Steven F. Cherry (*pro hac vice*)
Gordon Pearson (*pro hac vice*)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006-3642
Telephone: (202) 663-6000
Facsimile: (202) 663-6363
Steven.Cherry@wilmerhale.com
Gordon.Pearson@wilmerhale.com

Attorneys for Defendant Chi Mei Corporation, Chi Mei Optoelectronics Corp., CMO Japan Co., Ltd., and Chi Mei Optoelectronics USA Inc.

[Additional Defendants and Counsel listed on signature page]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION This Document Relates To: INDIRECT PURCHASER ACTIONS	Master File No. M: 07-1827 SI MDL No. 1827 **DEFENDANTS' JOINT NOTICE OF MOTION AND MOTION TO STRIKE PROPOSED MODIFICATIONS TO CLASS DEFINITIONS CONTAINED IN INDIRECT PURCHASER PLAINTIFFS' REPLY BRIEF ON CLASS CERTIFICATION AND DECLARATIONS FILED WITH INDIRECT PURCHASER PLAINTIFFS' REPLY BRIEF ON CLASS CERTIFICATION** Date: November 19, 2009 Time: 4:00 p.m. Dept.: Courtroom 10, 19th Floor Judge: Hon. Susan Illston

NOTICE OF MOTION AND MOTION TO STRIKE

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 19, 2009, at 4:00 p.m., or as soon thereafter as the matter may be heard in Courtroom 10, 19th Floor, San Francisco, California, before the Honorable Susan Illston, the moving Defendants listed in the signature block below will and hereby do move the Court for an Order striking (i) the attempts by Indirect Purchaser Plaintiffs ("Plaintiffs") in their Reply Brief In Support Of Indirect-Purchaser Plaintiffs' Motion For Class Certification ("Reply") (Dkt. 1268) to amend the proposed class definition set forth in the Plaintiffs' own Second Amended Complaint (Dkt. 746), and (ii) the fact declarations of Fu-Chia ("Morgan") Tai (Dkt. 1269), Yin-Hua ("Asuka") Hsu (Dkt. 1270), and Chien-Ming ("Milton") Kuan (Dkt. 1271), submitted by Plaintiffs for the first time with their Reply.

This motion is based upon this Notice of Motion, the Statement of Issues, the accompanying Memorandum of Points and Authorities, the Declaration of Gordon Pearson and the exhibits attached thereto, the complete files in this consolidated action, argument of counsel, and such other matters as this Court may consider.

STATEMENT OF ISSUES

1. Whether the Court should strike Plaintiffs' attempts to use their Reply in support of their motion for class certification to amend once again the proposed class definitions they set forth in their Second Amended Complaint without complying with Rule 15(a) of the Federal Rules of Civil Procedure; and

2. Whether the Court should strike from the class certification record three new fact declarations that Plaintiffs submitted for the first time with their Reply, thereby precluding Defendants from deposing the declarants, obtaining other discovery regarding the declarations, and responding to the assertions in the declarations.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants hereby jointly object to and move to strike Plaintiffs' improper attempts to use their Reply to amend once again the proposed class definitions in the Second Amended Complaint. In so doing, Plaintiffs seek to expand the proposed classes and eliminate certain residency requirements for the putative class members without obtaining Defendants' consent or even allowing Defendants to address the effect of those changes on Plaintiffs' motion for class certification. Plaintiffs have not complied with Rule 15(a) of the Federal Rules of Civil Procedure, and allowing Plaintiffs to use their Reply to amend their complaint at this late stage of the class certification proceedings would unfairly prejudice Defendants.

Defendants also jointly object to and move to strike the untimely declarations of Fu-Chia ("Morgan") Tai, Yin-Hua ("Asuka") Hsu, and Chien-Ming ("Milton") Kuan, submitted by Plaintiffs for the first time with their Reply. These declarations, which do not support the assertions for which Plaintiffs offer them, were obtained by Plaintiffs from three current employees of Chunghwa Picture Tubes, Ltd. ("CPT"), a defendant with which Plaintiffs have apparently entered into a proposed settlement. Defendants have not had the opportunity to depose the declarants or take other discovery regarding the circumstances under which the declarations were obtained, the purported facts set forth in those declarations, or Plaintiffs' proposed settlement with CPT. Plaintiffs' apparent attempt to avoid such discovery by offering the declarations only with their Reply is improper, and the declarations should be struck from the class certification record.

