants; the officers, directors, or employees of any defendant; any entity in which any defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any defendant. Also excluded are any federal, state, or local governmental entities, any judicial officers presiding over this action and members of their immediate families and judicial staffs, and any juror assigned to this action.

(2) Separate Indirect-Purchaser State-Wide Classes for damages under Rule 23(b)(3) procedural standards and equitable relief under Rule 23(b)(2) procedural requirements, in accordance with the laws of each of the states listed in Appendix B,[5] with the following definitions:

> All persons and entities residing in the [Indirect Purchaser State[6]] as of the date notice is first published, who indirectly purchased in [Indirect Purchaser State] between January 1, 1999 and December 31, 2006[7] LCD panels incorporated in televisions, monitors, and/or

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[4] "Named Defendants" refers to: AU Optronics Corp., AU Optronics Corp. America Inc. (collectively, "AUO"); Chi Mei Corp., Chi Mei Optoelectronics Corp., Chi Mei Optoelectronics USA Inc., CMO Japan Co. Ltd. (collectively, "Chi Mei"); Chunghwa Picture Tubes Ltd. ("Chunghwa"); HannStar Display Corp. ("HannStar"); Hitachi Ltd., Hitachi Displays Ltd., Hitachi Electronic Devices (USA) Inc. (collectively, "Hitachi"); LG Display Co. Ltd., LG Display America Inc. (collectively, "LGD"); Samsung Electronics Co. Ltd., Samsung Semiconductor Inc., Samsung Electronics America Inc. (collectively, "Samsung"); Sharp Corp., Sharp Electronics Corp. (collectively, "Sharp"); and Toshiba Corp., Toshiba Matsushita Display Technology Co. Ltd., Toshiba America Electronics Components Inc., Toshiba America Information Systems Inc. (collectively, "Toshiba"). *See* Indirect-Purchaser Plaintiffs' Second Consolidated Amended Complaint ("*Cmpl*.") ¶¶ 67-95.

[5] *See also Cmpl*. ¶¶ 256-94.

[6] "Indirect Purchaser State" refers to the following jurisdictions, separately: Arizona, California, District of Columbia, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin. The proposed state-wide classes are set forth in the accompanying notice of motion and proposed order; *see also* Appendix B to this motion.

[7] This class period is shorter than that proposed in the Indirect-Purchaser Plaintiffs' Second Consolidated Amended Complaint. *See Weisfeld v. Sun Chem Corp.*, 84 Fed. Appx. 257, 259 (3rd Cir. 2004) ("[t]he District Court considered this revised class definition in its analysis, and we will do the same."); *Robidoux v. Celani*, 987 F.2d 931, 937 (2nd Cir.

laptop computers, from one or more of the named Defendants, for their own use and not for resale. Specifically excluded from this Class are the named Defendants; the officers, directors, or employees of any defendant; any entity in which any defendant has a controlling interest; and any affiliate, legal representative, heir or assign of any defendant. Also excluded are any federal, state, or local governmental entities, any judicial officers presiding over this action and members of their immediate families and judicial staffs, and any juror assigned to this action.

In support of this motion, Plaintiffs submit, *inter alia*, the Declaration of Dr. Janet S. Netz ("Netz Decl."), an expert economist, and the Declaration of Judith A. Zahid ("Zahid Decl."), which attaches the evidence cited in this memorandum.[8]

III. STATEMENT OF FACTS

The Defendant–manufacturers of LCD panels, engaged in an international price-fixing cartel in the LCD panel market, no later than the beginning of the Class Period, specifically targeting and severely injuring indirect-purchaser consumers and affecting billions of dollars of commerce throughout the United States. As Deputy Assistant Attorney General Scott Hammond has stated: "[t]hese price-fixing conspiracies affected millions of American consumers who use computers, cell phones and numerous other household electronics every day. . . . By conspiring to drive up the price of LCD panels, consumers were forced to pay more for these products."[9] Defendants' anticompetitive conduct has resulted so far in four Sherman Act indictments and guilty pleas by the Defendants.[10] Certain former executives of the Defendants also have been indicted and some are serving jail time.[11] The U.S. Department of Justice also confirms that one

1993) (holding that a court "is not bound by the class definition proposed in the complaint.").

[8] Plaintiffs also respectfully request that the Court appoint the law firms of Zelle Hofmann Voelbel & Mason LLP and The Alioto Law Firm as counsel for the Nationwide Class and the Indirect-Purchaser State-Wide Classes (collectively, "the Classes") under Rule 23(g).

[9] Statement by Deputy Assistant Attorney General Scott Hammond, The Department of Justice ("DOJ")'s Press Release (Nov. 12, 2008) (Zahid Decl. Ex. A).

[10] *See* Plea Agreements of Sharp Corp. (Dkt. No. 750), LG Display (Dkt. No. 749), Chunghwa (Dkt. No. 767), and Hitachi (Dkt. No. 1000).

[11] Former Chunghwa CEO Chieng-Hon "Frank" Lin and two Chunghwa executives, Chih-Chun "C.C." Liu and Hsueh-Lung "Brian" Lee, pleaded guilty and were sentenced. *See* No. 3:09-CR-00045-SI, Dkt. 32, 48, 49. Two other Chunghwa employees, Wen Jun Cheng and Cheng Yuan Lin were indicted. *See* No. 3:09-CR-00110-SI, Dkt. 1. LG executive Chang Suk "C.S." Chung pleaded guilty and was sentenced. *See* No. 3:09-CR-00044-SI Dkt. 16. The DOJ also indicated LG's Duk Mo Koo and Hitachi's Sakae

participant in the conspiracy has been accepted into the Corporate Leniency Program.[12] As this Court is aware, the criminal investigation remains ongoing.

Through Defendants' highly-organized and well-documented meetings and communications, the cartel has proven to be effective, sustainable, and successful. Apart from the guilty pleas, the documents that Defendants produced (including but not limited to those previously-produced to the Grand Jury) provide an extensive, detailed account of the conspiracy, which was facilitated by the industry structure and characteristics. As Plaintiffs have alleged and demonstrated, through their Complaint and Dr. Netz's Declaration, Defendants' conduct resulted in across the board price increases to indirect purchasers of LCD panels incorporated in televisions, monitors and laptop computers.

A. Defendants Dominate the Multi-Billion Dollar LCD Panel Industry

LCD is a type of video-display technology used in TVs, computer monitors, laptops, and numerous other consumer electronic products. The principal component of an LCD panel is the two thin glass sheets, called "substrates," with a thin layer of liquid crystal sandwiched in between. This sandwich-like device is combined with a TFT array, color filter, a backlight unit and other equipment to form a panel which is then integrated into a TV, a computer monitor, a laptop, and other products. The panels are made to standard technical specifications and sizes, such that functionally equivalent panels can be, and are, produced by multiple manufacturers.[13]

The market for LCD panels is huge. LCD panels are the dominant form of display screens for TV, computer monitor, and laptop applications. For flat-panel TVs alone (approximately 80% of which contain LCD panels), worldwide sales in 2007 reached $100 billion. Despite its massive size, Defendants have collectively controlled a significant

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Someya and filed information against LG's Bock Kwon. *See* No. 3:09-CR-00110-SI, Dkt. 1; No. 3:09-CR-00437-SI, Dkt. 1; No. 3:09-CR-00329-SI, Dkt. 1. These criminal matters have been related to this MDL proceeding.

[12] Declaration of Niall Lynch In Support of The United States' Opposition to Direct Purchaser Plaintiffs' Motion to Compel the Amnesty Applicant, at ¶ 6 (Dkt. 966).

[13] *Cmpl*. ¶¶ 101, 106, 158, 199; Netz Decl. at 11; Samsung 30(b)(6) Depo. (Scott Birnbaum) Tr. 159:04-160:14 (Zahid Decl. Ex. B)

share of the market for LCD panels, both globally and in the United States. In 2000, Defendants controlled 76% of the market for LCD panels, and by 2007 controlled 94% of the market.[14]

Significant barriers to entry preserve Defendants' control of the market. Potential newcomers to the market face daunting capital expenditure requirements—the latest-generation LCD panel fabrication facilities ("fabs") can cost upwards of $3 billion to build. And, the technological know-how lies almost exclusively with Defendants, who have entered into elaborate arrangements to share crucial intellectual property among themselves. Through licensing agreements, joint ventures, and cross-supply contracts, the cartel tightly controls and dominates the multi-million dollar LCD panel industry.[15]

B. The Only Use for LCD Panels Is Incorporation—In Unchanged Form—Into Finished Products Sold To Consumers

LCD panels have no independent utility, but have value only as components of other products, such as TVs, computer monitors, and laptops. The demand for LCD panels therefore comes from the demand for such products, and the LCD panel market would not exist without the products purchased by class members. Direct purchasers buy LCD panels to incorporate them into finished products or distribute to others that incorporate the panels into LCD products. During the assembly process, the panel itself is not modified; it remains a discrete, physical object that does not change form or become indistinguishable once it is incorporated into a finished product.[16]

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[14] *Cmpl.* ¶¶ 101, 104, 115-17; Netz Decl. at 35. *See, e.g.,* AUO-MDL-00028957–29120, at 29023-29024, 29052 (Zahid Decl. Ex. 1); CPT0004057–58, at 4057.01E of translation (Zahid Decl. Ex. 2).

[15] *Cmpl.* ¶¶ 107, 111-14; Netz Decl. at 35-51, 53. *See, e.g.,* Samsung 30(b)(6) Depo. (Scott Birnbaum) Tr. 177:11-23 (Zahid Decl. Ex. E); GRNE-B-0132293 at Slides 25, 61 (Zahid Decl. Ex. 3); CMP0025110–17 (Zahid Decl. Ex. 4).

[16] *Cmpl.* ¶¶ 121-23, 212; Netz Decl. at 22. Some Defendants, including Samsung, Sharp, Hitachi, LGD, Toshiba, and HannStar, sell their own LCD panels to their corporate subsidiary product manufacturers which in turn assemble and sell finished products such as TVs, computer monitors, and/or laptops under their own brand name. *See, e.g.,* Sharp Corp. 30(b)(6) Depo. (Hiroyuki Morimitsu) Tr. 56:13-18 (Zahid Decl. Ex. C); Samsung 30(b)(6) Depo. (Scott Birnbaum) Tr. 332:10-14 (Zahid Decl. Ex. B); Sharp Electronics Corp. 30(b)(6) Depo. (Bob Scaglione) Tr. 76:03-78:10 (Zahid Decl. Ex. D); Hannstar 30(b)(6) Depo. (Fundi Chen) Tr. 33:18-35:09 (Zahid Decl. Ex. E); CMO 30(b)(6) Depo. (Fumiaki Kunimoto) Tr. 54:12-21 (Zahid Decl. Ex. F).

The panel accounts for a significant portion of the total retail price of a TV, a computer monitor, or a laptop. The cost of the LCD Panel typically represents 33-70% of the total retail price of a TV (even more for TVs exceeding 40"); 50-80% of the retail price of a computer monitor; and roughly 10-25% of the retail cost of a laptop. Thus, the market for LCD panels and the market for the products into which they are placed are intertwined because the LCD panel market exists to serve the LCD products markets—one would not exist without the other.[17]

Consumers—named Plaintiffs and members of the Classes here—bought LCD products containing LCD panels through either of two distribution channels: (1) LCD Panel direct purchasers, such as Dell, Hewlett-Packard, and Apple that incorporate LCD panels into final, branded LCD products and sell directly to the public (i.e., computer, notebook, or TV product manufacturers); or, (2) retailers, such as Best Buy, Wal-Mart, or Target, that acquire the LCD products from LCD panel direct purchasers or distributors.[18]

C. Defendants Participated In a Criminal Price-Fixing Conspiracy That Harmed the U.S. Consumers Who Are Plaintiffs In This Case

Defendants and their co-conspirators have operated a successful cartel from at least as far back as 1998. Through the cartel, they met and agreed to fix the prices of LCD panels at *supra*-competitive levels. As a result of Defendants' price-fixing conspiracy, class members, who are at the end of the distribution chain, have been injured by paying more for LCD products than they otherwise would have paid in the absence of Defendants' conspiracy.[19]

1. Defendants Successfully Agreed to Fix Prices and Limit Production of LCD Panels

Beginning at least as early as 1998, Defendants and their co-conspirators formed an illegal international cartel to restrict competition and fix prices in the LCD panel market.

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[17] *Cmpl.* ¶ 124; Netz Decl. at 24. *See, e.g.,* CMO 30(b)(6) Depo. (Fumiaki Kunimoto) Tr. 55:15-22 (Zahid Decl. Ex. F); Samsung 30(b)(6) Depo. (Scott Birnbaum) Tr. 249:21-250:15 (Zahid Decl. Ex. B).

[18] *Cmpl.* ¶¶ 125-27, 200; Netz Decl. at 25, 30.

[19] *Cmpl.* ¶ 2; Netz Decl. at 71-90.

Defendants carried out the conspiracy through frequent and systematic group and bilateral discussions in Japan, Korea, Taiwan, and the United States, which led to industry-wide cooperation, the sharing of information regarding pricing and production levels, and the monitoring of each other's compliance with the agreement.[20] The conspiracy has been so successful that the cartel members themselves have touted their success in raising LCD panel prices.[21]

2. Defendants' Price-Fixing Agreement Increased All LCD Panel Prices

Defendants' agreement increased LCD panel prices across the board. This was accomplished due to the widespread use of most-favored-customer price clauses in Defendants' contracts with direct purchasers, the fact that negotiations started from price points that were set by Defendants at anticompetitive levels (*i.e.*, price lists and guidelines), and that pricing decisions were highly centralized, with Defendants' top-level personnel (*e.g.*, a vice president of sales or even a company president) often making the ultimate decision. Moreover, Defendants relied on formulas to set panel prices according to basic characteristics, such as size and resolution. With price agreements in place for the most basic panels, Defendants' effectively set a floor for all LCD panels. Defendants also

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[20] *Cmpl.* ¶¶ 130-148; Netz Decl. at 33-35, 51-53, Appendix C: Cartel meetings. *See, e.g.*, GRNE-B-0133233 at p. 6 (Zahid Decl. Ex. 5); SAML-276862-63 at 276862 (Zahid Decl. Ex. 6); CPT02308022, at 2308022.01E-.02E of translation (Zahid Decl. Ex. 7); CPT00045435-37, at 45435.01E-37E of translation (Zahid Decl. Ex. 8); CPT0004004, at 4004.02E of translation (Zahid Decl. Ex. 9); CPT00045426-27, at 45426.01E of translation (Zahid Decl. Ex. 10); CPT0004012-14, at p. 1 of translation (Zahid Decl. Ex. 11); GRN000170-74 (Zahid Decl. Ex. 12); *see also* a collection of documents memorializing numerous conspiratorial meetings identified thus far and illustrating Defendants' systematic sharing of information and agreeing upon prices (Zahid Decl. Exs. 13-94).

