Francis O. Scarpulla (41059)
Craig C. Corbitt (83251)
Judith A. Zahid (215418)
Patrick B. Clayton (240191)
Qianwei Fu (242669)
ZELLE HOFMANN VOELBEL & MASON LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
Telephone: (415) 693-0700
Facsimile: (415) 693-0770
fscarpulla@zelle.com
ccorbitt@zelle.com

Joseph M Alioto (42980)
Theresa D. Moore (99978)
THE ALIOTO FIRM
555 California Street, 31st Floor
San Francisco, CA 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200

Interim Co-Lead Counsel for Indirect-Purchaser Plaintiffs and Class Members

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	Master File No. C07-1827-SI MDL No. 1827
This Document Relates to: All Indirect Purchaser Actions	**INDIRECT-PURCHASER PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO STRIKE PROPOSED MODIFICATIONS TO CLASS DEFINITIONS AND DECLARATIONS FILED WITH INDIRECT-PURCHASER PLAINTIFFS' REPLY BRIEF ON CLASS CERTIFICATION** Hearing Date: November 19, 2009 Time: 4:00 p.m. Courtroom: 10, 19th Floor Judge: Honorable Susan Illston

I. INTRODUCTION

Notwithstanding Defendants' efforts to get another "bite at the apple," their thinly-veiled surreply in the guise of a motion to strike is not only procedurally improper but also substantively defective. Defendants violate Local Rule 7-3(d) which prohibits filings after a reply brief without prior court approval.

Defendants' argument that Plaintiffs and the Court are bound by the class definition in the complaint which cannot be changed without a formal motion to amend the complaint is directly contrary to Rule 23 and the controlling case law. Courts have routinely allowed modification to class definitions in the class certification motion, in the certification reply brief, at oral argument, and even after the motion for class certification has been heard.

In their reply brief, Plaintiffs seek this Court's permission to make minor modifications to the class definitions in order to address concerns raised by Defendants in their opposition to class certification. Tellingly, Defendants are unable to identify any prejudice they would suffer as the result of these modifications. Defendants' actual objection seems to be that the proposed modifications eliminate the purported defects raised in their opposition to class certification. Defendants, however, fail to identify any additional evidence or argument they would have presented in opposition to class certification had the class definitions been modified earlier. Defendants' insistence that Plaintiffs should be required to file a formal motion to amend the complaint followed by a renewed motion for class certification would therefore be an unprecedented waste of time and effort for the parties and the Court, while serving no useful purpose.

Defendants' request to strike the three declarations (declarations of Chien-Ming ("Milton") Kuan, Yin-Hua ("Asuka") Hsu, and Fu-Chia ("Morgan") Tai) submitted by Plaintiffs with their class certification reply should also be denied. Each of these declarations comprise proper rebuttal in response to the arguments and evidence proffered by Defendants in their opposition to certification.

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II. ARGUMENT

A. DEFENDANTS' MOTION IS PROCEDURALLY IMPROPER

Defendants are using their self-styled motion to strike as an attempt to improperly bolster their arguments in their opposition to Plaintiffs' class certification motion—in effect, an unauthorized surreply.

The Civil Local Rules of the Northern District of California prohibit separation motions to strike which are essentially surreplies. Local Rule 7-3(d), which governs motion practice, provides that a party may not submit any supplemental material after a reply brief has been filed unless the new material relates to "a relevant judicial opinion published after the date the opposition or reply was filed." The rule continues that "[o]therwise, once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court approval." Civ. L.R. 7-3(d). Defendants failed to seek court approval for their post-reply filing as required under Rule 7-3(d). Moreover, Defendants improperly use their Motion as an opportunity to provide further briefing on the class motion, arguing that the Court should ignore the legal authorities and facts cited in Plaintiffs' reply brief that directly rebut Defendants' opposition arguments. *See Johnson v. Wennes*, No. 08cv1798-L (JMA), 2009 WL 1161620, at *2 (S.D. Cal. Apr. 28, 2009) (courts "generally do not permit such additional briefing absent good cause."). The Court should not condone Defendants' violation of the Local Rule to deliver their surreply arguments under the pretext of a motion to strike.