FACTUAL BACKGROUND

Plaintiffs' action has been pending for nearly three years. Before filing their motion for class certification, Plaintiffs amended their complaint three times, in each instance modifying their definitions of the various proposed classes. (*Compare* First Amended Class Action Complaint filed by Judd Eliaosph at 8, ¶ 37 (Aug. 13, 2007) (Dkt. 267) (defining proposed classes to include purchases made from January 1, 1998 through December 31, 2005), *with* Indirect-Purchaser Plaintiffs' Consolidated Amended Complaint at 5, ¶ 16 and 39, ¶ 216 (Nov. 5, 2007) (Dkt. 367) (defining proposed statewide classes to include purchases made from January 1, 1996 through

December 31, 2006), *and* Indirect-Purchaser Plaintiffs' Second Consolidated Amended Complaint ("Second Am. Compl.") at 5, ¶ 15 and 45-56, ¶¶ 230-231a.-aa. (Dec. 5, 2008) (Dkt. 746) (defining proposed statewide classes to include purchases made from January 1, 1996 through December 11, 2006).)

Without seeking leave of the Court or consent of Defendants, Plaintiffs purported to amend their complaint for a *fourth* time in their initial class certification brief. Plaintiffs revised their definition of the "Class Period" by: (i) eliminating the first three years of the putative class period from January 1, 1996 to January 1, 1999, implicitly acknowledging the absence of evidence of any purported conspiracy during that time; (ii) extending the putative class period for all statewide classes an additional 20 days from December 11, 2006 to December 31, 2006; and (iii) extending the end date of the putative class period for the nationwide class from December 31, 2006 to "the present." (*See* Memorandum of Points and Authorities in Support of Indirect-Purchaser Motion for Class Cert. at 2 (Dkt. 1023-1).)

In opposing Plaintiffs' class certification motion, Defendants did not object to Plaintiffs' elimination of the first three years of the purported class period. But Defendants did object to Plaintiffs' improper attempt to extend the class period, which was done apparently to avoid a finding that named plaintiffs Griffith and Hansen had not purchased the LCD products on which they base their claims during the proposed Class Period set forth in the Second Amended Complaint. (*See* Defendants' Opposition To Indirect Purchaser Plaintiffs' Motion For Class Certification ("Defs.' Opposition") at 60 n.52 (Dkt. 1162).) In addition, Defendants observed that named plaintiffs Baker, Jou, and Paguirigan were inadequate and atypical class representatives because they failed to satisfy the residency requirements set forth in Plaintiffs' own proposed class definitions (*id.* at 62), and because the Dell laptop computer allegedly purchased by Ms. Baker did not contain an LCD panel manufactured by any Defendant (*id.* at 61 n.55), again as required by Plaintiffs' own proposed class definition.

In Plaintiffs' Reply, they concede plaintiffs Baker, Jou, and Paguirigan fail to meet the residency requirements under the existing class definitions, even as modified in Plaintiffs' opening

brief. Accordingly, Plaintiffs – again without leave of the Court or consent of Defendants – purport to amend their complaint for a *fifth* time in two different footnotes of their Reply. First, Plaintiffs ask the Court to revise the first sentence of each of the 23 state class definitions to read as follows:

> All persons and entities in [Indirect Purchaser State] who, from January 1, 1999 to December 31, 2006, as residents of [Indirect Purchaser State], purchased LCD panels incorporated in televisions, monitors, and/or laptop computers in [Indirect Purchaser State] indirectly from one or more of the named Defendants for their own use and not for resale.

(*See* Pls.' Reply at 43 n.53.) Plaintiffs make this request in an attempt to obviate Defendants' residency objections to plaintiffs Baker, Jou, and Paguirigan.[1/] Second, Plaintiffs ask the Court to amend the current class definitions either (i) implicitly by interpreting them to include purchases of televisions, monitors, and laptop computers that contain LCD panels manufactured by unnamed "co-conspirator[s]" (Pls.' Reply at 44) or (ii) explicitly by revising the language to include purchases of televisions, monitors, and laptop computers that contain LCD panels "from one or more of the named Defendants *and Quanta Display, Inc.*" (*Id.* at 45 n.55 (emphasis added).)