[21] Netz Decl. at 57 *See, e.g.*, CPT0004015, at 4015.01E of translation ( ) (Zahid Decl. Ex. 95); CPT0004020-27, at p. 1 of translation ( ) (Zahid Decl. Ex. 96); CPT0004041-42, at 4041.02E of translation ( ) (Zahid Decl. Ex. 97); GRN000010-21, at 0010 ( ) (Zahid Decl. Ex. 98).

agreed to pricing structures that maintained specific price differences between themselves for specific LCD panels.[22]

3. Defendants Closely Monitored the "Street Prices" of LCD Products, Recognizing That Increased LCD Panel Costs Are Passed-Through To the Consumers of LCD Products

During the conspiracy, the Defendants recognized the close relationship between the price of LCD panels and the price of LCD products, and how the increased costs of the LCD panels are passed-through to the consumers in the form of increased prices for LCD products. Knowing this relationship between panel costs and product prices, Defendants routinely monitored the "street prices" (i.e., consumer retail prices) and consumer demand for LCD products. In fact, Defendants discussed on several occasions how their coordinated LCD panel price increases would impact the LCD product prices downstream.[23]

As a result of Defendants' successful price-fixing conspiracy, the overcharge was ultimately passed through to consumers, such as Plaintiffs and members of the Classes.[24]

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[22] *See* Netz Decl. at 61-67. *See, e.g.*, CPT0004035-40, at p. 1 of translation (Zahid Decl. Ex. 99); CPT0004028-34, at 4028.01E of translation (Zahid Decl. Ex. 100); GRN000027-28, at p. 1 of translation (Zahid Decl. Ex. 101); CPT0004041-42, at 4041.02E of translation (Zahid Decl. Ex. 97); GRN000138-40 at pp. 1-2 of translation (Zahid Decl. Ex. 102); GRN000126-32, at p. 1 of translation (Zahid Decl. Ex.103).
In addition, because some Defendants sold LCD panels to their own corporate subsidiaries and affiliates that manufacture or assemble LCD products, *See, e.g.*, CPT0004008–11 at 4010E of translation (Zahid Decl. Ex. 94). Netz Decl. at 18-20.

[23] *See, e.g.*, SECm00403531-34 at 403532 () (Zahid Decl. Ex. 104); Toshiba 30(b)(6) Depo. (Junnosuke Tojo) Tr. 110:20-112:12 (Zahid Decl. Ex. G); *see also* a collection of documents illustrating Defendants' awareness that changes in component costs are passed-through to retail prices (Zahid Decl. Exs. 105-108); AUO 30(b)(6) Depo. (Joyce Pan) Tr. 116:14-117:22 (Zahid Decl. Ex. H); HannStar 30(b)(6) Depo. (Fundi Chen) Tr. 84:20-86:14 (Zahid Decl. Ex. E); Hitachi 30(b)(6) Depo. (Tamaki Iwamiya) Tr. 82:20-83:15 (Zahid Decl. Ex. I); LG Display 30(b)(6) Depo. (Yoong Ki Min) Tr. 145:09-19 (Zahid Decl. Ex. J); Sharp 30(b)(6) Depo. (Masahiro Yokota) Tr. 114:20-116:17 (Zahid Decl. Ex. K); SAML-523034-39 (Zahid Decl. Ex. 109); SCm00589566 (Zahid Decl. Ex. 110); CPT00394337-439355 (Zahid Decl. Ex. 111); *see also* a collection of documents illustrating how Defendants routinely monitored retail prices and consumer demand (Zahid Decl. Exs. 112-126); CPT0004043-45, at p. 2 of translation (Zahid Decl. Ex. 127); GRN000031-41 (Zahid Decl. Ex. 62).

[24] *Cmpl.* ¶¶ 132, 218.

IV. CLASS CERTIFICATION IS APPROPRIATE IN THIS CASE

A. Standards For Class Certification Of Federal Sherman Act Antitrust Claims

As the Supreme Court has recognized, antitrust class actions play an important role in the enforcement of the antitrust laws. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972). Because of this critical enforcement role, "courts resolve doubts in these actions in favor of certifying the class." *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005) (citations omitted); *accord*, *In re Tableware Antitrust Litig.*, 241 F.R.D. 644, 648 (N.D. Cal. 2007).

In moving for class certification under Rule 23, Plaintiffs must satisfy the four requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—and, show that the class action fits within at least one of the three types of class actions described in Rule 23(b). Here, Plaintiffs meet the threshold requirements of Rule 23(a)(1) – (4) under an analysis applicable to all of the Classes. Additionally, the Nationwide Class for injunctive relief is appropriate, and should be certified, under Rule 23(b)(2). Finally, the Indirect-Purchaser State-Wide Classes for damages are appropriate, and should be certified, under Rule 23(b)(3).

In determining whether to certify a case as a class action, the question is not whether plaintiffs have stated a cause of action or will prevail on the merits, but, rather, whether Plaintiffs have met requirements of Rule 23. *See Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). While the Court may consider information as needed to make an informed judgment on the requirements of Rule 23 (*Blackie v. Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir. 1975)), it is inappropriate for the Court to engage in a weighing of competing evidence on class certification. *Staton*, 327 F.3d at 954. In this Circuit, the purpose of an expert's declaration is clear: "At the class certification stage, it is enough that [plaintiffs' expert] present[s] properly-analyzed, scientifically reliable evidence *tending to show* that a

common question of fact . . . exists with respect to all members of the class." *Dukes v. Wal-Mart*, 509 F.3d 1168 (9th Cir. 2007) (emphasis added).[25]

B. The Classes Satisfy The Rule 23(a) Requirements

1. Class Members Are Sufficiently Numerous

Plaintiffs satisfy the numerosity requirement of Rule 23(a)(1) because joinder of all members of the Classes—consumers who purchased LCD products—would be impracticable. Membership in the Classes is alleged to include "thousands" of members in the Indirect-Purchaser State-Wide Classes, and "hundreds of thousands" in the Nationwide Class, with all members geographically dispersed throughout the United States. *See Cmpl.* ¶ 232; *see also In re Rubber Chemicals*, 232 F.R.D. at 350-51 ("geographically dispersed" class membership supports class certification). Therefore, the class is sufficiently numerous.

2. Common Questions Of Law And Fact Exist

Plaintiffs meet the "permissively" construed elements of Rule 23(a)(2) because there are questions of both law and fact common to the Classes in this antitrust conspiracy action. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *see also In re Sugar Industry Antitrust Litig.*, 1976 WL 1374 at * 13 (N.D. Cal. May 21, 1976) ("Courts consistently have held that the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist."). Here, the common questions include:

- whether Defendants shared confidential pricing and production information regarding LCD panels;

[25] *See also In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 115 (C.D. Cal. 2007) (analyzing Ninth Circuit precedent including *Dukes*, and concluding that "[r]eview of a motion for class certification would be similar to review of a Rule 12(b)(6) motion because class certification would be granted so long as the Plaintiffs submitted expert testimony in support of each of the Rule 23 requirements."); *L.H. v. Schwarzenegger*, 2007 WL 662463, at *12-13 (E.D. Cal. Feb. 28, 2007) (limiting the court's analysis at certification stage and holding that "arguments evaluating the weight of evidence or the merits of a case are improper"); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 384 (S.D.N.Y.1996) ("we need not consider [defendants' expert declaration] in detail, as it is for the jury to evaluate conflicting evidence and determine the weight to give the experts' conclusions.").

- whether Defendants through meetings and communications reached agreements on pricing and production of LCD panels;
- whether Defendants developed and implemented measures to monitor each member's compliance with their unlawful agreements;
- whether Defendants' agreements resulted in an unlawful overcharge on the price of LCD panels;
- whether the unlawful overcharge on the price of LCD panels was passed-through to the indirect purchasers of LCD products;
- whether the overcharge to indirect purchasers can be calculated using a common, formulaic method;
- whether there is an ongoing threat of injury to the members of the class as a result of the Defendants' unlawful conduct.

3. Named Plaintiffs Have Claims Typical Of The Classes

Plaintiffs, all of whom are members of the Nationwide Class, and each of whom are members of one of the Indirect-Purchaser State-Wide Classes (*see* Appendix A), fulfill the typicality requirement of Rule 23(a)(3). This element of Rule 23 is "liberally construed" and the "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1019-20; *see also Arnold v. United Artists Theatre Circuit Inc.*, 158 F.R.D. 439, 449 (N.D. Cal. 1994) (typicality met where named plaintiffs' claims "arise from the same remedial and legal theories" as the class claims). Differences as to "the various products purchased and the . . . amount of damage sustained by individual plaintiffs do not negate a finding of typicality, provided the cause of action arises from a common wrong." *Thomas & Thomas Rodmakers Inc. v. Newport Adhesives & Composites Inc.*, 209 F.R.D. 159, 164 (C.D. Cal. 2002) (internal quotation marks and citations omitted).

Here, all members of the Classes, including Plaintiffs, purchased LCD products containing Defendants' LCD panels and allege that they were overcharged as a result of

Defendants' collusive conduct. All members of the Indirect-Purchaser State-Wide Classes will prove their damages in the same way: first, by establishing the amount of the illegal overcharge on LCD panels, and, second, by demonstrating the amount of the illegal overcharge that was passed through to the price of LCD products. The Netz Declaration establishes that this can be done on a common basis. Thus, the proof does not depend on any class member's individual circumstances, and in fact, the proof offered would be the same regardless of the number or location of class members. All members of the Nationwide Class will base their claims on the same facts and the same legal theories: that Defendants' anticompetitive conduct violated the Sherman Act, 15 U.S.C. § 1, thus entitling them to injunctive relief, and all members of each of the state-wide classes will base their claims on the same predominate facts and same laws for each of those states.

4. Plaintiffs And Counsel Will Adequately Represent The Classes

Plaintiffs and interim co-lead counsel Zelle Hofmann Voelbel & Mason LLP and The Alioto Law Firm satisfy the Rule 23(a)(4) "adequacy" requirements because: (1) the proposed representatives do not have conflicts of interest with the proposed Classes; and (2) the representatives are represented by qualified counsel. *See Hanlon*, 150 F.3d at 1020; *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998).[26]

All members of the Classes share an interest in establishing liability and preventing future antitrust violations by Defendants. *See Tableware*, 241 F.R.D. at 649 ("[m]embers of the class were allegedly overcharged for tableware and have a mutual and coterminous interest in establishing defendants' liability and recovering damages.")

Plaintiffs here are individuals from around the country who seek to serve as representatives for the Classes. All of them are willing to fulfill their responsibilities as representatives of the Classes. These individuals have already produced documents, answered interrogatories, and appeared for depositions in this case. Information about

[26] Rule 23 was amended in 2003 so that proposed class counsel is assessed under subdivision (g), rather than under subdivision (a)(4). Subdivision (g) does not introduce a new element to the class certification procedure, but instead "builds on" prior case law. *See* Fed. R. Civ. P. 23(g) Advisory Committee Note to 2003 Amendments.

each of the proposed representatives is set forth in Appendix A. There are no conflicts among members of the Classes, and certification of the Classes is appropriate.

Plaintiffs have been well represented by the interim co-lead counsel of Zelle Hofmann Voelbel & Mason LLP and The Alioto Law Firm. Each firm, ably assisted by numerous other firms representing Plaintiffs, has devoted considerable time and resources to prosecuting this action vigorously since its inception, and each is committed to continuing to do so through the course of this litigation. The firms have overseen the litigation strategy, the briefing and argument of motions, the coordination and review of millions of pages of document discovery from Defendants and third parties, the taking and defending of dozens of depositions, and the retention of experts. Both firms are prepared to serve, and should be appointed, as counsel to the Classes.

C. Certification Of A Nationwide Class For Injunctive Relief Under Rule 23(b)(2) Is Appropriate

1. Injunctive Relief Is Necessary To Prevent Further Injury

Pursuant to Section 16 of the Clayton Act (15 U.S.C. § 26), Plaintiffs seek to enjoin Defendants' collusive practices and policies that violate Section 1 of the Sherman Act (15 U.S.C. § 1), and operate to artificially inflate LCD panel prices in the U.S. *Cmpl*. ¶ 3. Indirect purchasers may sue for injunctive relief under the Clayton Act. *See In re New Motor Vehicles Canadian Export Antitrust Litig*., 307 F. Supp. 2d 136, 144 (D. Me. 2004) *rev'd on other grounds*, 522 F.3d 6 (1st Cir. 2008) (holding "indirect-purchaser status does not bar the plaintiffs from seeking injunctive relief under . . . the Clayton Act").[27]

Certification under Rule 23(b)(2) is appropriate if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Here, Defendants have acted on grounds generally applicable to the class. As described in

[27] The Supreme Court's decision in *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977), does not bar indirect purchasers from securing nationwide equitable relief under Section 16 of the Clayton Act, 28 U.S.C. § 26. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1146 (9th Cir. 2003).

the Statement of Facts (section II, *supra*), the Defendants' collusive conduct was market-wide and not specific to individual consumers. As a result, injunctive relief is appropriate with respect to the Nationwide Class as a whole.

Defendants' anticompetitive conduct has enabled them to overcharge for their LCD panels, resulting in inflated prices for LCD products. Plaintiffs believe that this conduct is ongoing, and Defendants, even those which have pled guilty, have not admitted the full scope or duration of the conspiracy.[28] *Cmpl.* ¶ 251; *see, e.g.,* Answer of Defendant Sharp Corporation to Indirect Purchaser Plaintiffs' Second Consolidated Amended Complaint ¶¶ 128-182. Members of the Nationwide Class continue to purchase LCD products. An injunction that forces Defendants to cease any anticompetitive conduct will ultimately result in lower-priced LCD panels, and lower-priced LCD products purchased by Nationwide Class members in the future. The relief sought by Plaintiffs would, therefore, benefit the Nationwide Class.

2. The Court Should Certify The Nationwide Class For Equitable Relief

It is neither inconsistent nor unusual for courts to certify both an equitable relief class under Rule 23(b)(2) and a damages class under Rule 23(b)(3). "Class actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages." *Probe v. State Teachers' Ret. Sys*., 780 F.2d 776, 780 (9th Cir. 1986). *See Jefferson v. Ingersoll lnt'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) ("It is possible to certify the injunctive aspects of the suit under Rule 23(b)(2) and the damage aspects under Rule 23(b)(3), achieving both consistent treatment of class-wide equitable relief and an opportunity for each affected

[28] The DOJ's criminal investigation into the LCD market is limited in scope. Unlike in a civil antitrust case, which plaintiffs only need to prove by a preponderance of evidence that the defendants agreed to fix prices, the DOJ must prove beyond a reasonable doubt the existence and scope of the conspiracy. At the time of this filing, only four Defendants pled guilty on limited time periods and particular accounts. The discovery on the civil side of this case reveals a far more extensive conspiracy which is still ongoing. For a collection of documents memorializing Defendants' conspiratorial activities, see Zahid Decl. Exs. 13-94.

person to exercise control over the damage aspects."); *In re NasdaqMarket-Makers Antitrust Litig.*, 169 F.R.D. 493, 515 (S.D.N.Y. 1996) (observing that nothing in Rule 23 precludes certifying both types of classes).