Moreover, even if Defendants' filing could be properly characterized as a motion to strike, the Ninth Circuit has ruled that under Rule 12(f) of the Federal Rules of Civil Procedure, "only pleadings are subject to motions to strike." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983); *see also Moreno v. USG Corp.*, No. 06-CV-2196-B (PCL), 2007 WL 951301, at *1 (S.D. Cal. Mar. 19, 2007). Additionally, such motions are viewed with disfavor and are infrequently granted, because it "proposes a drastic remedy." James Wm. Moore *et al*., Moore's Federal Practice § 12.37 (3d ed. 2009); *see also Lunsford v. United States*, 570 F.2d 221, 229 (8th Cir. 1977). As demonstrated below, Defendants offer no colorable legal or factual arguments to support their extraordinary Motion; it is nothing but a strategic effort to have the last word on Plaintiffs' class certification motion.

B. DEFENDANTS' MOTION IS SUBSTANTIVELY DEFECTIVE

1. Revising the Class Definition After The Initial Pleading Is Authorized by Law

Defendants claim that Plaintiffs' modifications to the class definitions in the Reply were improper. Defs.' Mot. at 4; 6-8. Defendants misleadingly cite Federal Rule of Civil Procedure 15(a) which has no bearing on the issue of whether Plaintiffs can seek the Court's permission to modify the class definitions in their reply brief. *Id.* at 6. To the contrary, Defendants' argument finds no support in Federal Rule 23 or in the supporting case law permitting further refinement in the class definition.

a. Rule 23 And Case Law Supports Modifications To The Class Definitions

Modifying the class definition to address the objections of defendants and to reflect the results of discovery is common practice in federal class action litigation and is supported by Rule 23 itself. *See* Plfs.' Mot. at fn. 7 and Plfs.' Reply at 42-43; s*ee also In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 683 n. 5 (N.D. Ga. 1991) ("The act of redefining a class definition is a natural outcome of federal class action practice."); *Rodriguez by Rodriguez v. Berrybrook Farms, Inc.*, 672 F.Supp. 1009, 1012 (W.D. Mich. 1987) (noting that class certification device is flexible and that the practice of modifying class definition and defining subclasses accommodates the products of discovery and even developments at trial) (citation omitted).

Modification of the class definition is liberally allowed to facilitate the "ongoing refinement and give-and-take inherent in class action litigation, particularly in the formation of a workable class definition. District courts are permitted to limit or modify class definitions to provide the necessary precision." *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004). "Rule 23(c)(1) specifically empowers district courts to alter or amend class certification orders at *any* time prior to a decision on the merits." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000) (emphasis in original); *see also Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005) (noting that "[l]itigants and judges regularly modify class definitions"); *Powers v. Hamilton County Public Defender Com'n*, 501 F.3d 592, 619 (6th Cir. 2007) ("[D]istrict courts have broad discretion to modify class definitions.").

Accordingly, Federal courts routinely permit changes to class definition in a variety of contexts, at a variety of different points during determination of class certification, including revisions made in plaintiffs' reply briefs, as is the case here.[1] For example, in *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251 (D.D.C. 2002), the plaintiffs sought in their reply brief to modify the class definitions of their two proposed classes by changing the ending dates. *Id.* at 256. The court allowed this modification in granting the motion for class certification. *Id.* Likewise, in *Gulino v. Board of Educ. of City School Dist. of City of New York*, 201 F.R.D. 326 (S.D.N.Y. 2001), the court adopted the proposed class definition as amended in plaintiffs' reply brief in response to some of the objections in defendants' opposition briefs. *Id.* at 330-331. *See also Jordan v. Commonwealth Financial Systems, Inc.*, 237 F.R.D. 132 (E.D. Pa. 2006) (permitting an expansion of the class raised for the first time in a reply brief and noting that the revision of the class definition at this stage of the litigation "is procedurally appropriate, as the Court retains jurisdiction to modify the class until there is a decision on the merits."); *Conant v. McCaffrey*, 172 F.R.D. 681, 693 (N.D. Cal. 1997) (permitting plaintiffs' revisions of class definition in the reply brief in order to address defendants' concerns on class members' ascertainability). Therefore, the minor modifications to the class definitions sought in Plaintiffs' reply brief should be permitted.