Additionally, Plaintiffs' Reply is accompanied by previously unsubmitted declarations obtained from three current employees of CPT, a defendant with which Plaintiffs reached a proposed settlement before moving for class certification.[2/] Defendants have not had the opportunity to depose these three employees or take other discovery regarding the declarations or the proposed settlement. Plaintiffs offer no explanation in their Reply as to why they withheld this testimony and submitted the declarations only now instead of with their motion and initial brief.[3/]

[1/] The Second Amended Complaint currently defines each state class as follows:

> All natural persons and entities residing in [STATE] who indirectly purchased in [STATE] for their own use and not for resale LCD panels manufactured and/or sold by one or more of the defendants during the Class Period.

(Second Am. Compl. at 45-56, ¶231a.-aa.)

[2/] Plaintiffs first disclosed their proposed settlement with CPT in a draft case management conference statement exchanged with Defendants in May of this year. (*See* Declaration of Gordon Pearson ¶ 3, Ex. 1, and Ex. 1-A at 2.) Plaintiffs filed their motion for class certification on June 2, 2009. (Dkt. 1023.)

[3/] Two of the declarations – those by Yin-Hua "Asuka" Hsu and Fu-Chia "Morgan" Tai – were also submitted by the Direct Purchaser Plaintiffs with their reply papers in support of their motion

ARGUMENT

I. PLAINTIFFS' ATTEMPTS TO AMEND THE CLASS DEFINITIONS IN THEIR REPLY ARE IMPROPER AND SHOULD BE STRUCK BY THE COURT.

Plaintiffs' attempts to use their Reply to amend the complaint for a fifth time in an effort to overcome acknowledged flaws in the claims of various putative class representatives are improper. The Federal Rules are clear that plaintiffs cannot revise their proposed class definitions by purporting to amend the complaint through footnotes in a reply brief. Fed. R. Civ. P. 15(a); *see also Jordan v. Paul Financial, LLC*, No. C 07-04496 SI, 2009 WL 192888, at *6 (N.D. Cal. Jan. 27, 2009) (Illston, J.). Federal Rule of Civil Procedure 15(a) provides that, after a complaint has been amended once, "a party may amend its pleading *only* with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a) (emphasis added). Plaintiffs have sought neither in this case.

Indeed, this Court recently rejected a plaintiff's attempt to use a reply brief to amend his class action complaint in circumstances precisely like those found here. *See Jordan*, 2009 WL 192888, at *6. In *Jordan*, the plaintiff sought to avoid denial of his motion for class certification by redefining the putative class in his reply brief in support of that motion. *Id.* This Court not only refused to permit the plaintiff to do so, but also denied his subsequent request to withdraw the class certification motion. Instead, the Court denied the plaintiff's motion for class certification and held the plaintiff must "seek leave to file an amended complaint" if he "wish[es] to redefine the putative class." *Id.* Plaintiffs should be required to do the same here.

Moreover, allowing Plaintiffs to expand the proposed classes and eliminate certain residency requirements through amendments first proposed in their Reply would unfairly prejudice Defendants. The parties have engaged in substantial class discovery for over a year. Defendants have served document requests and interrogatories on, and have noticed and deposed, each of the

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for class certification, and Defendants also objected to and moved to strike the declarations from the record in that matter. (*See* Defendants' Joint Objections and Motion to Strike Reply Declarations Filed With Direct Purchaser Plaintiffs' Reply Brief on Class Certification at 8-10 (Dkt. 1261).) The third declaration by Chien-Ming "Milton" Kuan was submitted only in this case.

nearly 50 named plaintiffs who seek to serve as class representatives. The focus and scope of that discovery, the expert analysis of Professor Edward Snyder opposing class certification, and Defendants' own legal arguments were shaped in part by Plaintiffs' allegations, including their alleged class definitions and alleged class period. By unilaterally purporting to rewrite those definitions at this late date, Plaintiffs have precluded Defendants from pursuing additional lines of questioning in depositions, seeking additional written discovery, and conducting additional analyses based on those different definitions. *See Pierce v. NovaStar Mortgage, Inc.*, 489 F. Supp. 2d 1206, 1215 (W.D. Wash. 2007) (refusing request to modify class definition made for the first time in reply because "defendant has been deprived of an opportunity to respond to this argument").