The Nationwide Class includes all persons and entities who indirectly purchased LCD panels. *See Cmpl.* ¶ 230. The Indirect Purchaser State Classes comprise only a subset of states. *See id.* at ¶ 231. Thus, the plain language of the Complaint—and the number of class members and the anticipated impact upon them—dictate that the Nationwide Class is "primary." Not only is the Nationwide Class broader than the Indirect-Purchaser State Classes in terms of numerosity and geography, but the long-lasting effect of an injunction would far eclipse the effects of damages awards. *See Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 643 (N.D. Cal. 2007) (certifying Rule 23(b)(2) class where injunction would have "far-reaching" effects on defendant's promotion practices and would "benefit class members in the same way"). Products containing LCD panels—TVs, computer monitors, and laptops—are integral to Nationwide Class members' personal and professional lives. Unless Defendants are enjoined from perpetuating their price-fixing scheme, these class members will continue to spend more for these frequently-purchased products than they would have spent in a competitive market.

Even if members of the Indirect-Purchaser State-Wide Classes are awarded monetary relief, injunctive and declaratory relief will still be reasonable and appropriate. Defendants' activities as alleged in the complaint are, and have been, *per se* illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1. When the participants in a conspiracy will continue to reap anticompetitive benefits to the detriment of a class, certification under Rule 23(b)(2) is warranted. *See Nasdaq*, 169 F.R.D. at 516 (certifying a class under Rule 23(b)(2) and (3)). Monetary relief covers only past damages. Without equitable relief, Defendants could simply continue to sell their products at *supra*-competitive prices, forcing Plaintiffs to bring repetitious litigation. Accordingly, the Court should certify the Nationwide Class under Rule 23(b)(2) to ensure efficiency and deterrence.

D. Certification Of State-Wide Classes Under State Substantive Laws For Damages And Equitable Relief Is Appropriate

The Court should certify the 23 Indirect-Purchaser State-Wide Classes using the appropriate procedure of Rule 23(b)(2) and (b)(3). The state-law equitable restitutionary claims are subject to Rule 23(b)(2) requirements as stated above (*supra* IV-C) and should be certified for the same reasons. Upon a showing that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy," (Rule 23(b)(3)), all of the state-law damage claims should be certified for individual state-wide classes under each state's substantive class action precedent. As demonstrated in Appendix C, such state-wide classes are regularly certified in both state and federal courts. Although the "predominance" and "superiority" considerations are interrelated, it is appropriate to address them separately. *See, e.g., Valentino v. Carter-Wallace Inc.*, 97 F.3d 1227 (9th Cir. 1996).

1. A Class Action Is Superior To Other Available Methods Of Adjudication

"A class action is the superior method for managing litigation if no realistic alternative exists." *Valentino*, 97 F.3d at 1234. The Supreme Court has explained that the main purpose of Rule 23(b)(3)-type class actions is to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all," such as those whose individual recoveries would be too small to warrant an individual suit. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 617 (1997). In determining whether a class action is the superior method, the court must consider the four non-exclusive factors identified in Rule 23(b)(3):

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

Rule 23(b)(3); *see Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas*, 244 F.3d 1152, 1163 (9th Cir. 2001). Plaintiffs' Indirect Purchaser State Classes meet all four factors, and accordingly, satisfy the superiority inquiry.

a. There Is No Realistic Alternative To A Class Action For Class Members To Recover The Damages Caused By Defendants

Where the damages suffered by each putative class member are not large, the first factor weighs in favor of certifying a class action. *Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 671 (C.D. Cal. 2009). Here, the damages suffered by members of the Indirect Purchaser State Classes will be measured in relation to the purchase price paid for LCD products, such as TVs, monitors, and laptop computers. In the aggregate, these purchases are significant. However, each member's individual purchase of an LCD product costing, at most, a few thousand dollars, cannot sustain the costs associated with an antitrust conspiracy action against large multinational corporations.

As the court recognized in *Hanlon*, 150 F.3d at 1023, this disparity between claims and the costs of complex litigation creates several disadvantages for individual plaintiffs, including "less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *See also Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) ("If plaintiffs cannot proceed as a class, some—perhaps most—will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover."). Permitting the members of the Indirect Purchaser State Classes, who individually would be unable to vindicate their rights, to collectively assert their causes of action is consistent with the primary purpose of Rule 23(b)(3)-type class action. *Amchem*, 521 U.S. at 617. Accordingly, the first factor here weighs heavily in favor of the superiority of certifying the Indirect Purchaser State Classes.

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b. This Court Is The Only Available Forum

The answer to the second and third factor of the superiority inquiry—existence of collateral litigation, and desirability of concentrating litigation in the particular forum, respectively—has already been provided by the Judicial Panel on Multidistrict Litigation. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 483 F.Supp.2d 1353 (Jud. Pan. Mult. Lit. 2007). Here, no other individual lawsuits alleging a price-fixing conspiracy in the LCD panel market are pending and the cases have already been consolidated in the MDL proceeding for purposes of judicial efficiency. 28 U.S.C. § 1407.[29] Because of diversity jurisdiction created by CAFA, indirect-purchaser cases that formerly were litigated in state courts now must be litigated in federal courts. Only this Court is in a position to provide a remedy to the indirect purchasers. Therefore, the second and third factors support certification of the Indirect-Purchaser State-Wide Classes.

c. Class Certification Is More Manageable Than Any Other Procedure Available

The fourth element, manageability, weighs in Plaintiffs' favor because certification of the Indirect Purchaser State Classes would be far superior to, and more manageable than, any other procedure available for the treatment of the factual and legal issues raised by Plaintiffs' claims. *See Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 189 (N.D. Ill. 1992) ("What would be unmanageable is the institution of numerous individual lawsuits."); *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 700 (S.D. Fla. 2004) ("Multiple lawsuits brought by thousands of consumers and third-party payors in seventeen different states would be costly, inefficient, and would burden the court system.").

Courts in this Circuit and elsewhere have frequently certified classes under the laws of multiple jurisdictions, recognizing the substantial similarity among the unjust

[29] The Panel's authority extends to any future-filed actions with similar allegations, which would be transferred to this Court as MDL "tag-along" actions. *See* Multidistrict Litig. R. 7.4, 7.5. Moreover, by virtue of CAFA, 119 Stat. 4, Pub.L. 109-2, state courts were recently stripped of jurisdiction to hear most class actions, in favor of federal court jurisdiction. *See* 28 U.S.C. § 1332 (d).

enrichment, antitrust, and consumer protection laws of various states. *See, e.g., In re Abbott Labs Norvir Anti-Trust Litig.*, 2007 WL 1689899 at *8 (N.D. Cal. June 11, 2007) (certifying class under the common law of 48 states); *In re Pharm. Indus. Average Wholesale Price Litig.*, 233 F.R.D. 229, 230-31 (D. Mass. 2006) (certifying multi-state defendant subclasses under the consumer protection laws of 39 states).

Here, the Indirect-Purchaser State-Wide Classes are easily managed due to the substantial similarity of the laws at issue. For example, Plaintiffs assert claims for unjust enrichment in 21 of the Indirect-Purchaser State-Wide Classes.[30] Courts in California, Kansas, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, West Virginia, and Wisconsin have expressly followed or cited with approval the Restatement's definition of unjust enrichment. *Terazonsin*, 220 F.R.D. at 697 ; *Sobolewski v. Kaltsas*, 830 N.E.2d 247 (Mass. App. Ct. 2005.). While Arizona, District of Columbia, Hawaii, Iowa, Maine, Rhode Island, South Dakota, Tennessee, and Vermont do not cite the Restatement, the elements of an unjust enrichment claim in those states mirror those of the Restatement. *Id.*; *Comty. Guardian Bank v. Hamlin*, 898 P.2d 1005, 1008 (Ariz. App. Ct. 1995); *Small v. Badenhop*, 701 P.2d 647, 654 (Haw. 1985); *Bouchard v. Price,* 694 A.2d 670, 673 (R.I. 1997); *Freeman Indus. v. Eastman Chem. Co.*, 172 S.W.3d 512, 525 (Tenn. 2005); *Center v. Mad River Corp*., 561 A.2d 90, 92 n. 2 (Vt. 1989); *see also Singer v. AT&T Corp.*, 185 F.R.D. 681, 692 (S.D. Fla. 1998) (unjust enrichment is a "universally recognized cause[] of action that [is] materially the same throughout the United States").

Furthermore, as demonstrated in section IV D-3, *infra*, the 18 classes with state antitrust claims, and the 10 classes with state consumer protection claims, all share substantially the same cause of action elements.[31] Any variations in state law can be

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[30] Arizona, California, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, Rhode Island, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin. *See* Appendix B.

[31] *Accord Hanlon*, 150 F.3d at 1022 ("In this case, although some class members may possess slightly differing remedies based on state statute or common law, the actions

readily managed by grouping the Indirect-Purchaser States in accordance with common requirements for antitrust and consumer protection claims. Therefore, class resolution of Plaintiffs' state law claims is superior to other available methods in order to offer those with small claims the opportunity for meaningful redress. *Norvir*, 2007 WL 1689899 at *10. Accordingly, all elements of the "superiority" inquiry weigh in favor of certification.

Even if the laws of the various states were not so similar, this Court is bound to apply each of them under *Erie*, and as noted above, state courts are no longer an option for resolution of these claims. All of the various state claims are before this Court as a result of CAFA and the Judicial Panel on Multidistrict Litigation's order transferring all LCD cases to this Court. As discussed below, California and numerous other states have a well-developed body of law permitting, encouraging, and certifying indirect-purchaser consumer class actions, particularly in antitrust litigation; none of that law has been altered by CAFA or any other federal statute. Each of the 23 proposed statewide classes is separately manageable, as are the classes as a whole.

2. Common Questions Of Law And Fact Predominate

"Predominance," under Rule 23(b)(3), "is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem*, 521 U.S. at 625. "In price-fixing cases, courts repeatedly have held that the existence of the conspiracy is the predominant issue and warrants certification even where significant individual issues are present." *Thomas & Thomas,* 209 F.R.D at 167 (internal quotation marks and citation omitted).

"The very definition of the requirement of the predominance of common questions contemplates that individual issues will remain after the common issues are adjudicated." 1 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS, § 4:25 at 4-82 (4th ed. 2005). Class certification does not require that common questions be "completely dispositive of a litigation as to all potential members of the class" nor "dispositive of the

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asserted by the class representatives are not sufficiently anomalous to deny class certification.").

entire litigation." *In re Sugar Industry Antitrust Litig*., 73 F.R.D. 322, 344 (E.D. Pa. 1976). The requirement "is satisfied unless it is clear that individual issues will overwhelm the common questions and render the action valueless." *In re Cardizem CD Antitrust Litig*., 200 F.R.D. 326, 339 (E.D. Mich. 2001). Where the claims are "uniformly premised" on a "shared factual predicate" which gives rise to common legal issues, the predominance requirement is satisfied. *In re Napster, Inc. Copyright Litig*., 2005 WL 1287611, at *7 (N.D. Cal. June 1, 2005).

Here, Plaintiffs' claims are based on a "shared factual predicate"—Defendants' conspiracy. All will be resolved by presentation of evidence including documents, testimony, and economic analysis. Such common proof will demonstrate <u>liability</u> and <u>impact</u> on a class-wide basis, and a reasonable method for ascertaining <u>damages</u>.

a. Common Questions Of Liability In This Criminal Conspiracy Predominate

Predominant questions of law and fact exist because of class members' common interest in proving the existence and scope of the alleged conspiracy. Common issues predominate in proving an antitrust violation when the focus is on the defendants' conduct and not on the conduct of the individual class members. *See, e.g., In re Relafen Antitrust Litig*., 221 F.R.D. 260, 275 (D. Mass. 2004) ("The alleged antitrust violation relates solely to SmithKline's conduct, and as such, constitutes a common issue subject to common proof."); *Norvir*, 2007 WL 1689899 at *9 ("Common to all class members and provable on a class-wide basis is whether Defendant unjustly acquired additional revenue or profits by virtue of an anti-competitive premium on the price of Norvir.").

Class certification does not require that the common questions be completely dispositive of the litigation. *In re Sugar Indust*., 73 F.R.D. at 344. The differences among class members regarding the manner of purchase and payment, the design specifications of the LCD products they purchased, and the amounts they paid relate solely and primarily to the amount of damages and are not relevant to determining Plaintiffs' underlying liability

claims. Thus, the overriding need to prove antitrust conspiracy in the LCD panel market is alone sufficient to satisfy the Rule 23(b)(3) "predominance" requirement.

b. Common Questions Also Predominate With Respect To Economic Impact and Plaintiffs Have A Reliable Quantitative Method To Show Impact

Although not required for class certification, Plaintiffs have chosen to propose the question of whether Defendants' conspiracy harmed indirect purchasers, as yet another issue that is uniform to the Classes and adds to the overall predominance of common questions. The overwhelming corpus of evidence that will be common to all class members on this question includes qualitative economic opinions, the structure of the market, the fungibility of the product, Defendants' systematic collusive communications with one another, Defendants' resulting pricing behavior, and other facts. Netz Decl. at 17-61; *see In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 103 (D. Conn. 2009) (applying *In re Initial Public Offerings Securities Antitrust Litig.*, 471 F.3d 24 (2d Cir. 2006), the court held that, "regardless of the efficacy of the plaintiffs' economic modeling, the plaintiffs have presented factual evidence" that would predominate concerning the proof of harm to class members).

Separately, Plaintiffs have also combined the foregoing corpus of qualitative expert opinion and extensive common facts with quantitative expert statistical analyses to present yet another method that will show by common classwide proof the fact (and amount) of harm to each class member. Netz Decl. at 71-116

Importantly, the inquiry with respect to the expert analysis method of showing common impact is a very limited one at this stage: "It must be remembered, however, that during the class certification stage, . . . [t]he court cannot weigh in on the merits of plaintiffs' substantive arguments, and must avoid engaging in a battle of expert testimony. . . . Plaintiffs need only advance a plausible methodology to demonstrate that antitrust injury can be proven on a class-wide basis". *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 1530166 at *9 (N.D. Cal. June 5, 2006).