b. Defendants Are Not Prejudiced By The Changes To The Class Definitions

Defendants also make an unfounded, conclusory assertion of prejudice, arguing that the changes will deprive them of the opportunity to modify their defense theory and expert analysis, and the scope of their discovery. Defs.' Mot. at 6-7. Ironically, Defendants' self-servingly accept Plaintiffs' elimination of the first three years of the initially-proposed class period, which limits Defendants' potential liability. *Id.* at 4. Indeed, Plaintiffs' proposed changes merely align with

[1] Courts have allowed revisions to class definition even after the reply brief is filed. *See, e.g., In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 444 (D. Kan. 2006) (certifying a Rule 23(b)(3) class with the revised proposed class definition as clarified at the class certification hearing); *In re Polypropylene Carpet Antitrust Litig.*, 996 F.Supp.18, 21-22 (N.D. Ga.1997) (plaintiffs allowed to modify class definition after initial class certification hearing to address certain concerns raised by the court at the certification hearing); *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 611 (E.D. La. 2006) (court modified class definition based on evidence presented at the class certification hearing).

evidence that was obtained during discovery. Defendants did not and cannot specify what different discovery responses or arguments against class certification they would have made had these modifications been made earlier.

The two cases cited by Defendants are inapposite. The plaintiff in *Jordan v. Paul Financial, LLC*, No. C 07-04496 SI, 2009 WL 192888 (N.D. Cal. 2009) sought to drastically redefine at oral argument the class definition described in his reply brief and to conduct new discovery. *Id.* at *6. The court denied the plaintiff's request to withdraw the class certification motion but allowed the plaintiff to seek leave to file an amended complaint should he wish to redefine the putative class. *Id.* *Pierce v. Novastar Mortg. Inc.*, 489 F.Supp.2d 1206 (W.D. Wash. 2007) addressed a summary judgment motion regarding the adequacy of the mortgage companies' Yield-Spread-Premium disclosures. The *Pierce* court declined plaintiffs' request to redefine the class in order to include a new issue for summary judgment, and denied plaintiffs' motion as to the new issue, appearing for the first time in plaintiffs' summary judgment reply brief. *Id.* at 1215. None such circumstances are present here. In striking contrast to *Pierce*, here, Plaintiffs' changes will neither alter the basic course and scope of the litigation, nor require any new discovery.[2] *Cf. Bennett v. Central Telephone Co. of Illinois*, 97 F.R.D. 518 (N.D. Ill. 1983).

Defendants next argue that Plaintiffs' proposed revision to the residency requirements of the state classes and inclusion of Quanta Display, Inc. are ineffective responses to Defendants' attack on Plaintiffs Baker, Jou, and Paguirigan. Defs.' Mot. at 7-8. Regarding Quanta Display, Plaintiffs already adequately briefed their position in the reply. *See* Plfs.' Reply at 44-45. Regarding the residency requirement, the plain language of the proposed definition does not require that Plaintiffs be "currently residing" in the state, as long as they made qualifying purchases as residents of the state which they represent. *See* Plfs.' Reply at 43 n. 53. *Cf. In re Monumental Life*, 365 F.3d at 414

[2] As Defendants correctly pointed out, all proposed class representatives have provided written discovery and offered deposition testimonies regarding their purchases long before Defendants' Opposition filing. *See* Defs.' Mot. at 6-7. Moreover, Defendants' expert, Professor Snyder, based his opposing analysis on the same universe of data that Defendants have produced and arguably had access to additional venues and information from Defendants. Not surprisingly, Defendants fail to identify any additional discovery or arguments they would have made had the class definitions been modified earlier.

("[H]olding plaintiffs to the plain language of their definition would ignore the ongoing refinement and give-and-take inherent in class action litigation, particularly in the formation of a workable class definition.").

For these reasons, the proposed modifications to the class definitions could cause no prejudice to the Defendants and the Federal Rules and case law overwhelmingly support allowance of these modifications.