Finally, Plaintiffs provide no justification for their belated attempt now to rewrite the proposed class definitions for a fifth time without complying with Rule 15(a), and none exists. The deficiencies that Plaintiffs seek to correct should have been patently obvious to them from the outset of this litigation. Indeed, Plaintiffs nowhere explain why they have realized *only now* that plaintiffs Baker, Jou, and Paguirigan do not actually reside in the states they seek to represent, that plaintiffs Griffin and Hansen did not purchase the LCD products on which they purport to base their claims during the Class Period set forth in the Second Amended Complaint, or that the Dell laptop computer on which plaintiff Baker purports to base her claim does not contain an LCD panel manufactured by any Defendant.

In any event, Plaintiffs' attempted modifications to the residency requirements of the state class definitions are futile. The language Plaintiffs offer purportedly to include Plaintiffs Baker, Jou, and Paguirigan in the putative state classes they seek to represent does not solve the problem. Under Plaintiffs' proposed amendment, each plaintiff must still presently be "in" the indirect purchaser state to be a member of that putative state class. (*See* Pls.' Reply at 43 n.53 ("All persons and entities *in* [Indirect Purchaser State] who . . . ." (emphasis added)).) But plaintiffs Baker, Jou, and Paguirigan are not "in" the States they seek to represent. (*See* Defs.' Opposition at 62 (explaining that Ms. Baker currently lives *in* Florida but seeks to represent a Michigan class; Ms. Jou currently works *in* China although she also seeks to represent a Michigan class; and Mr. Paguirigan

currently resides *in* Washington but seeks to represent a class in Wisconsin).) Thus, Plaintiffs Baker, Jou, and Paguirigan would still be inadequate and atypical class representatives even under the revised class definitions Plaintiffs have proposed in their Reply.

Plaintiffs are also wrong that Ms. Baker's inadequacies can be overcome by interpreting – and, thus, implicitly amending – their alleged class definitions to include purchases of televisions, monitors, and laptop computers containing LCD panels manufactured by a "co-conspirator." The plain language of the Second Amended Complaint clearly limits qualifying purchases only to those involving televisions, monitors, or laptop computers containing "LCD panels manufactured and/or sold by one or more of the *defendants.*" (*E.g.,* Second Am. Compl. at 45, ¶231a (emphasis added).) Thus, there is no "interpretation" of this definition that would include purchases of products containing LCD panels manufactured by non-defendants such as Quanta Display, Inc. More important, as this Court noted during the hearing on Direct Purchaser Plaintiffs' motion for class certification, reading undefined "co-conspirators" into the class definitions would raise obvious ascertainability and notice problems that would preclude class certification.[4/]

II. PLAINTIFFS' UNTIMELY SUBMISSION OF THE DECLARATIONS OF THREE CPT EMPLOYEES IS IMPROPER AND THE DECLARATIONS SHOULD BE STRUCK.

The Court should strike the untimely declarations of the three CPT employees Plaintiffs submitted for the first time with their Reply. By offering these declarations after Defendants submitted their opposition papers, Plaintiffs have precluded Defendants from conducting discovery regarding the declarations, including deposing the three CPT employees about the scope of their duties and their personal knowledge of the purported facts they declare, and presenting evidence to respond to the assertions made in these declarations. This is precisely why it is well-established that attempts to submit *new* evidence in reply are improper, and that a court should strike such evidence

[4/] Plaintiffs' request in the alternative to expand explicitly the proposed class definition belies their self-serving rationale: Quanta Display, Inc., was selected not on any principled basis, but simply for the sake of expediency, to fill a void created in one putative state class by Plaintiffs' failure to identify a proposed class representative who was actually a member of that alleged state class.

from the record before considering the pending motion. *See Contratto v. Ethicon, Inc.*, 227 F.R.D. 304, 309 & n.5 (N.D. Cal. 2005) (citing supportive cases and granting motion to strike additional declaration submitted in reply); *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 682 (S.D. Cal. 1999) ("It is well accepted that raising of new issues and submission of new facts in reply brief is improper.") (quoting *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996)); *Morris v. Schriro*, No. CV 05-0515-PHX-JAT (JRI), 2008 WL 820559, at *8 (D. Ariz. Mar. 25, 2008) (refusing to consider declaration submitted in reply).