In the Ninth Circuit, courts consistently prohibit inquiry into the merits of the expert reports. The inquiry is rather whether the plaintiffs' method of proof is a form of common evidence. *Dukes,* 509 F.3d at 1179 (9th Cir.2007) ("At the class certification stage, it is enough that [plaintiffs' expert] present[s] properly-analyzed, scientifically reliable evidence *tending to show* that a common question of fact . . . exists with respect to all members of the class.") (emphasis added); *see also In re Live Concert,* 247 F.R.D. at 110-114; *In re DRAM,* 2006 WL 1530166, at *9; *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 354 (N.D. Cal 2005) ("[A]ssessing whether to certify a class, the court's inquiry is limited to whether or not the proposed methods are so insubstantial as to amount to no method at all.") (Citations omitted); *In re Indus. Diamonds* 167 F.R.D. at 384 ("[W]e need not consider [defendants' expert declaration] in detail, as it is for the jury to evaluate conflicting evidence and determine the weight to give the experts' conclusions.").[32]

The Declaration of Dr. Netz accompanying this motion demonstrates, through the application of economic theory, the analysis of data, and ample documentary evidence, that Defendants' price-fixing conspiracy had a common impact on indirect-purchaser class members. In particular, Dr. Netz' descriptive and statistical analyses show the following:

- The characteristics of the industry and pricing data indicate that the Defendants' conspiracy was effective in raising prices of LCD panels;
- Any price increases that Defendants agreed upon affected the prices paid by all direct purchasers; and
- The commonly imposed higher prices to direct purchasers were passed through into commonly higher prices on indirect purchasers (class members).

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[32] *Cf. In re Hydrogen Peroxide Antitrust Litig.*, 552 F. 3d 305 (3d Cir. 2008) (vacating class certification order on ground that district court did not undertake necessary rigorous analysis of parties' experts' opinions and remanding with direction that district court should resolve dispute *between* experts whether impact was susceptible to class-wide proof). This is the not the law in this Circuit. In any event, Dr. Netz has presented an economic method showing that antitrust impact is susceptible to common proof, which satisfies the stricter standard in the Third Circuit. *See In re EPDM*, 256 F.R.D. at 101-103.

Netz Decl. at 17-91.

Additionally, both the overcharge from the Defendants to direct purchasers of LCD panels (such as product manufacturers, retailers, and distributors), and the pass-through rate of that overcharge to indirect purchasers (Plaintiffs and members of the Classes) can be measured on a common, formulaic basis. Netz Decl. at 91-114.

This economic and factual showing more than suffices to establish that impact can be demonstrated on a classwide basis under any standard.[33] But "[e]ven if common impact cannot be proven, the Court may certify the class. The great weight of authority suggests that the dominant issues in cases like this are whether the charged conspiracy existed and whether price-fixing occurred." *In re Citric Acid Antitrust Litig.*, 1996 WL 655791 at *8 (N.D. Cal. Oct. 2, 1996); *see also In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693-96 (D.Minn.1995).

c. Common Questions Also Predominate Regarding The Measure Of The Amount Of Damages

Plaintiffs have also chosen to propose the question of whether Plaintiffs can prove the amount of damages to members of the Classes on a common, formulaic basis, as yet another question that adds to predominance. *Compare Blackie*, 524 F.2d at 905 ("The amount of damages is invariably an individual question and does not defeat class action treatment."). The burden to qualify even the damages proof as yet another common question is a modest one, *In re Rubber Chemicals*, 232 F.R.D. at 354 ("Plaintiffs do not

[33] *Cf. In re Graphics Processing Units Antitrust Litig.* ("*GPUs*"), 253 F.R.D. 478 (N.D. Cal. 2008) (denying indirect and all but a small fraction of direct purchasers' motion for class certification). Plaintiffs respectfully submit that Judge Alsup erred in his decision, and that his analysis of the level of completeness required for an expert report at the class certification stage is inconsistent with the binding Ninth Circuit authority in *Dukes*, as well as other recent decisions in this district such as *Rubber Chemicals* and *DRAM*. *See In Re Rubber Chem.,* 232 F.R.D. at 350-51; *In re DRAM,* 2006 WL 1530166 at *1. *GPUs* involved a broader range of products, a more complex distribution market, and a fuller discovery record than the instant case, but Judge Alsup nevertheless acknowledged that his decision to deny certification was inconsistent with the numerous decisions that certified *Microsoft* indirect purchaser classes. He distinguished those decisions as "*sui generis*" by finding that Microsoft's liability had been established, whereas in *GPUs* he thought that the government had dropped its investigation. That merits analysis was inappropriate at the class certification stage, but in any event the existence of an LCD conspiracy is clear from the guilty pleas.

need to supply a precise damage formula at the certification stage of an antitrust action. . . . [Rather, Plaintiffs need only] . . . have proffered a method that is not so insubstantial or unreasonable as to amount to no method at all.”).

Here, Plaintiffs more than meet this low burden to show yet another common question adding to predominance. In her declaration, Dr. Netz describes three widely-accepted and feasible methods for calculating the “but-for” LCD panel prices (and thus overcharges to direct purchasers): (1) a regression model of price based on a competitive time period; (2) a structural model of the market; and (3) an econometric estimation of firm conduct. Netz Decl. at 91-102. Dr. Netz also describes how regression analysis can be applied to measure the rate of pass-through of the overcharges on the LCD panels to LCD product prices (as well as illustrates the implementation of the method with data produced by several third parties). Netz Decl. at 102-114. All of the methods described by Dr. Netz are widely accepted and commonly used by economists. Netz Decl. at 91-102. Given the feasibility of calculating the overcharge to direct purchasers and estimating how LCD panel price increases are pass-through to LCD product prices, the damages to class members can be quantified using common evidence on a common formulaic basis. Netz Decl. at 115-116**.**

3. The Indirect-Purchaser State-Wide Classes Should Be Certified

As described above, the Indirect-Purchaser State-Wide Classes should be certified because the predominance requirement is satisfied under Rule 23(b)(3). Federal courts determining certification of state classes routinely apply substantive state-law standards as part of their Rule 23 analyses. For each Class, the applicable legal standards for class certification are set forth below. The question of whether Defendants’ conspiracy harmed indirect purchasers is similarly a question in which common questions of law and fact predominate. Injury and damages do not present predominately individual issues because California and other repealer states’ laws permit an inference of classwide injury or classwide proof of damages.

For example, in *Relafen*, the court granted in part the plaintiffs' motion for class certification of state law antitrust claims. *In re Relafen*, 221 F.R.D. at 260. The court held: "the Court must examine the end payer plaintiffs' claims under governing state law . . . state law defines the elements of the end payor plaintiffs' claims and in turn, proves relevant to determining the demonstration of common injury necessary for certification." *Id.* at 276; *In re New Motor Vehicles Canadian Export Antitrust Litig*., 235 F.R.D. 127, 132-136 (D. Maine), *rev'd on other grounds*, 522 F.3d 6 (1st Cir. 2008). Moreover, for purposes of substantive issues such as burdens of proof and inferences, a federal court must rely on the substantive law in question when determining if the procedural requirements of Rule 23 are satisfied.[34]

Since CAFA was enacted, state antitrust claims are now litigated almost exclusively in federal courts. This procedural change must not eviscerate consumers' substantive antitrust rights and the state's legislative intent to retain the availability of indirect-purchaser suits as a viable and effective means of enforcing state antitrust laws.

a. California

California's antitrust law, the Cartwright Act, Cal. Bus. & Prof. Code § 16700, *et seq.*, prohibits combinations between two or more persons to "[a]gree in any manner to keep the price of [a product] . . . at a fixed or graduated figure," or to "[e]stablish or settle the price of any [product] . . . , so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of [the product]." *Id.* § 16720(e)(2) and (3). The California Supreme Court has specifically identified "price-fixing" as among the business practices "which because

[34] Courts sitting in diversity are bound to follow state substantive law unless it conflicts with a Federal Rule. *Erie*, 304 U.S. at 64; *Walker v. Amco Steel Corp*., 446 U.S. 740, 749-50 (1980); *U.S. ex. rel. Newsham v. Lockheed Missles & Space Co., Inc.*, 190 F.3d 963 (9th Cir. 1999); *Computer Economics, Inc. v. Gartner Group, Inc*., 50 F. Supp. 2d 980, 990 (S.D. Cal. 1999) ("[s]tate rules that define . . . presumptions, [or] burdens of proof . . . are so obviously substantive that their application in diversity actions is required.") (citations omitted). Fed. R. Civ. P. 23, like all Rules, is to be interpreted "with sensitivity to important state interests and regulatory policies." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 n.7 (1996).

of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Corwin v. Los Angeles Newspaper Service Bureau, Inc*., 4 Cal. 3d 842, 853 (1971) (*quoting Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958)).

When the legislature enacted the Cartwright Act, it delivered "a mandate to avoid unnecessary procedural barriers to indirect purchasers' prosecution of California antitrust suits" and "to retain the availability of indirect-purchaser suits as a viable and effective of means of enforcing California's anti-trust laws." *Union Carbide Corp. v. Super. Ct.*, 36 Cal. 3d 15, 21-22 (1984). The California Supreme Court clarified that "indirect purchasers are persons 'injured' by illegal overcharges passed on to them in the chain of distribution." *Id.* at 20. Courts regularly certify classes of indirect purchasers on Cartwright Act claims. *See, e.g., Rosack v. Volvo of Am. Corp.*, 131 Cal. App. 3d 741, 760-62 (1982), *cert. denied* 460 U.S. 1012 (1983); *Terazosin,* 220 F.R.D. at 695, 702.

California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code, § 17200, *et seq.*, defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice." *Id.* § 17200. The UCL extends to antitrust violations such as price-fixing, and UCL claims are commonly certified for class treatment. *See Corbett v. Super. Ct*., 101 Cal. App. 4th 649, 654-55 (2002); *Massachusetts Mutual Life Ins. Co. v. Super. Ct.*, 97 Cal. App. 4th 1282, 1292 (2002) ("plaintiffs' UCL claim presents common legal and factual issues which were plainly suitable for treatment as a class action*."); Rees v. Souza's Milk Transp., Co.*, 2006 WL 738987, at *9 (E.D. Cal. 2006) (certifying class on UCL claim); *Relafen*, 221 F.R.D. at 283 (certifying California end-purchaser class under UCL).

California's well-established law permits an inference of antitrust impact to indirect purchasers by horizontal *per se* illegal price-fixing conspiracies. *Rosack*, 131 Cal. App. 3d at 760 ("contentions of infinite diversity of product, marketing practices, and pricing have

1 been made in numerous cases and rejected. Courts have consistently found the conspiracy
2 issue the overriding, predominant question"); *B.W.I.*, 191 Cal. App. 3d at 1352 (holding
3 presumption of injury appropriate in indirect-purchaser class action, noting "courts have
4 assumed consumers were injured when they purchased products in an anticompetitive
5 market").[35] Applying California precedent on the issue of impact does not interfere with
6 Rule 23 as there is no contrary substantive element in the Federal Rules. Rather,
7 California's presumption of impact is entirely consistent with them and with federal
8 precedent. *Bogosian v.Gulf Oil Corp.*, 561 F.2d 434, 454 (3d Cir. 1977) ("proof of impact
9 [may] be made on a common basis so long as the common proof adequately demonstrates
10 some damage to each individual."). California courts apply this presumption in the context
11 of California's own class certification requirements, which have a "predominance"
12 requirement identical to Rule 23.[36] In fact, California courts have consistently recognized
13 that this presumption of impact is entirely consistent with federal law.[37]
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[35] *See also Hopkins v. De Beers Centenary AG*, 2005 WL 1020868, at *4-5 (certifying class of indirect-purchases, holding "[w]here, as here, Plaintiff alleges a market-wide restraint of trade, fact-of-injury is assumed for class certification purposes.") (citations omitted); *Microsoft I-V Cases*, 2000-2 (CCH) Trade Cas. ¶73,013, at 88,560 (San Francisco Super. Ct. Aug. 29, 2000) (noting "[t]here is considerable authority for the proposition that in a case alleging price fixing the fact of injury may be determined on a classwide bases. Because price fixing is a per se violation of antitrust law, a presumption of harm arises from proof of such a violation.") (internal citations omitted) (RJN Ex. 9).

[36] Class actions in California are governed by Cal. Civ. Proc. Code §382, which requires, inter alia, "predominant common questions of law or fact." *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 470 (1981). These requirements (at least with respect to predominance) are identical to Rule 23(a)(3)'s "predominance" requirement and interpreted in accordance with Rule 23. *See, e.g., Mendoza v. County of Tulare*, 128 Cal. App. 3d 403, 418 n.6 (1982); *B.W.I.*, 191 Cal. App. 3d 1341, 1347 (1987).

[37] *See In re Cipro Cases I and II*, 121 Cal.App.4th 402, 411-13 (2004) (affirming order certifying class of indirect-purchasers alleging price-fixing, holding "state and federal courts alike have recognized that common issues usually predominate" and citing numerous federal decisions in support of analysis); *B.W.I.*, 191 Cal. App. 3d at 1348-53 (reversing order denying class certification of indirect-purchasers alleging price-fixing and rejecting argument that predominance with respect to impact was insufficient based on federal court cases interpreting "predominance" requirement with respect to impact); *Rosack,* 131 Cal. App. 3d at 753 (same; every case cited in "impact" section was an opinion of a federal court); *Hopkins v. De Beers Centenary*, No. CGC-04-432954, 2005 WL 1020868, at *4-5 (Cal. Sup. Ct. April 15, 2005) (certifying class of indirect-purchasers, noting "[s]tate and federal courts alike have recognized that common issues usually predominate in cases where the defendants are alleged to have engaged in collusive, anti-competitive conduct resulting in artificially high market-wide prices for a product" and citing federal cases in support of finding predominance); *Microsoft I-V*

1 This burden of proof with respect to impact derives from recognition that class
2 actions protect consumers, prevent repetitive claims, and deter irresponsible corporate
3 behavior. To achieve these salutary purposes, the California courts embrace class actions.
4 *See, e.g., Discover Bank v. Super. Ct.*, 36 Cal. 4th 148, 156 (2005); *Richmond v. Dart*
5 *Indus*., Inc., 29 Cal. 3d 462 (1981). "The right to seek classwide redress is more than a
6 mere procedural device in California," rather, California's express public policy is to
7 encourage the class action as an "essential tool for the protection of consumers against
8 exploitative business practices." *Klussman v. Cross Country Bank,* 134 Cal. App. 4th
9 1283, 1296 (2005); *State of California v. Levi Strauss & Co.*, 41 Cal. 3d 460, 471 (1986).
10 "A company which wrongfully exacts a dollar from each of millions of customers will reap
11 a handsome profit; the class action is often the only effective way to halt and redress such
12 exploitation. The problems which arise in the management of a class action involving
13 numerous small claims do not justify a judicial policy that would permit the defendant to
14 retain the benefits of its wrongful conduct and to continue that conduct with impunity."
15 *Discover Bank*, 36 Cal. 4th at 156 (citation omitted).
16 The standard of proof for claims applicable to UCL is even lower than the
17 Cartwright Act, which makes claims under the UCL even more suited for class
18 certification. A plaintiff in a class UCL action is entitled to an injunction and restitution,
19 authorized under the UCL, and to disgorgement into a fluid recovery fund, as authorized
20 under the California class action statutes. *See, e.g., Corbett v. Superior Court*, 101
21 Cal.App.4th 649, 655 (2002); *Massachusetts Mut. Life Ins. Co. v. Superior Court*, 97 Cal.
22 App. 4th 1282, 1288-92 (2002); *Kraus v. Trinity Mgt. Svcs., Inc.*, 23 Cal.4th 116, 136
23 (2000) (noting that fluid recovery is available in certified UCL class actions). Here,
24 Plaintiffs will use common evidence to show that Defendants' price-fixing in the LCD
25 panel market is "unfair" within the meaning of the UCL. Plaintiffs will rely on class-wide
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27 *Cases*, 2000-2 Trade Cas. ¶73,013, at 88,560 (same, citing state and federal cases in support of holding that predominance of common issues with respect to antitrust injury
28 existed) (RJN Ex. 9).

evidence to establish that Defendants' unfair business practices resulted in overcharges in the LCD panel prices which were passed on to California consumers. Plaintiffs will thus show injury to the class resulting from Defendants' UCL violation.