2. The Three Declarations Constitute Valid Rebuttal Evidence

Defendants argue that the three declarations of Chunghwa employees submitted by Plaintiffs constitute untimely-filed "new evidence." Def. Mot. at 3, 8-9. "Evidence is not 'new,' however, if it is submitted in direct response to proof adduced in opposition to a motion." *Edwards v. Toys "R" Us*, 527 F.Supp.2d 1197, 1205 n.31 (C.D. Cal. 2007).[3] A review of the declarations in question demonstrates the fallacy of Defendants' contention. These declarations, signed under penalty of perjury of law, address the same issues presented in Plaintiffs' class certification motion and are proper rebuttal evidence which refutes Defendants' opposition arguments. *See Terrell v. Contra Costa County*, 2007 WL 1119331, at *2, n. 2 (9th Cir. Apr. 16, 2007).

All three cases relied upon by Defendants involve facts materially different from this case. In *Contratto v. Ethicon, Inc*., 227 F.R.D. 304 (N.D. Cal. 2005), the defendants failed to meet their burden of proof in their opening brief for motion to uphold confidential designations of documents. The court declined to consider the new declaration submitted in defendants' reply "to the extent that the declaration introduces new evidence not presented in *either the motion or opposition*." *Id*. at 309 n.5 (emphasis added). Here, none of the issues addressed in these declarations is new or goes beyond those raised in the moving and opposition papers. It is entirely proper for plaintiffs to address in their reply declarations issues that defendants raised in their oppositions. *Wren v. RGIS*

[3] Black's Law Dictionary defines "rebuttal evidence" as: "evidence offered to disprove or contradict evidence presented by an opposing party." Black's Law Dictionary 599 (8th ed. 2004). Similarly, a "rebuttal witness" as "a witness who contradicts or attempts to contradict evidence previously presented." *Id*. at 1634; *see also United States v. Stitt*, 250 F.3d 878, 897 (4th Cir. 2001) (rebuttal evidence is "evidence given to explain, repel, counteract, or disprove facts given in evidence by the opposing party . . . [t]hat which tends to explain or contradict or disprove evidence offered by the adverse party." (citing Black's Law Dictionary 1267 (6th ed. 1990)).

Inventory Specialists, 256 F.R.D. 180, 201 (N.D. Cal 2009) (denying motion to strike declarations submitted with a class certification reply brief where "the new declarations, as well as the arguments raised in the Reply, were largely within the scope of the issues raised by RGIS' opposition.").

Schwartz v. Upper Deck, 183 F.R.D. 672 (S.D. Cal. 1999) is also inapposite. In *Schwartz*, the plaintiffs attempted to introduce previously withheld material in violation of discovery rules and the Magistrate Judge's Order. *Id*. at 682. *Morris v. Schriro*, No. CV 05-0515-PHX-JAT (JRI), 2008 WL 820559 (D. Ariz. March 25, 2008) is also entirely inapposite. In that case, defendants submitted moving papers in support of their summary judgment motion that consisted of nothing but a three-paragraph Statement of Facts and the court refused to consider defendants' declaration submitted after plaintiff had already responded. *Id.* at *7-8.

a. The Kuan Declaration

Mr. Kuan's declaration reveals yet another example of Defendants' recognition of the tie between LCD panel prices and LCD product prices. *See* Plfs.' Mot. at 8; Netz Decl. at 84-88 & fn. 246 (citing a collection of documents to show that Defendants themselves indicate that pass-through of panel prices to product prices occurs). Mr. Kuan's declaration does not purport to replace Dr. Netz's economic analyses on common impact and pass-through, but merely offers an "add-on" piece of corroborating evidence in support of such analyses. It is immaterial, whether Mr. Kuan has knowledge of any of the other Defendants' practices in this regard. Indeed, Plaintiffs in their opening brief and expert report presented sufficient documentary evidence establishing similar practices by other Defendants. *See* Plfs.' Mot. at 8; Netz Decl. at 84-88 & fn. 246.