As noted, Plaintiffs purportedly agreed to a proposed settlement with CPT before they filed their motion for class certification, and apparently secured CPT's agreement to cooperate with them. (*See* Declaration of Gordon Pearson ¶ 3 and Ex. 1-A at 2.) This fact alone casts doubt on the declarations and further highlights the need to allow Defendants a fair opportunity to depose the three CPT employees and obtain other discovery regarding their declarations and any proposed settlement between Plaintiffs and CPT, if the declarations are to be included in the class certification record.

In any event, these declarations are not competent evidence for the facts that Plaintiffs seek to establish through them:

Kuan Declaration. In his declaration, Milton Kuan states only that, for a period of little more than three years of the eight-year putative Class Period, Mr. Kuan collected information on retail prices of notebook computers and computer monitors in the United States, which he provided to his superiors at CPT. (*See* Kuan Decl. ¶ 2.) Mr. Kuan further explains that he collected this information on "U.S. street prices" because the "street prices for monitors and notebooks *affected the demand* for TFT-LCD panels and *affected the prices* that [CPT] was able to obtain for the TFT-LCD panels it sold." (*Id.* ¶ 3 (emphasis added).) But the declaration describes no background in economics or other professional expertise that would establish Mr. Kuan's qualifications to offer such an opinion on the economic relationships, if any, among the different LCD panel and finished product markets. Furthermore, Mr. Kuan claims no knowledge of any other Defendants' practices in this regard.

More important, Mr. Kuan's declaration provides no support whatsoever for Plaintiffs' assertion that CPT or any other Defendant participated in a "cartel" to set the prices for LCD panels that had the effect of increasing the "street prices" paid by *all* end-users who purchased finished LCD televisions, monitors, and laptop computers during any of the entire eight-year class period. First, there is nothing unusual, suspicious, or improper about a business (such as a TFT-LCD panel manufacturer like CPT) monitoring the prices charged by its customers (the manufacturers of finished products incorporating such panels), or the economic conditions in the markets where the finished products are sold. To the contrary, such information may be vital in determining what prices the product manufacturers can or will pay for TFT-LCD panels, even in the absence of any price collusion.

Second, the Kuan declaration does not suggest that the alleged cartel "affected the prices of finished LCD Products incorporating the LCD Panels." (Pls.' Reply at 6.) If anything, it suggests the opposite: that changing economic conditions in the three separate finished product markets constrained price increases in the upstream panel markets. The focus on "street prices" and CPT's concern that changes in the "street prices" of monitors and notebooks would "affect[] the demand for TFT-LCD panels," which Mr. Kuan describes, weighs *against* a finding of class-wide impact for all end-user purchasers. Indeed, CPT's observation of "street prices" of monitors and laptop computers suggests that it did so in order *to avoid* increasing TFT-LCD panel prices to an extent that would cause increases in the "street prices" of the finished products, and, as a consequence, a reduction in demand for TFT-LCD panels.

Hsu Declaration. The declaration of Asuka Hsu speaks only in very general terms about Ms. Hsu's participation for less than half the putative class period in certain lower-level meetings of "marketing employees" where "participants exchanged current shipment and pricing information about TFT-LCD panels." (Hsu Decl. ¶ 5.) Ms. Hsu does *not* say that any agreements on price or output were reached at these meetings, that the participants had the authority to determine prices or outputs, or even that participants ever exchanged any prospective price or output information. Moreover, this declaration does not support Plaintiffs' contention of a single, overarching conspiracy

involving all Defendants over an eight-year period. (*See* Pls.' Reply at 8 n.8.) In fact, Ms. Hsu expressly distinguishes between the low-level "vendor parties" and the "higher-level . . . Crystal Meetings," and she conspicuously does not assert that any of the Japanese manufacturers took part in the latter. (*See* Hsu Decl. ¶ 9.)

Tai Declaration. Neither of the points for which Plaintiffs cite Morgan Tai's declaration are, in fact, bolstered by that declaration. Mr. Tai provides information only as to CPT's practices regarding product standardization; he says nothing about any alleged concerted action by other manufacturers to standardize the characteristics of LCD panels, and Plaintiffs' citation to it for this assertion (*see* Pls.' Reply at 23 n.24) is misguided. Indeed, it is far from apparent that Mr. Tai's sales positions would have put him in a position to know about the manufacturing practices of other LCD manufacturers. Furthermore, Mr. Tai's acknowledgment that "[c]ustomers routinely turned to more than one manufacturer to supply the same panels for use in the same finished good" (Tai Decl. ¶ 8), if anything, supports Defendants' contention that Plaintiffs' proposed classes are not ascertainable. (*See* Defs.' Opposition at 51-53.) Because customers may use more than one manufacturer to supply the same LCD panels, any given television, monitor, or laptop computer sold by that customer may or may not contain an LCD panel manufactured by a particular Defendant. Finally, Mr. Tai's declaration provides nothing to support, much less prove as Plaintiffs contend, the assertion that all LCD panels are interchangeable, homogenous products. (*Cf.* Expert Report of Edward A. Snyder, Ph.D., Aug. 10, 2009, at 40 ¶ 81 (Dkt. 1178).)