In light of the foregoing principles, it is clear that under California law, the issues of whether Defendants engaged in a price-fixing conspiracy, whether class members were injured, and the amount of those damages, are subject to generalized proof, not individualized proof. As set out in Appendix C attached hereto, numerous courts have certified indirect purchaser classes under California's Cartwright Act and the UCL, and the Court should do so here as well.

b. Arizona

The Arizona Indirect-Purchaser State Class asserts causes of action under the Arizona Uniform Antitrust Act, Ariz. Rev. Stat. §§ 44-1401, *et seq.* The Arizona Uniform Antitrust Act states that "[a] contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce, any part of which is within this state, is unlawful." A.R.S. § 44-1402. Damages available to individuals under the Act include injunctive relief, money damages, and attorneys' fees and costs. A.R.S. § 44 1408(B). An indirect purchaser of goods has standing to bring an action under the Act to recover damages resulting from the alleged price-fixing by the manufacturers of those goods. *Bunker's Glass Co. v. Pilkington PLC,* 75 P.3d 99, 102 (2003); *Friedman v. Microsoft Corp*., 141 P.3d 824, 828 (Ariz. App. 2006) ("it [is] clear that Arizona indirect purchasers [can] recover for antitrust violations under Arizona law."). The Arizona Supreme Court recognized that indirect-purchaser damages could be proven with class-wide evidence and that expert testimony regarding proof of class-wide pass-on damages is sufficient to uphold class certification of indirect-purchaser claims. *Bunker,* 75 P.3d at 108-09. Dr. Netz, Plaintiffs' expert here, also was an expert for plaintiffs in the Arizona Microsoft case.

Here, whether an LCD panel price-fixing conspiracy exists under Arizona antitrust law, and whether the class members were injured can be shown with predominantly generalized evidence. Plaintiffs also put forward sufficient methodologies for calculating damages on a class-wide basis. Numerous courts have certified claims under the Arizona Antitrust Act in cases brought by indirect purchasers. *See* Appendix C at c-1. The same result is appropriate here.

c. District of Columbia

The District of Columbia Indirect-Purchaser State Class alleges violations of the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901, *et seq.*, and the District of Columbia Antitrust Act, D.C. Code §28-4501 *et seq.* ("DCAA"). The DCAA provides that "[e]very contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce all or any part of which is within the District of Columbia is declared to be illegal" (D.C. Code § 28-4502), and expressly provides a cause of action for indirect purchasers (D.C. Code §28-4509(a)). Indeed, the District of Columbia legislators "deliberately chose to reject the gloss put on the Clayton Act by *Illinois Brick* and to provide a contrasting antitrust scheme for the District of Columbia." *Holder v. Archer Daniels Midland Co.*, 1998 WL 1469620, at *3 (D.C. Super. Ct. Nov. 4, 1998). In addition to injunctive or equitable relief, a private plaintiff can also recover treble damages and attorneys' fees. D.C. Code Ann. §28-4508(a).

The issue of whether there was a conspiracy to fix the prices of LCD panels in violation of the DCAA or CCPA, is subject to generalized proof, not individualized proof. Also, the other elements of the claims, injury and damages, are also subject to generalized proof, and the DCAA expressly provides for such class-wide proof.[38] Indeed, District of Columbia courts addressing impact recognize that "[a]t the class certification stage, plaintiffs need only demonstrate that they intend to use generalized evidence which is

[38] "In any class action brought under this section by purchasers or sellers, the fact of injury and the amount of damages sustained by the members of the class may be proven on a class-wide basis, without requiring proof of such matters by each individual member of the class." D.C. Code § 28-4508 (c).

common to the class and will predominate over individualized issues with respect to proving impact." *In re Vitamins Antitrust Litig*., 209 F.R.D. 251, 266 (D.D.C. 2002). A number of courts have certified classes of indirect purchasers under District of Columbia law, and for the reasons set forth above, this Court should do so here. *See* Appendix C at c-2.

d. Florida

The Florida Indirect-Purchaser State Class asserts a cause of action under the Florida Deceptive and Unfair Trade Practices Act ("DTPA"), F.S.A. § 501.201 *et seq.* The Florida DTPA expresses a primary policy "[t]o protect the consuming public from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce," and provides that the act "shall be construed liberally to promote [such] policies. . . ." F.S.A. § 501.202. Florida courts have expressly held that an indirect-purchaser action alleging a price-fixing conspiracy is actionable under the Florida DTPA. *See Mack v. Bristol Myers Squibb*, 673 So. 2d 100, 108 (Fla. 1st DCA 1996) ("we read subsections 501.202(2), 501.211(2) and 501.204(1) of the Florida DPTA as a clear statement of legislative policy to protect consumers through the authorization of such indirect purchaser actions."). A consumer who has suffered a loss as a result of a DTPA violation may bring an action for actual damages, attorney fees and costs. F.S.A. § 501.211(2).

In *In re Florida Microsoft Antitrust Litig,* the Florida court recognized and applied an inference of antitrust impact despite pricing diversity. 2002 WL 31423620, at *14 (Fla. Cir. Ct, Aug. 26, 2002). The court also noted that "[w]hen the experts for the parties both are well credentialed and even if both offer compelling arguments, resolution of such a 'duel' is beyond the scope of the class certification inquiry." *Id.* at *15; *see also* Appendix C at c-3.

Here, like in *Florida Microsoft*, Plaintiffs' expert has proffered viable economic theories and methodologies to prove fact of injury and damages on a class-wide basis. The Florida Indirect-Purchaser State-Wide Class should therefore be certified.

e. Hawaii

The Hawaii Indirect-Purchaser State Class asserts causes of action under the Hawaii Revised Statutes, H.R.S. §§ 480-1, *et seq.* Hawaii antitrust law prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the practice of any trade or commerce" (H.R.S. §480-2(a)); it further provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is illegal" (H.R.S. § 480-4(a)). Thus, in terms of liability, §480-4(a) mirrors section 1 of the Sherman Act. H.R.S. §480-3 further states: "This chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes, except that lawsuits by indirect purchasers may be brought as provided in this chapter." *See McDevitt v. Guenther*, 522 F.Supp.2d 1272, 1289 (D.Haw. 2007). An indirect purchaser of goods has standing to bring an action under Hawaii law to recover treble damages, attorneys' fees and costs, resulting from the alleged price-fixing by the manufacturers of those goods as well as to enjoin the unlawful practices. *See* H.R.S §§ 480-13; 480-13.3; *see also Sea Land Service, Inc. v. Atlantic Pacific Intern., Inc.*, 61 F. Supp. 2d 1092, 1097 (D. Haw. 1999).

The issues of whether there was a conspiracy to fix the prices of LCD panels in violation of Hawaii antitrust law, whether the Hawaii Indirect-Purchaser State-Wide Class members suffered damage, and proof of the amount of damages sustained on a class-wide basis are subject to generalized proof, not individualized proof. Consumer claims have been certified for class treatment under Hawaii law, and the same result is warranted here. *See* Appendix C at c-3.

f. Iowa

The proposed Iowa Indirect-Purchaser State-Wide Class asserts a cause of action under the Iowa Competition Law ("ICL"), I.C.A. § 553.4. The ICL provides that "a person shall not attempt to establish, maintain, or use a monopoly of trade or commerce in a relevant market for the purpose of excluding competition or of controlling, fixing or maintaining prices." Iowa Code § 553.5. Under the ICL, private parties who are "injured or threatened with injury by conduct prohibited [by the ICL]" may seek equitable relief and recover actual damages, including costs and attorneys' fees. Iowa Code § 553.12. In *Comes v. Microsoft*, 646 N.W. 2d 440, 447 (Iowa 2002), the Iowa Supreme Court held that indirect purchasers may recover damages under the ICL.

All of the elements of the statutory claim (*i.e.*, conspiracy, impact and the amount of damages) can be established through common proof. Indeed, not only has the Iowa Supreme Court held that class treatment is appropriate in indirect purchaser actions based on antitrust misconduct, but it has also held that common issues on liability would predominate even without a finding of commonality as to impact and damages. *See Comes*, 696 N.W.2d at 323. The Court also found that plaintiffs' expert's opinion as to common impact and damages based on economic theory was more than sufficient to support certification. *Id.* at 324-325. Dr. Netz, Plaintiffs' expert here, also was an expert for plaintiffs in the Iowa *Microsoft* case. Moreover, a number of other courts have certified claims under the ICL in cases brought by indirect purchasers, lending further support to certification here. *See* Appendix C at c-3.

g. Kansas

The proposed Kansas Indirect-Purchaser State Class asserts causes of action under the Kansas antitrust statute, K.S.A. § 50-112. The statute prohibits "arrangements, contracts, agreements, trusts, or combinations between persons with a view or which tend to prevent full and free competition." K.S.A. § 50-112. A private right of action exists under the statute for any person injured or damaged directly or indirectly by any such arrangement, contract, agreement, trust or combination. *See* K.S.A. § 50-115; K.S.A. § 50-

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161(b); *see also Four B Corp. v. Daicel Chemical Industries, Ltd*., 253 F. Supp. 2d 1147, 1150, 1152 (D. Kan. 2003) (indirect purchasers have standing under this statute to sue for antitrust misconduct).

Like other repealer states, Kansas courts recognize the importance of class actions to enforce its citizens' substantive antitrust rights. *Bellinder v. Microsoft,* 2001 WL 1397995, at *5 (Kan. Dist. Ct. Sept. 7, 2001) ("The antitrust laws rely heavily for their enforcement on citizen suits. Without the class action device, such laws could be violated with impunity, as long as individual damages were comparatively small, even though the aggregate damage was great").

K.S.A. § 50-115 allows recovery of full consideration by indirect purchasers. *Four B,* 253 F. Supp. 2d at 1152. Under this statute, damages would equal the total amount paid by the Kansas class members, therefore obviates the need for common proof of damages. *See In re Western States Wholesale Natural Gas*, 2007 WL 2178063, at *5(D.Nev. July 27, 2007).

The other elements of the Kansas antitrust claim (*i.e.*, conspiracy and injury) can be established through common proof. A number of other state and federal courts have certified indirect purchaser classes asserting claims under the Kansas antitrust statute. *See* Appendix C at c-3-4. Certification of the Kansas Indirect-Purchaser State Class is similarly warranted here.

h. Maine

The proposed Maine Indirect-Purchaser State-Wide Class asserts a cause of action under the Maine antitrust act, 10 M.S.R.A. § 1101, *et seq.* The statute prohibits "[e]very contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce." 10 M.S.R.A. § 1101. A private right of action for damages, including treble damages, costs and attorneys' fees and equitable relief, is available to "[a]ny person . . . injured directly or indirectly in its business or property" by reason of conduct in violation of "section 1101, 1102 or 1102 A." *Id.* at §1104.

The elements of the Maine antitrust claim (*i.e.*, conspiracy, injury and the amount of damages) can be established through common proof. Indeed, several courts have certified Maine classes of indirect purchasers under the Maine antitrust and consumer protection statutes, and the Court should do so here as well. *See, e.g., In re Terazosin*, 220 F.R.D. at 700 (certifying multiple state-wide classes of indirect purchasers under state laws, including claims under the Maine antitrust act); Appendix C at c-4.

i. Massachusetts

The proposed Massachusetts Indirect Purchaser State Class asserts a cause of action under the Massachusetts consumer protection act, Mass. Gen. Laws, Ch. 93A, § 9. The statute provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." G.L., c. 93A, § 2(a). The Massachusetts legislature further provided that, in construing the latter provision, "the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended." G.L. c. 93A, § 2(b). Section 9 of c. 93A provides a private right of action for "[a]ny person, . . ., who has been injured by another person's use or employment of any method, act or practice declared unlawful by section two." G.L. c. 93A, § 9. The statute also provides for the recovery of "damages and such equitable relief, including an injunction, as the court deems to be necessary and proper." G.L. c. 93A, § 9(1). Additionally, "G.L. c. 93A allows indirect purchasers to bring a cause of action for anticompetitive conduct that would be precluded under the [Massachusetts] Antitrust Act." *Ciardi v. F. Hoffman La Roche, Ltd.*, 436 Mass. 53, 64, n.18 (2002).

The issues of whether there was a conspiracy to fix the prices of LCD panels in violation of Massachusetts law, whether the Massachusetts Indirect-Purchaser State-Wide Class members were injured, and proof of the damages sustained on a class-wide basis are

all subject to generalized proof, not individualized proof.[39] Numerous Massachusetts indirect purchaser claims under c. 93A have been certified by state and federal courts, providing further support for certification here. *See* Appendix C at c-5.

j. Michigan

The proposed Michigan Indirect-Purchaser State-Wide Class asserts causes of action under the Michigan Antitrust Reform Act ("MARA"), MCLS § 445.771, *et seq.* The statute provides that "[a] contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." MCLS § 445.772. Furthermore, MARA provides that: "It is the intent of the legislature that in construing all sections of this act, the courts shall give due deference to interpretations given by the federal violations and the rule of reason." MCLS § 445.784(2). Section 445.778(2) provides that:

> [a]ny other person threatened with injury or injured directly or indirectly in his or her business or property by a violation of this act may bring an action for appropriate injunctive or other equitable relief against immediate, irreparable harm, actual damages sustained by reason of a violation of this act.

The issues of whether there was a conspiracy to fix the prices of LCD panels in violation of MARA, whether the Michigan Indirect-Purchaser State-Wide Class members were injured, and proof of the damages sustained on a class-wide basis are subject to generalized proof, not individualized proof. A number of courts have certified classes of Michigan indirect purchasers in similar contexts. *See e.g.*, *In re Cardizem CD Antitrust Litigation*, 200 F.R.D. 326 (E.D.Mich.,2001);[40] Appendix C at c-5.

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[39] Moreover, in lieu of calculating actual damages, Massachusetts Indirect-Purchaser State Class members can recover statutory damages in the sum of $25 for each Class member, making the calculation even simpler. Additionally, members can recover a share of the Defendants' profits under a disgorgement theory, removing the need to calculate actual damages for each class member. This theory has been applied to claims under c. 93A. *See Melo Tone Vending, Inc. v. Sherry, Inc*., 39 Mass. App. Ct. 315 (1995); *Mill Pond Associates, Inc. v. E & B Gift Ware, Inc*., 751 F. Supp. 299 (D. Mass. 1990).

