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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15
16 IN RE: TFT-LCD (FLAT PANEL)
17 ANTITRUST LITIGATION

Master File No. 3:07-MD-01827 SI
MDL NO. 1827

18 This Document Relates To:
19 DIRECT PURCHASER CLASS
20 ACTIONS

**TOSHIBA ENTITIES' MOTION TO SET
OFF SETTLEMENT AMOUNTS AGAINST
SPECIAL VERDICT'S DAMAGES
AWARD**

21
22 Date: August 20, 2012
Time: 9:00 a.m.
23 Place: Courtroom 10, 19th Floor
24 Judge: Hon. Susan Illston

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1 **INTRODUCTION**

2 On July 3, 2012, the jury returned a Special Verdict for the Plaintiffs in the amount of
3 \$87 million. After trebling, that amount would be \$261 million. Settlement amounts from the
4 other Defendants in this action total approximately \$443 million, far exceeding the jury verdict
5 even after trebling. Under controlling law described herein, the verdict amount (after trebling)
6 must be reduced by the amount of the settlements. Therefore, when this Court enters judgment
7 on the Special Verdict under Rule 58(b)(2) of the Federal Rules of Civil Procedure, the damages
8 amount should be zero.

9 **ARGUMENT**

10 It is well settled that a plaintiff who recovers damages from one co-conspirator, by verdict
11 or settlement, may not recover those same damages again. *See, e.g., Zenith Radio Corp. v.*
12 *Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971) (holding in civil antitrust case: “a plaintiff
13 who has recovered any item of damage from one coconspirator may not again recover the same
14 item from another conspirator; the law, that is, does not permit a plaintiff to recover double
15 payment.”). It is a “fundamental principle that a payment made by a joint tortfeasor diminishes
16 the claim against the remaining tortfeasors.” *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d
17 1385, 1389 (9th Cir. 1987) (*citing* Restatement (Second) of Torts § 885(3) (1977)); *Husky*
18 *Refining Co. v. Barnes*, 119 F.2d 715, 716 (9th Cir. 1941) (stating general rule that “whether the
19 tortfeasors be joint or independent, the injured party is entitled to no more than compensation for
20 his injury; and that consideration received from one, for the release of any claim against him,
21 operates to reduce pro tanto the amount recoverable from the other”); *In re Piper Aircraft*, 792 F.
22 Supp. 1189, 1190-91 (N.D. Cal. 1992) (holding that defendant “is entitled to a set off for
23 economic damages previously compensated through the settlement agreement”).

24 It is also well settled that the appropriate set-off calculation in antitrust cases is first to
25 treble the amount of the damage award and then to deduct any prior settlement amounts from the
26 trebled amount. *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 298 (9th Cir. 1957) (holding that it
27 is “proper to deduct [the settlement] sum from the trebled amount”). Cases applying *Flintkote*
28 “have uniformly accepted its rule” to deduct settlement amounts from the trebled award. *In re*

1 *Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig.*, 636 F. Supp. 1138, 1151-52 (C.D.
2 Cal. 1986) (applying *Flintkote* and finding that “settlement payments should be deducted from the
3 award against the non-settling defendant(s) *after* actual damages are trebled”) (emphasis in
4 original).

5 Before proceeding to trial against Toshiba, the Plaintiffs settled their claims against each
6 of the other Defendants in this action. The settlements from the Chimei, Chunghwa, Epson,
7 Hannstar, Hitachi, LG Display, Mitsui, Samsung, Sanyo and Sharp Defendants totaled
8 \$405,022,242. *See* Amended Order Granting Direct Purchaser Plaintiffs’ Motion for Attorneys’
9 Fees, Reimbursement of Expenses, and Incentive Awards at ¶ 3, *In re: TFT-LCD (Flat Panel)*
10 *Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. Dec. 27, 2011), ECF No. 4436. In addition to
11 those settlements, the Plaintiffs have also reached a settlement agreement with the AUO
12 Defendants for \$38 million. *See* Notice of Motion and Motion For Preliminary Approval of Class
13 Settlement With Defendant AU Optronics Corporation and AU Optronics Corporation America,
14 at 2, *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI (N.D. Cal. July 6, 2012),
15 ECF No. 6095. Thus, the amounts from settling Defendants total more than \$443 million.

16 Plaintiffs proceeded to trial against Toshiba on the same claim that they settled with each
17 of the other Defendants. The jury returned its Special Verdict on that claim in the amount of
18 \$87 million. This Court must, after trebling that damages award, deduct the \$443 million
19 settlement figure. Because the deduction of \$443 million in settlements from the \$261 million in
20 damages (after trebling) results in a negative dollar amount (indeed, an excess of set off funds in
21 the amount of \$182 million), this Court must enter a judgment of no damages. *See William Inglis*
22 *& Sons Baking Co. v. Cont'l Baking Co., Inc.*, 981 F.2d 1023, 1024 (9th Cir. 1992) (determining
23 that set off produced “ultimate judgment” for “no damages,” *i.e.*, zero dollars); *In re Hawaii Fed.*
24 *Asbestos Cases*, 960 F.2d 806, 809 (9th Cir. 1992) (reciting that trial court entered final judgment
25 “after reducing the awards to account for amounts received in settlement”); *Holmgren v. State*
26 *Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 576 (9th Cir. 1992) (stating that trial court entered
27 judgment on jury verdict “after crediting . . . the amount paid to settle [related] suit”).
28

1 Because the verdict is a special verdict, Rule 58(b)(2) of the Federal Rules of Civil
2 Procedure requires court approval of the form of the judgment prior to the clerk's entry of
3 judgment. Such entry of judgment does not affect any right Plaintiffs may have to apply for
4 attorneys' fees or costs, or Toshiba's rights to oppose any such application in whole or part.
5 Indeed, attorneys' fees are to be dealt with after entry of judgment. *See* Fed. R. Civ. P.
6 54(d)(2)(B) (motion for attorneys' fees and costs must "be filed no later than 14 days after the
7 entry of judgment"); Civil L.R. 54-5 (setting same 14-day period); Fed. R. Civ. P. 23(h)(1) ("A
8 claim for an award [of attorneys' fees and costs] must be made by motion under Rule 54(d)(2),
9 subject to the provisions of this subdivision (h), at a time the court sets."). In fact, attorneys' fees
10 may be dealt with after resolution of post-trial motions under Rule 50. *See Bailey v. Cnty. of*
11 *Riverside*, 414 F.3d 1023, 1025 (9th Cir. 2005) (holding that post-trial motions toll time period
12 for motion seeking attorneys' fees). Thus, entry of judgment does not in any way affect any
13 party's right to seek or oppose an award of attorneys' fees or costs, and all such rights are
14 preserved.

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CONCLUSION

For the foregoing reasons, Toshiba’s motion to set off the settlement amounts against the Special Verdict’s damages award should be granted, and the Court should enter a zero-dollar judgment under Rule 58(b)(2) of the Federal Rules of Civil Procedure.

Respectfully submitted,

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DATED: July 11, 2012

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