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court (i) to strike Plaintiffs' attempts in their Reply to amend the proposed class definitions set forth in the Second Amended Complaint, and (ii) to strike in their entirety the declarations of Ms. Hsu, Mr. Kuan, and Mr. Tai.

DATED: October 15, 2009

WILMER CUTLER PICKERING HALE & DORR LLP

By: */s/ Steven F. Cherry*
Steven F. Cherry

Steven F. Cherry (*pro hac vice*)
Gordon Pearson (*pro hac vice*)
1875 Pennsylvania Avenue NW
Washington, DC 20006
Tel: (202) 663-6000
Fax: (202) 663-6363

Attorneys for Defendants Chi Mei Corporation, Chi Mei Optoelectronics Corp., CMO Japan Co., Ltd., and Chi Mei Optoelectronics USA, Inc.

NOSSAMAN LLP

By: */s/ Christopher A. Nedeau*
Christopher A. Nedeau

Christopher A. Nedeau (State Bar No. 81297)
50 California Street
34th Floor
San Francisco, CA 94111
Tel: (415) 398-3600
Fax: (415) 398-2438

Attorneys for Defendants AU Optronics Corporation and AU Optronics Corporation America

K & L GATES

By: */s/ Hugh F. Bangasser*
Hugh F. Bangasser

Hugh F. Bangasser (*pro hac vice*)
Ramona Emerson (*pro hac vice*)
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Tel: (206) 623-7580
Fax: (206) 623-7022

Attorneys for Defendant HannStar Display Corporation

MORGAN, LEWIS & BOCKIUS LLP

By: */s/ Kent M. Roger*
Kent M. Roger

Kent M. Roger (State Bar No. 95987)
One Market
Spear Street Tower
San Francisco, CA 94105
Tel.: (415) 442-1140
Fax: (415) 442-1001

Attorneys for Defendants Hitachi, Ltd., Hitachi Displays, Ltd., and Hitachi Electronic Devices (USA), Ltd.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

By: */s/ Michael R. Lazerwitz*
Michael R. Lazerwitz

Michael R. Lazerwitz (*pro hac vice*)
2000 Pennsylvania Avenue NW
Washington, DC 20006
Tel.: (202) 974-1500
Fax: (202) 974-1999

Attorneys for Defendants LG Display Co. Ltd. and LG Display America, Inc.

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: */s/ Michael W. Scarborough*
Michael W. Scarborough

Michael W. Scarborough (State Bar No. 203524)
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111
Tel: (415) 434-9100
Fax: (415) 434-3947

Attorneys for Defendants Samsung Electronics Co., Ltd., Samsung Semiconductor, Inc. and Samsung Electronics America, Inc.

PILLSBURY WINTHROP SHAW PITTMAN LLP

By: */s/ Jacob R. Sorensen*
Jacob R. Sorensen

Jacob R. Sorensen (State Bar No. 209134)
50 Fremont Street
San Francisco, CA 94105
Tel.: (415) 983-1000
Fax: (415) 983-1200

Attorneys for Defendants Sharp Corporation and Sharp Electronics Corporation

WHITE & CASE LLP

By: */s/ Wayne A. Cross*
Wayne A. Cross

Wayne A. Cross (*pro hac vice*)
1155 Avenue of the Americas
New York, NY 10036
Tel: (212) 819-8200
Fax: (212) 354-8113

Attorneys for Defendants Toshiba America Electronic Components, Inc., Toshiba Corporation, Toshiba Matsushita Display Technology Co., Ltd, and Toshiba America Information Systems, Inc.

Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the filing of this document has been obtained from Christopher A. Nedeau, Hugh F. Bangasser, Kent M. Roger; Michael R. Lazerwitz; Michael W. Scarborough; Jacob R. Sorensen; and Wayne Cross.