Defendants' practice of monitoring LCD product street prices is evidence that Defendants acknowledge the relationship between LCD panel prices and LCD product street prices. It does not indicate, as the Defendants assert, that LCD panel makers set panel prices based upon LCD product street prices. Defs.' Mot. at 10. Defendants ignore the voluminous documentary evidence that directly refutes that contention. For example, the evidence shows that panel makers do not consider product street prices in setting the bottom price for LCD panels. *See, e.g.,* Netz Rebuttal at fn. 317. Mr. Kuan's declaration, when examined along with, and in the context of, all documentary evidence presented in Plaintiffs' motion, shows that LCD product prices ultimately reflect increases in LCD

panel prices. *See* Plfs.' Mot. at 8 n. 23 (citing documents in which Defendants discussed how their coordinated LCD panel price increases would impact the LCD product prices downstream); Netz Decl. at fn. 245-252 (citing documents demonstrating pass-through of panel prices to product prices).

b. The Hsu Declaration

Adding to the overwhelming evidence of Defendants' conspiracy submitted with Plaintiffs' Opening brief, Ms. Hsu's declaration further confirms that regular cartel meetings occurred among Defendants. Ms. Hsu explains the operation, function, and frequency of the group meetings as well as one-on-one communications. *See* Hsu Decl. ¶¶2-6. Ms. Hsu also identifies the meeting participants during the entire 2001-2004 period when she attended. *Id.* Professor Snyder failed to analyze any of Plaintiffs' voluminous evidence demonstrating the formation and operation of the cartel and it is therefore clear that he would also have ignored Ms. Hsu's declaration had it been available earlier.

Defendants take issue with the absence of certain facts in Ms. Hsu's declaration and misleadingly conclude that the declaration does not support a single, overarching conspiracy involving *all* Defendants over the *entire* class period. This is a false assumption and argument in a vacuum which disregards the overwhelming evidence in the record which supports Plaintiffs' single conspiracy allegations. *See* Plfs.' Mot. at 6-8 (describing the single conspiracy allegations and citing supporting documents). The fact that Ms. Hsu was not privy to every aspect of the overarching conspiracy does not mean that her testimony should be ignored.

c. The Tai Declaration

Mr. Tai's declaration directly rebuts Defendants' claim that LCD panels are customized to particular panel purchasers' specifications and are not homogeneous commodities for that reason. Defs.' Opp. at 31-32; *cf.* Netz Rubuttal 15-16. In his position as Sales Manager and later Director of Monitor Sales, Mr. Tai declares that, based on his extensive experience negotiating and dealing with customers, other panel makers "followed a similar practice" regarding panel standardization. Tai Decl. ¶¶1, 7-8. Mr. Tai specially explains that pricing decisions were centralized within Chunghwa, thus leaving less room for individualized pricing through negotiations. Tai Decl. ¶2. In

addition, the fact that customers view the LCD panels made by one manufacturer as interchangeable with panels made by other panel manufactures does not preclude the proposed classes from being ascertainable. *See Plfs.*' Reply at 34-41 (addressing Defendants' "ascertainability" argument and showing that determination of class membership using information submitted by class members their claims will be straightforward and objective).

III. CONCLUSION

For the foregoing reasons, Defendants' Motion to Strike has no merit and should be denied.

Respectfully submitted,

Dated: October 29, 2009

ZELLE HOFMANN VOELBEL & MASON LLP

/s/ Craig C. Corbitt
Craig C. Corbitt

Francis O. Scarpulla (41059)
Craig C. Corbitt (83251)
Judith A. Zahid (215418)
Patrick B. Clayton (240191)
Qianwei Fu (242669)
ZELLE HOFMANN VOELBEL & MASON LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
Telephone: (415) 693-0700
Facsimile: (415) 693-0770

Dated: October 29, 2009

THE ALIOTO FIRM

/s/ Joseph M. Alioto
Joseph M. Alioto

Joseph M Alioto (42980)
Theresa D. Moore (99978)
THE ALIOTO FIRM
555 California Street, 31st Floor
San Francisco, CA 94104
Telephone: (415) 434-8900
Facsimile: (415) 434-9200

Interim Co-Lead Counsel for Indirect-Purchaser Plaintiffs and Class Members

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

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