[40] In *Cardizem*, plaintiffs sought to certify claims under MARA against the manufacturer of Cardizem CD for entering into an agreement with a generic drug manufacturer to delay the introduction of the generic drug into the market, allowing the defendant to maintain Cardizem CD prices at supra competitive levels. *Id.* at 345. To prove overcharge to indirect purchasers, plaintiffs offered expert testimony opining on the price differentials

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k. Minnesota

The proposed Minnesota Indirect-Purchaser State-Wide Class asserts causes of action under the Minnesota Antitrust Law, Minn. Stat. § 325D.49, *et. seq*. Under the statute, "A contract, combination or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful." Minn. Stat § 325D.51. Furthermore, "any person . . . injured directly or indirectly by a violation of [section 325D.5 1] shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees." Minn. Stat. § 325D.57. Injunctive relief is also available. § 325D.58.

"Minnesota antitrust law expressly provides damages for indirect purchasers injured by antitrust violations." *Gordon v. Microsoft Corp*., 2001 WL 366432 at *2 (Minn. Dist. Ct., Mar. 30, 2001); *see also Lorix v. Crompton Corp*., 736 N.W.2d 619 (Minn. 2007). In *Gordon*, 2001 WL 366432, at *11-12, the court certified a class consisting of indirect purchasers of operating system software produced by Microsoft, permitting an inference of impact:

> In antitrust cases, damage issues "are rarely susceptible of the kind of detailed proof of injury which is available in other contexts ... [I]n the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure ... that defendants' wrongful acts had caused damage to the plaintiffs.

Id. at *11 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 123-24 (1969)). In finding certification to be superior to other methods of adjudication, the court stated that "based on Plaintiffs' proposed methods of determining an overcharge to direct purchasers and a percentage pass through to individual consumers, the court does not find manageability problems sufficient to deny certification of the class." *Id*. at *12.

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between brand name drugs and their generic equivalents. The Court certified the class, accepting the proof offered by the plaintiffs' expert as demonstrating that class-wide impact could be shown with common proof and declining to require the plaintiffs to offer a specific method of tracing the overcharge at every step of the distribution chain to show pass-through. *Id.* at 344, 346.

As in *Gordon v. Microsoft*, where she was also one of plaintiffs' experts, Dr. Netz's Declaration in this case describes the common methods for determining overcharge to direct purchasers and the pass-through rate to indirect class members. Netz Decl. at 91-114. In addition to *Gordon*, at least two other courts have certified classes of Minnesota indirect purchasers in similar cases. *See* Appendix C at c-5.

l. Mississippi

The proposed Mississippi Indirect-Purchaser State-Wide Class alleges violations of Mississippi Code Ann. § 75-21-1, *et seq*. The Mississippi antitrust statute specifically allows the recovery of damages for the "direct or indirect" effect of a combination to fix prices or to limit quantities of a commodity sold. Miss. Code Ann. § 75-21-1, 75-21-9. The party injured by an antitrust violation may recover damages plus a penalty of $500. Miss. Code Ann. § 75-21-9.

All of the elements of the Mississippi antitrust claim (*i.e.*, existence of conspiracy, fact of injury and the amount of damages) can be established through common proof. Courts have certified indirect purchaser classes asserting claims under the Mississippi antitrust statute. *See, e.g., In re Terazosin*, 220 F.R.D. at 700 (certifying multiple state-wide classes of indirect purchasers under state laws, including claims under the Mississippi antitrust statute); *see* Appendix C at c-6.

m. Nevada

The proposed Nevada Indirect-Purchaser State-Wide Class alleges violations of Nevada Revised Statute §§ 598A, *et seq.* (the "UTPA"). The Nevada UTPA specifically prohibits price-fixing conspiracies, and provides that indirect purchasers may sue for such violations. *See* N.R.S. 598A.060; N.R.S. 598A.210(2); *In re Terazosin*, 220 F.R.D. 672 (an indirect purchaser of goods has standing under the UTPA to recover damages for price-fixing by the manufacturers of those goods). Finally, the Nevada UTPA "shall be construed in harmony with prevailing judicial interpretations of the federal antitrust

statutes." N.R.S. 598A.050. The statute allows private antitrust plaintiffs to sue for damages and an injunction. N.R.S.. 598A.210.

The Nevada Indirect-Purchaser State-Wide Class satisfies the predominance requirement because all of the elements of the Nevada UTPA claim (*i.e.*, conspiracy, impact and damages) can be established through common proof. Other courts have certified claims in cases brought by indirect purchasers under the Nevada UTPA, and this Court should do so here. *See* Appendix C at c-6.

n. New Mexico

The New Mexico Indirect-Purchaser State-Wide Class alleges violations of the New Mexico Antitrust Act, N.M.S.A. 1978 § 57-1-1 *et seq.* and the New Mexico Unfair Practices Act, N.M.S.A. 1978 § 57-12-1 *et seq.* ("NMUPA"). Under the New Mexico Antitrust Act, "[e]very contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful." N.M. Stat. Ann. §57-1-1. Additionally, the statute expressly provides that indirect purchasers who are "threatened with injury or injured" have standing to assert such a claim and "may bring an action for appropriate injunctive relief, up to threefold the damages sustained and costs and reasonable attorneys' fees." N.M. Stat. Ann. §57-1-3(A); s*ee also Romero v. Philip Morris Incorporated*, 137 N.M. 229, 231-32, 109 P. 3d 768, 770-71 (N.M. App. 2005).[41]

The elements of the claim under New Mexico's Antitrust Act (*i.e.*, a price-fixing conspiracy, injury and the amount of damages) can be established through common proof, and the New Mexico Indirect Purchaser State Class satisfies the predominance requirement of Rule 23 (b)(3). Indeed, claims under the New Mexico Antitrust Act have been certified for class treatment in cases brought by indirect purchasers in both state and federal courts.

[41] As the court recognized in *Romero*, 137 N.M. at 254, 109 P. 3d at 793, "[a]s a rule of thumb, a price-fixing antitrust conspiracy model is generally regarded as well suited for class treatment." (quoting *In re Catfish Antitrust Litig*., 826 F. Supp. 1019, 1039 (N.D. Miss. 1993)). Also, "from a manageability perspective, a class action is a superior procedure to handle thousands of class members' small claims when common issues of fact and law predominate and common methods of proving those claims exist." *Id.* at 782.

The Court should also certify the claim of the New Mexico Class under the State's Antitrust Act.[42] A class of indirect purchasers under the NMUPA was certified in *In re Pharm. Indus. Average Wholesale Price Litigation*, 233 F.R.D. at 230. *See also* Appendix C at c-6-7. A similar result is warranted here.

o. New York

The New York Indirect-Purchaser State-Wide Class asserts a cause of action for actual damages under New York General Business Law (GBL) §349(h). The prima facie elements of a §349 claim are: (1) a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way, and (2) that plaintiff has been injured as a result. *Goshen v. Mut. Life Ins. Co*., 98 N.Y.2d 314, 324 (2002) (*citing Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A*., 85 N.Y.2d 20, 25 (1995)). Reliance is not an element of the claim. *See Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000) (*citing Small v. Lorillard Tobacco Co*., 94 N.Y.2d 43, 55-56 (1999)). Private parties may sue to enjoin unlawful practices and to recover damages. §349(h).

Each of the elements of a claim under §349 can be established through common proof. The issue of whether Defendants made public statements about the price of LCD panels that were directed to the New York Indirect-Purchaser State-Wide Class and were misleading is the same for one, 20 or 10,000 class members. Additionally, whether New York Indirect-Purchaser State-Wide Class members were injured is subject to common proof. This case is similar to *Cox v. Microsoft Corp*., 2005 WL 3288130 (N.Y. Supr. Ct. N.Y. Cty. July 29, 2005). In *Cox*, the New York lower court certified a class under § 349 where, as here, the defendant "was able to charge inflated prices for its products as a result of its deceptive actions and that these inflated prices passed to consumers." *Id.* at * 5. The

[42] Section 57-12-3 of the NMUPA provides that "[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful." NMUPA section 57-12-10 provides that any person who suffers any loss of money or property as a result of any such unlawful act may bring an action to recover actual damages or $100, whichever is greater, and may seek treble damages or $300 for willful violations. A claim under NMUPA does not require a direct representation by the defendant to the plaintiff. *Lohman v. Daimler-Chrysler Corp*., 142 N.M. 437 (2007), 166 P.3d 1091, *cert. denied* 142 N.M. 434 (2007), 166 P.3d 1088.

court in Cox found that certain questions of pass through, such as whether intermediaries did not raise their prices on computer packages when the price of Microsoft products increased, involved the amount of dollar damages that individual class members suffered and was not determinative of the question of class certification. *Id.*

Additionally, New York courts, like many other states, permit aggregate proof of damages when establishing common impact. *Id.* Other courts have certified indirect purchaser classes alleging price-fixing claims under New York law, and this Court should do the same. *See* Appendix C at c-7.

p. North Carolina

The North Carolina Indirect-Purchaser State-Wide Class asserts causes of action under North Carolina's Monopolies, Trusts, and Consumer Protection Act, N.C. Gen. Stat. § 75, *et seq.* (the "N.C. Act"). Under the Act, any "conspiracy in restraint of trade or commerce" is illegal. N.C. Gen. Stat. § 75-1. To prevail under the Act, Plaintiffs must show: (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby. *Stetser v. TAP Pharmaceutical Products, Inc.*, 165 N.C.App. 1 (2004); *First Atlantic Management Corp. v. Dunlea Realty Co.,* 507 S.E.2d 56, 131 N.C.App. 242 (1998). "A trade practice is 'unfair' if it is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *First Atlantic*, 507 S.E.2d at 63 (citation omitted). The Act also provides standing for individual plaintiffs (§75-16), which right was specifically extended to indirect purchasers in *Hyde v. Abbott Labs*, 123 N.C. App. 572, 584 (N.C. Ct. App. 1996); *see also Teague v. Bayer AG*, 671 S.E.2d 550, 558 (N.C. App. 2009) ("fear of complexity is not a sufficient reason to disallow a suit by an indirect purchaser, given the intent of the General Assembly to 'establish an effective private cause of action for aggrieved consumers in this State.'")

All of the elements of a claim under the Act (*i.e.*, conspiracy, impact and the amount of damages) can be established through common proof. Indeed, the North Carolina Indirect-Purchaser State-Wide Class members claims are analogous to a number

of other cases where courts have certified indirect purchaser claims under N.C. Gen. Stat. § 75, *et seq*. The Court should, likewise, certify the class here. *See* Appendix C at c-7.

q. North Dakota

The North Dakota Indirect-Purchaser State-Wide Class alleges violations of the North Dakota Antitrust Act, N.D. Cent. Code §§ 51-08.1-01 *et seq*. The North Dakota Antitrust Act provides that, "[a] contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." N.D. Cent. Code § 51-08.1-02. The statute expressly provides a cause of action for indirect purchasers, who may obtain injunctive relief and/or recover damages. N.D. Cent. Code § 51-08.1-08.

All of the elements of a claim under the North Dakota Antitrust Act (*i.e.*, conspiracy, impact and the amount of damages) can be established through common proof. Indeed, a number of state and federal courts have certified classes of indirect purchasers in several cases under the North Dakota Antitrust Act. In *Howe v. Microsoft Corp*., 656 N.W. 2d 285, 295-296 (N.D. 2003), for example—which involved indirect purchasers of Microsoft Windows operating system software—the court articulated the state's presumption in favor of certification: "We have consistently construed N.D.R.Civ. P. 23 to provide an open and receptive attitude toward class actions . . . we are guided by the broad and liberal public policy in favor of class actions in this state." *Howe*, 656 N.W.2d at 288. The court certified a class of indirect purchasers of Microsoft Windows operating system software, accepting the plaintiffs' proffered expert declarations as sufficient to show common proof of impact. Plaintiffs' expert relied upon economic theories to establish the "pass-through" of the alleged overcharge through various channels of distribution, and the defendant attacked plaintiffs' expert for failing to present "real world" evidence in support of these theories. *Id.* at 290. The court disapproved of trial courts delving into the merits of a case at the class certification stage, and stated that the expert's evidence may be considered in determining whether to certify the class, as long as the expert's analysis is

not “blatantly flawed.” *Id.* at 295-296. Various other courts have certified for class treatment indirect purchaser claims under the North Dakota Antitrust Act, and a similar result is appropriate here. *See* Appendix C at c-7.

r. Rhode Island

The Rhode Island Indirect-Purchaser State-Wide Class alleges violations of Rhode Island General Laws §§ 6-13.1-1, *et seq.* (“DPTA”). The DPTA prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices.” Section 6-13.1-5.2(a) of DTPA “provides a private right of action to any person who suffers ‘any ascertainable loss’ as the result of an illegal act or practice.” *Park v. Ford Motor Co*., 844 A.2d 687, 693 (R.I. 2004). Individuals may “recover actual damages or two hundred dollars ($200), whichever is greater.” R. I. Gen. Laws § 6-13.1-5.2(a). In addition to damages, the court may also grant injunctive or other equitable relief. *Id.*

The DTPA specifically provides for a less stringent burden of proof for certification of consumer protection claims. “Namely, the commonality and typicality requirements … are not expressly present in the DTPA. Additionally, the class action provision under DTPA is more specific than the [general class certification] rule because it only arises in the context of consumer protection litigation.” *Park v. Ford Motor Co.*, 2004 WL 2821312, at *3 (R.I. Super. Oct. 7, 2004).

Here, the issues to be determined in assessing whether Defendants’ practices – namely, the price-fixing conspiracy and secret meetings and agreements to artificially maintain prices – were “unfair”, “offend public policy” and/or were “unscrupulous,” are undoubtedly subject to common proof. Additionally, proof of injury to consumers and the amount of damage are also subject to common proof. Other courts have certified a class of consumer indirect purchasers under R. I. Gen. Laws § 6-13.1-1, *et seq.* *See* Appendix C at c-8. Thus, this Court should certify the Rhode Island Indirect-Purchaser State-Wide Class’s DTPA claim.

s. South Dakota

The South Dakota Indirect-Purchaser State-Wide Class asserts causes of action under the South Dakota antitrust statute. S.D. Codified Laws, § 37-1-3.1, *et. seq*. The South Dakota antitrust statute declares unlawful, "[a] contract, combination, or conspiracy between two or more persons in restraint of trade or commerce any part of which is within this state S.D.C.L. § 37-1-3.1. Under the statute, any person injured directly or indirectly by an antitrust violation may sue for injunctive and equitable relief as well as to recover treble damages. S.D.C.L. §§ 37-1-14.3, 37-1-33.

The South Dakota Indirect-Purchaser State-Wide Class satisfies the predominance requirement of Rule 23(b)(3). Whether the Defendants engaged in a conspiracy in restraint of trade is clearly subject to common proof on behalf of the South Dakota Indirect-Purchaser Class. Proof of such conduct would establish a violation of Section 37-1-3.1 on a class-wide basis for the South Dakota Indirect-Purchaser Class.

In certifying indirect- purchaser classes, South Dakota courts have addressed the amount and type of proof required to show common proof of impact. *See e.g., In re South Dakota Microsoft Antitrust Litig*., 657 N.W. 2d 668, 670 (SD 2003). There, the court noted that plaintiffs did not need to prove the merits of the case at the class certification stage. *Id.* at 673. There, the plaintiffs' expert proposed several "standard, yardstick methodologies" for calculating the amount of injury experienced by each class member (*id.* at 676), and the court noted that the question of whether or not the conclusions of plaintiffs' expert as to impact were correct was properly determined by a jury at a later date. The South Dakota Supreme Court also upheld the trial court's ruling that "[p]laintiffs need not calculate each class member's damages individually. Instead damages can be calculated in the aggregate for the class." *Id.* at 674. Similarly, here, impact and damages for the South Dakota Indirect-Purchaser State-Wide Class can be determined on a class-wide basis, so Rule 23(b)(3) is therefore satisfied. In addition to the *South Dakota Microsoft* decision discussed above, indirect purchaser claims under the South Dakota

statute have been certified for class treatment in several other cases. *See* Appendix C at c-8.

t. Tennessee

The Tennessee Indirect-Purchaser State-Wide Class asserts causes of action under the Tennessee Unfair Trade Practices Act, Tennessee Code Ann. §§47-25-101 *et seq*. The Act declares unlawful and void "[a]ll arrangements, contracts, agreements, trusts or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article." Tenn. Code Ann. § 47-25-101. Persons injured by any such arrangement may recover "the full consideration or sum… for any goods, wares, merchandise, or articles, the sale of which is controlled by such combination or trust." Tenn. Code Ann. §47-25-106. In *Sherwood v. Microsoft Corp.*, 2003 WL 21780975, at *29 (Tenn. Ct. App. July 31, 2003), the Tennessee Court of Appeal held that indirect purchasers have standing to bring an action under the Act to recover damages resulting from the alleged price-fixing. *See also Blake v. Abbott Labs., Inc.*, 1996 WL 134947, at *3-4 (Tenn. Ct. App. Mar. 27, 1996).

Numerous courts have certified claims under the Tennessee Antitrust Act in cases brought by indirect purchasers. *See* Appendix C at c-8. The same result is appropriate here.

u. Vermont

The Vermont Indirect-Purchaser State-Wide Class alleges violations of the Vermont Consumer Fraud Act, Vt. Stat. Ann. tit. 9, §§ 2451, *et. seq*. ("CFA") which prohibits unfair methods of competition. 9 V.S.A. §2453(a). The Act authorizes suits by consumers who have contracted for goods or service in reliance upon false or fraudulent representation or practices, or who sustain damages or injury as a result of any false or fraudulent representations or practices. A successful plaintiff may obtain equitable relief and recover attorneys' fees and exemplary damages up to treble the value of the consideration given. 9 V.S.A. § 2461(b). Vermont has expressly disagreed with *Illinois*

Brick and allowed indirect purchasers suits and recovery for a violation of the state antitrust law as set forth in the CFA. *Id.*; Vermont Laws P.A. 65 (H. 301) (2000); *Elkins v. Microsoft Corp*., 174 Vt. 328, 337-38. (2002).

The elements of a claim under the Vermont Consumer Fraud Act (i.e. conspiracy, fact of injury and amount of damages) can be established through common proof. Courts have certified classes of indirect purchasers under the CFA in the past. *See, e.g.*, *In re Relafen*, 221 F.R.D. at 279 (certifying Vermont end payor class and holding that "[n]or do the individual damages issues appear 'especially complex or burdensome …'"); Appendix C at c-8-9. The same result is warranted here.

v. West Virginia

The West Virginia Indirect-Purchaser State-Wide Class alleges violations of the West Virginia Antitrust Act, West Virginia Code §47-18-1, *et seq.*, which provides that "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this State shall be unlawful." W.Va. Code §47-18-3(a). The Act enumerates additional specific acts that constitute a violation of the statute, such as a conspiracy to fix prices, limit production, and allocate customers or markets. W.Va. Code §47-18-3(b). Section §47-18-9 thereof authorizes "any person" injured by reason of such a violation to bring suit for damages and other remedies.

The elements of the West Virginia antitrust claim (*i.e.*, a price-fixing conspiracy, injury and the amount of damages) can be established through common proof. Indeed, state and federal courts have certified West Virginia indirect purchaser antitrust claims like those asserted here. *See, e.g., In re Terazosin*, 220 F.R.D. at 700 (certifying multiple state-wide classes of indirect purchasers under state laws, including claims under the West Virginia Antitrust Act); Appendix C at c-9. This Court should certify the West Virginia claim for class treatment.

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w. Wisconsin

The Wisconsin Indirect-Purchaser State-Wide Class alleges violations of the Wisconsin Antitrust Act, Wis. Stat. Ann. §133.03(1). The statute provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal." Wis. Stat. Ann. §133.03(1). Any person injured directly or indirectly by an antitrust violation may seek injunctive relief and recover treble damages. Wis. Stat. Ann. §§133.16, 133.18(1)(a).

In *Olstad v. Microsoft Corp.*, 700 N.W.2d 139, 263 (Wis. 2005), the Wisconsin Supreme Court held that a plaintiff may bring suit under the Wisconsin antitrust act when, as here, "the conduct complained of 'substantially affects' the people of Wisconsin and has impacts in this state, even if the illegal activity resulting in those impacts occurred predominantly or exclusively outside of the state." (Citation omitted); *See also Meyers v. Bayer AG*, 2006 WL 1228957 (Wis. App. May 9, 2006).

The elements of the Wisconsin antitrust claim (*i.e.*, a price-fixing conspiracy, injury and the amount of damages) can be established through common proof. Indeed, Wisconsin courts have approved the use of aggregate proof of damages in class actions. *Cruz v. All Saints Healthcare System, Inc.*, 625 N.W. 2d 344, 348 (Wis. App. 2001). Claims under the Wisconsin antitrust statute have been certified for class treatment in numerous cases in state and federal courts. *See* Appendix C at c-9-10.

V. THE COURT SHOULD APPOINT CLASS COUNSEL

In appointing counsel for the Classes, the Court should apply the same standard as it did in appointing interim co-lead counsel. In addition, the Court may consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. p 23(g)(1)(C)(ii); *see also In re Cree Inc. Sec. Litig.*, 219 F.R.D. 369, 373 (M.D.N.C. 2003) (designating a firm as lead counsel after finding that the firm had "extensive experience" with the particular area of litigation (class actions) and that "the firm ha[d] sufficient resources to prosecute this action in a thorough and expeditious manner."); *Coopersmith v. Lehman Bros. Inc.*, 344 F.Supp.2d 783, 793 (D. Mass. 2004)

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(designating two law firms as co-lead counsel because "[i]t is clear that these firms have extensive experience in cases such as this and are well situated to pursue this action on behalf of the class.").

As noted in section IV.B.4., *supra*, Plaintiffs have been well represented by the interim co-lead counsel of Zelle Hofmann Voelbel & Mason LLP and The Alioto Law Firm. Each firm, along with many other indirect-purchaser counsel, has devoted considerable time and resources to prosecuting this action vigorously since its inception. The firms have overseen the briefing and argument of motions, the coordination and review of millions of pages of document discovery from Defendants and third parties, the taking and defending of dozens of depositions, and the retention of experts. Both firms are prepared to serve, and should be appointed, as counsel to the Classes.

VI. CONCLUSION

For the foregoing reasons, the proposed classes meet the requirements of Rule 23(a), (b)(2), and (b)(3). Plaintiffs' motion to certify the Nationwide Class and the 23 Indirect Purchaser State-Wide Classes, and to appoint Zelle Hofmann Voelbel & Mason LLP and The Alioto Law Firm as counsel to the Classes should be granted.

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APPENDIX A

In re TFT-LCD (Flat Panel) Antitrust Litigation

Indirect-Purchaser Plaintiffs

State	Plaintiff	Product(s) Purchased
Arizona	Allan Rotman*	A Dell 17” desktop LCD computer
California	Frederick Rozo	A Dell Inspiron 1100 laptop
California	Steven Martel	A Sharp Aquos LCD TV
California	Robert Kerson	A Sharp LCD TV
California	Byron Ho	A Hyundai 17” LCD computer monitor
California	Joe Solo	A Sharp Aquos LCD TV
California	Lisa Blackwell	An Apple LCD computer monitor and an Apple MacBook laptop
D.C.	David Walker	An LCD TV
Florida	Robert Feins	Two Sharp Aquos LCD TVs
Florida	Scott Eisler	An Acer LCD computer monitor
Hawaii	John Okita	An HP laptop and a Cornea LCD computer monitor
Iowa	Ben Northway	A Dell 19” LCD computer monitor
Kansas	Rex Getz	A Vivitek 32” LCD TV
Kansas	Kou Srimoungchanh	A Sony VAIO laptop; a Sony LCD TV; and a Toshiba 17” laptop
Maine	Patricia Giles	A Panasonic 17” LCD TV and a Sony 15” LCD computer monitor
Massachusetts	Christopher Murphy	A Samsung 15” LCD TV and a Compaq EVO N800v laptop
Michigan	Gladys Baker	A Dell Inspiron 1100 laptop
Michigan	Judy Griffith	Two HP Pavilion laptops
Michigan	Ling-Hung Jou	A Maxent LCD TV
Minnesota	Martha Mulvey	A Sony LCD computer monitor
Mississippi	Cynthia Saia	A Dell LCD computer monitor
Nevada	Allen Kelley	A HP 17” LCD computer monitor
New Mexico	Thomas Clark	A Dell Inspiron 1300 Laptop
New Mexico	Marcia Weingarten	A Gem Silver 17” LCD computer monitor and a Neovo17” SXGA LCD computer monitor
New York	Tom DiMatteo	An Apple 30” LCD computer monitor
New York	Chris Ferencsik	A Sharp 37” LCD TV
North Carolina	William Fisher	A Sony Bravia 40” LCD TV
North Carolina	Donna Jeanne Flanagan	An Apple LCD computer monitor
North Dakota	Bob George	A Hitachi 50” LCD TV and A Sylvania 15” TV

Rhode Island	Dr. Robert Mastronardi	Two Dell laptops and a Sylvania LCD computer monitor
South Dakota	Christopher Bessette	A Dell LCD computer monitor
South Dakota	Chad Hansen	An LG 42” LCD TV, a Dell Inspiron 9400 laptop, and a Dell 20” LCD computer monitor
Tennessee	Dena Williams	A Dell 19” LCD computer monitor
Tennessee	Scott Beall	A Sony 60” LCD TV and a Samsung 14” LCD computer monitor
Vermont	Robert Watson	A Gateway 14” laptop
West Virginia	John Matrich	A Dell 19” LCD computer monitor
Wisconsin	Joe Kovacevich	A Dell 17” LCD computer monitor
Wisconsin	Jai Paguirigan	A Planar 17” LCD computer monitor

*Indicates person not named in Plaintiffs’ Second Consolidated Amended Complaint whom Plaintiffs propose to substitute for the existing Arizona class representative.

APPENDIX B

In re TFT-LCD (Flat Panel) Antitrust Litigation

State Law Claims

State	Antitrust	Consumer Protection	Unjust Enrichment
Arizona	X		X
California	X	X	X
D.C.	X	X	X
Florida		X	
Hawaii		X	X
Iowa	X		X
Kansas	X		X
Maine	X		X
Massachusetts		X	X
Michigan	X		X
Minnesota	X		X
Mississippi	X		X
Nevada	X		X
New Mexico	X	X	X
New York		X	X
North Carolina	X	X	X
North Dakota	X		
Rhode Island		X	X
South Dakota	X		X
Tennessee	X		X
Vermont	X	X	X
West Virginia	X		X
Wisconsin	X		X

APPENDIX C

In re TFT-LCD (Flat Panel) Antitrust Litigation

Indirect Purchaser Litigated (Non-Settlement) Class Certification Decisions

State	Type of Claim	Case Authority	Product Involved	Ruling
AZ	AT	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) Attached as Exhibit 1 to accompanying "Request for Judicial Notice" ("RJN").	Estrogen replacement products	Arizona class certified
	AT	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005) RJN Exhibit 2.	Estrogen replacement products	Arizona class certified
	CP	"Order" (Nov. 14, 2000) in *Friedman v. Microsoft Corp.*, No. CV 2000-000722, minute order at 2 (Ariz. Super. Ct., Maricopa Cty.) RJN Exhibit 3.	Computer Software	Arizona class certified
	AT, CP	*In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 278-84 (D. Mass. 2004)	Drugs	Arizona among exemplar classes certified
CA	AT	"Order Granting Motion For Motion For Class Certification" in *Aguilar v. Atlantic Richfield Corp.,* 1998-1 Trade Cas. (CCH) ¶72,080 at 81,495, 81,497 (Cal. Super. Ct., San Diego Cty., May 1, 1997) RJN Exhibit 4.	Gasoline	California class certified
	AT	*B.W.I. Custom Kitchen, Inc. v. Owens-Illinois*, 191 Cal. App. 3d 1341, 1355 (1987)	Glass containers	Reversed decision denying certification
	AT, CP	"Order Granting Motion of Plaintiffs For Class Certification" (June 17, 2004) in *In re Automotive Refinishing Paint Cases,* No. J.C.C.P. 4199 at 1 (Cal. Super. Ct., Alameda Cty.) RJN Exhibit 5.	Automotive refinishing paint	California end-user, reseller classes certified
	AT, CP	*In re Cipro Cases I and II,* 121 Cal. App. 4th 402, 418 (2004)	Drugs	Certification of California class affirmed
	CP	*In re Pharm. Indus. Average Wholesale Price Litig.,* 233 F.R D. 229, 230-31 (D. Mass. 2006)	Various drugs	California co-payor class certified

State	Type of Claim	Case Authority	Product Involved	Ruling
	AT, CP	"Order Granting Plaintiffs' Motion for Class Certification" (March 27, 2007) in *In re Reformulated Gasoline (RFG) Antitrust & Patent Litig.,* No. CV-05-01671 (VBKx) at 25 (C.D. Cal.) RJN Exhibit 6.	Gasoline	California class certified
	AT, CP	*In re Relafen Antitrust Litig.,* 221 F.R.D. 260, 288 (D. Mass. 2004)	Drugs	California among exemplar classes certified
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	California class certified
	CP	"Order Re Class Certification" (June 29, 2000) in *Kristensen v. Great Spring Waters of America,* No. 302774 at 1 (Cal. Super. Ct., San Francisco Cty.) RJN Exhibit 7.	Spring water	California consumer class certified
	AT	*Lethbridge v. Johnson & Johnson,* No. B105754 at 24 (Cal. Ct. App. Nov. 10, 1997) (unpublished), RJN Exhibit 8.	Disposable contact lenses	Reversed decision denying certification
	AT, CP	"Order Re Class Certification" in *Microsoft I-V Cases*, 2000-2 Trade Cas. (CCH) ¶73,013 at 88,555, 88,565 (Cal. Super. Ct., San Francisco Cty., Aug. 29, 2000) RJN Exhibit 9.	Computer Software	California class certified
	CP, AT	"Orders" of June 26 & Aug. 16, 1995 in *Pharmaceutical Cases I, II, and III,* J.C.C.P. Nos. 2969, 2971 & 2972 at 1-3, 1-3 (Cal. Super. Ct., San Francisco Cty.) RJN Exhibit 10.	Drugs	California class certified
	AT, CP	*Robinson v. EMI Music Dist., Inc.,* Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including California
	AT	*Rosack v. Volvo of America Corp.,* 131 Cal. App. 3d 741, 763 (1982), *cert. denied,* 460 U.S. 1012 (1983)	Autos	Reversed decision denying certification
	AT, CP	"Order Granting Motion For Class Certification" in *Smokeless Tobacco Cases I-V,* J.C.C.P. Nos. 4250, 4258, 4259 & 4262 at 2 (Cal. Super. Ct. Jan. 29, 2004) RJN Exhibit 11.	Smokeless Tobacco	California class certified
DC	AT	*Goda v. Abbott Labs.,* 1997 WL 156541, at *10 (D.C. Super. Ct. 1997)	Prescription Drugs	District of Columbia class certified

State	Type of Claim	Case Authority	Product Involved	Ruling
	AT, CP	*Robinson v. EMI Music Dist., Inc.,* Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including the District of Columbia
FL	CP	*Execu-Tech Bus. Sys., Inc. v. Appleton Papers, Inc.,* 743 So. 2d 19, 22 (Fla. Dist. Ct. App. 1999)	Thermal fax paper	Certification of Florida class affirmed
	CP	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	Florida consumer class certified
	AT	*In re Fla. Microsoft Antitrust Litig.,* No. 99-27340, 2002 WL 31423620, at *19 (Fla. Cir. Ct. Aug. 26, 2002)	Computer software	Florida class certified
	CP	*In re Pharm. Indus. Average Wholesale Price Litig.,* 233 F.R D. 229, 230-31 (D. Mass. 2006)	Various drugs	Florida co-payor class certified
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	Florida class certified
	AT, CP	*Robinson v. EMI Music Dist., Inc.,* Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including Florida
HI	CP	*Daly v. Harris*, 209 F.R.D. 180, 201 (D. Haw. 2002)	Beach entrance fee	Hawaii subclass (consisting of "non-residents of Hawaii who paid $3.00 to access the public beach) certified
IA	AT	"Ruling on Plaintiff's Motion for Class Certification" (March 19, 2007) in *Anderson Contr., Inc. v. Bayer AG,* No. CL 95959 at 22 (Iowa Dist. Ct., Polk Cty.) RJN Exhibit 12.	Synthetic rubber ("EPDM")	Iowa class certified
	AT	*Comes v. Microsoft Corp.,* 696 N.W.2d 318, 323, 327 (Iowa 2005)	Computer software	Iowa class certified
	AT	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	Iowa class certified
KS	AT, CP	*Bellinder v. Microsoft Corp.*, No. 00-C-0855, 2001 WL 1397995, at *8 (Kan. Dist. Ct. Sept. 7, 2001)	Computer software	Kansas class certified
	AT	"Order Of Class Certification" (Nov. 3, 1995) in *Donelan v. Abbott Labs., Inc.*, No. 94-C-709 at 2-3 (Kan. Dist. Ct.) RJN Exhibit 13.	Infant formula	Kansas class certified

State	Type of Claim	Case Authority	Product Involved	Ruling
	AT	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	Kansas class certified
	AT	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005) RJN Exhibit 2.	Estrogen replacement products	Kansas class certified
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	Kansas class certified
	AT	"Memorandum Decision And Journal Entry On Plaintiffs' Motion For Class Certification" (May 4, 2004) in *Premier Pork, Inc. v. Rhone Poulenc, S.A.,* No. 00 C 3 at 9 (Kansas Dist. Ct.) RJN Exhibit 14.	Methionine	Kansas class certified
	AT, CP	*Robinson v. EMI Music Dist., Inc.*, Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including Kansas
	AT	"Journal Entry Of Decision By The Court Upon Plaintiffs' Motion For Class Certification" (Nov. 16, 2001) in *Smith v. Philip Morris Cos., Inc.,* No. 00-CV-26 at 10 (Kan. Dist. Ct.) RJN Exhibit 15.	Cigarettes	Kansas class certified
	AT	"Journal Entry" (Mar. 10, 2006) in *Todd v. F. Hoffman-La Roche, Ltd.,* No. 98-C-4574 at 8 (Kan. Dist. Ct.) RJN Exhibit 16.	Choline chloride	Kansas class certified
ME	AT	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	Maine class certified
	AT	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005) RJN Exhibit 2.	Estrogen replacement products	Maine class certified
	AT, CP	*Robinson v. EMI Music Dist., Inc.,* Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including Maine
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	Maine class certified

State	Type of Claim	Case Authority	Product Involved	Ruling
MA	CP	*Aspinall v. Philip Morris Cos., Inc.,* 442 Mass. 381, 402 (2004)	Light cigarettes	Certification of Massachusetts class affirmed
	CP	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	Massachusetts consumer class certified
	CP	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005) RJN Exhibit 2.	Estrogen replacement products	Massachusetts consumer class certified
	CP	*In re Pharm. Indus. Average Wholesale Price Litig.,* 233 F.R.D. 229, 230-31 (D. Mass. 2006)	Various drugs	Massachusetts co-payor class certified
	AT, CP	*In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 288 (D. Mass. 2004)	Drugs	Massachusetts among exemplar classes certified
MI	AT	*In re Pharm. Indus. Average Wholesale Price Litig.,* 233 F.R.D. 229, 230-31 (D. Mass. 2006)	Various drugs	Michigan co-payor class certified
	AT	*In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	Michigan class certified
	AT, CP	*Robinson v. EMI Music Dist., Inc.,* Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including Michigan
MN	AT	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	Minnesota class certified
	AT	*Gordon v. Microsoft Corp.,* No. 00-594, 2001 WL 366432, at *13 (Minn. Dist. Ct. March 30, 2001), *interlocutory review denied*, 645 N.W.2d 393 (Minn. 2002) and 2003 WL 23105552, at *10 (Minn. Dist. Ct. March 14, 2003)	Computer software	Minnesota class certified
	CP	*In re Pharm. Indus. Average Wholesale Price Litig.,* 233 F.R.D. 229, 230-31 (D. Mass. 2006)	Various drugs	Minnesota co-payor class certified
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	Minnesota class certified
	AT	*Robinson v. EMI Music Dist., Inc.,* Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including Minnesota

State	**Type of Claim**	**Case Authority**	**Product Involved**	**Ruling**
MS	AT	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	Mississippi class certified
	AT	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005) RJN Exhibit 2.	Estrogen replacement products	Mississippi class certified
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	Mississippi class certified
	AT	*Robinson v. EMI Music Dist., Inc.*, Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including Mississippi
NV	CP	*Ferrell v. Wyeth Ayerst Labs*, No. C 1 0l 447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	Nevada consumer class certified
	CP	*Ferrell v. Wyeth Ayerst Labs*, No. C l 01 447, Order at 8 (S.D. Ohio Feb. 2, 2005) RJN Exhibit 2.	Estrogen replacement products	Nevada consumer class certified
	CP	*In re Pharm. Indus. Average Wholesale Price Litig.,* 233 F.R D. 229, 230-31 (D. Mass. 2006)	Various Drugs	Nevada co-payor class certified
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	Nevada class certified
NM	AT	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	New Mexico class certified
	AT	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005) RJN Exhibit 2.	Estrogen replacement products	New Mexico class certified
	AT	"Decision And Order On Motion For Class Certification" (Oct. 2, 2002) in *In re New Mexico Indirect Purchasers Microsoft Antitrust Litig.,* No. D-0101-CV-2000 (1st Judicial Dist.), RJN Exhibit 17; *see In re New Mexico Indirect Purchasers Microsoft Corp. Antitrust Litig.,* 149 P.3d 976, 983-84 (N.M. Ct. App. 2006)	Computer software	New Mexico class certified

State	Type of Claim	Case Authority	Product Involved	Ruling
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	New Mexico class certified
	AT	*Robinson v. EMI Music Dist., Inc.*, Civ. No. L10462, 1996 WL 495551, at **1, 5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including New Mexico
	AT	*Romero v. Philip Morris Inc*., 109 P.3d 768, 770-71, 795 (N.M. Ct. App. 2005)	Cigarettes	New Mexico class certified
	CP	*In re Pharm. Indus. Average Wholesale Price Litig.,* 233 F.R.D. 229, 230-31 (D. Mass. 2006)	Various drugs	New Mexico class certified
NY	CP	*Cox v. Microsoft Corp.,* 10 Misc. 3d 1055(A), 809 N.Y.S.2d 480, 2005 WL 3288130, at *6 (N.Y. Sup. Ct. 2005)	Computer software	New York class certified
	CP	*Drizin v. Sprint Corp*., 785 N.Y.S.2d 428, 429 (N.Y. App. Div. Nov. 16, 2004)	Phone charges	New York class alleging Gen. Bus. Law § 349 and common law fraud claims certified
	CP	*In re Pharm. Indus. Average Wholesale Price Litig.,* 233 F.R D. 229, 230-31 (D. Mass. 2006)	Various drugs	New York co-payor class certified
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	New York class certified
NC	AT	*In re Pharm. Indus. Average Wholesale Price Litig.*, 233 F.R D. 229, 230-31 (D. Mass. 2006)	Drugs	North Carolina co-payor class certified
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	North Carolina class certified
ND	AT	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	North Dakota class certified
	AT	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005) RJN Exhibit 2.	Estrogen replacement products	North Dakota class certified
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	North Dakota class certified
	CP	*In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 540 (3d Cir. 2004)	Drugs	Certification of North Dakota class affirmed

State	Type of Claim	Case Authority	Product Involved	Ruling
	AT, CP	*Robinson v. EMI Music Dist., Inc.,* Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including North Dakota
RI	CP	*In re Pharmaceutical Industry Average Wholesale Price Litig*., 252 F.R.D. 83, 109 (D. Mass. 2008)	Drugs	Rhode Island consumer and third party payor class certified
SD	AT	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	South Dakota class certified
	AT	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005) RJN Exhibit 2.	Estrogen replacement products	South Dakota class certified
	AT	"Order Granting Class Certification" (Nov. 21, 1995) in *Hagemann v. Abbott Labs., Inc*., No. 94-221 (S.D. Cir. Ct., Hughes Cty.) RJN Exhibit 18.	Infant formula	South Dakota class certified
	CP	*In re Pharm. Indus. Average Wholesale Price Litig.,* 233 F.R D. 229, 230-31 (D. Mass. 2006)	Various drugs	South Dakota co-payor class certified
	AT	*In re S.D. Microsoft Antitrust Litig.,* 657 N.W.2d 668, 672 (S.D. 2003)	Computer software	Certification of South Dakota class affirmed
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	South Dakota class certified
	AT, CP	*Robinson v. EMI Music Dist., Inc.,* Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including South Dakota
TN	CP	*In re Pharm. Indus. Average Wholesale Price Litig.,* 233 F.R D. 229, 230-31 (D. Mass. 2006)	Various drugs	Tennessee co-payor class certified
	AT, CP	*Robinson v. EMI Music Dist., Inc.,* Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including Tennessee
	AT	"Memorandum and Order" (Dec. 20, 2002) in *Sherwood v. Microsoft Corp.,* No. 99C-5362 at 21 (Tenn. Cir. Ct., Davidson Cty.) RJN Exhibit 19.	Computer software	Tennessee class certified
VT	CP	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	Vermont consumer class certified

State	Type of Claim	Case Authority	Product Involved	Ruling
	CP	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005) RJN Exhibit 2.	Estrogen replacement products	Vermont consumer class certified
	CP	*In re Pharm. Indus. Average Wholesale Price Litig.*, 233 F.R D. 229, 230-31 (D. Mass. 2006)	Various drugs	Vermont co-payor class certified
	CP	*In re Pharmaceutical Industry Average Wholesale Price Litig*., 252 F.R.D. 83, 109 (D. Mass. 2008)	Drugs	Vermont consumer and third party payor class certified
	AT, CP	*In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 288 (D. Mass. 2004)	Drugs	Vermont among exemplar classes certified
WV	AT	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	West Virginia class certified
	AT	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005) RJN Exhibit 2.	Estrogen replacement products	West Virginia class certified
	AT, CP	*In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 288 (D. Mass. 2004)	Drugs	West Virginia among exemplar classes certified
	AT	*In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	West Virginia class certified
	AT, CP	*Robinson v. EMI Music Dist., Inc.,* Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including West Virginia
WI	AT	"Order Certifying Class Action" (July 25, 2001) in *Capp v. Microsoft Corp.,* No. 00 CV 0637 at 1 (Wis. Cir. Ct., Dane Cty.) RJN Exhibit 20.	Computer software	Wisconsin class certified
	AT	"Order" (March 23, 1995) in *Carlson v. Abbott Labs., Inc.* No. 94-CV-002608 at 2 (Wis. Cir. Ct., Milwaukee Cty.) RJN Exhibit 21.	Infant formula	Wisconsin class certified
	AT	*Ferrell v. Wyeth-Ayerst Labs.,* No. C-1-01-447, Order at 27 (S.D. Ohio June 30, 2004) RJN Exhibit 1.	Estrogen replacement products	Wisconsin class certified
	AT	*Ferrell v. Wyeth-Ayerst Labs.*, No. C-1-01-447, Order at 8 (S.D. Ohio Feb. 2, 2005) RJN Exhibit 2.	Estrogen replacement products	Wisconsin class certified

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	AT	"Decision And Order Granting Plaintiffs' Motion For Class Certification" (May 10, 2004) in *Feuerabend v. UST Corp*., No. 2002 CV 007124 at 15 (Wis. Cir. Ct., Milwaukee Cty.) RJN Exhibit 22.	Smokeless tobacco	Wisconsin class certified
	CP	*In re Pharm. Indus. Average Wholesale Price Litig.,* 233 F.R D. 229, 230-31 (D. Mass. 2006)	Various drugs	Wisconsin co-payor class certified
	AT	*In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 702 (S.D. Fla. 2004)	Drugs	Wisconsin class certified
	AT	*K-S Pharmacies, Inc. v. Abbott Laboratories*, 1996 WL 33323859, at *13 (Wis. Cir. Ct. May 17, 1996)	Drugs	Wisconsin class certified
	CP	*Robinson v. EMI Music Dist., Inc.,* Civ. No. L10462, 1996 WL 495551, at *5 (Tenn. Cir. Ct. July 8, 1996)	CDs	Multi-state classes certified, including Wisconsin