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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	**REPLY BRIEF IN SUPPORT OF INDIRECT-PURCHASER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** Hearing Date: October 1, 2009 Time: 4:00 p.m. Courtroom: 10, 19th Floor Judge: Honorable Susan Illston

[REDACTED PUBLIC VERSION]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

Federal Rules

State Rules

I. INTRODUCTION

The opposition filed by Defendants attempts a remarkable feat: it acknowledges, as it must, that these Defendants broke U.S. antitrust law by fixing prices for LCD panels bought by American consumers. ("*Acts in furtherance of this conspiracy were carried out within the Northern District of California. TFT-LCD that were the subjects of the conspiracy were sold by one or more of the conspirators to customers in this District.*")[1]

The Defendants' opposition then suggests that a clever parsing of the Foreign Trade Antitrust Improvements Act, or statements by a Justice Department lawyer concerning the number of conspiracies, or the purported complexity in proving consumer injury, should defeat class certification. For Defendants, this is of course a convenient flip-flop from the fact that the already-convicted Defendants avoided restitutionary penalties for their criminal price-fixing conduct by pointing to the civil class actions pending against them. ("*In light of the civil class action cases filed against the defendants . . . which potentially provide for a recovery of a multiple of actual damages, the United States agrees that it will not seek a restitution order for the offense charged in the Information.*")[2]

Sidestepping full liability on the criminal side by promising to make it up on the civil side class actions, and thereafter denying class-wide civil liability altogether, is too clever by half. ("*The participants in the LCD conspiracy committed a serious fraud upon American consumers by fixing the prices of a product that is in almost every American home.*")[3]

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[1] Plea Agreement, *United States v. LG Display Co. Ltd.*, ¶ 4 (e); Supplemental Declaration of Judith A. Zahid In Support Of Indirect-Purchaser Plaintiffs' Class Certification Motion ("Zahid Supp. Decl.") Ex. 1. *See also* Plea Agreement, *United States v. Sharp Corp.*, ¶ 4 (g); Plea Agreement, *United States v. Hitachi Displays Ltd.*, ¶ 4 (e), Zahid Supp. Decl. Exs. 2-3.

[2] Plea Agreement, *United States v. LG Display Co. Ltd.*, ¶ *12; see also* Plea Agreement, *United States v. Sharp Corp.*, ¶ 12; Plea Agreement, *United States v. Hitachi Displays Ltd.*, ¶ 12.

[3] Department of Justice Press Release, "Korean Executive Agrees to Plead Guilty and Serve One Year In Prison for Participation in LCD Price-Fixing Conspiracy" (April 27, 2009); Zahid Supp. Decl. Ex. 4.

At a minimum, the convicted felons LG Display Co., Sharp Corp., Hitachi Displays Ltd., and Epson Imaging Devices Corp.[4] should be foreclosed from staking out positions in this civil case that flatly contradict the terms of the guilty pleas entered under oath and accepted by this Court. ("*THE COURT: You have requested that there be no restitution because it is anticipated that the MDL proceedings, and possibly other civil proceedings out there, will on their own provide recourse to the victims of these activities independent of restitution from the Government. And on that basis, I will agree not to impose restitution.*")[5]

When the opposition is stripped of its many pages of rhetoric, what remains is the standard knee-jerk defense to class certification: citation to an opposition economist's report attacking the results of the plaintiff economist's report, and speculation about the plaintiffs' ability to prevail on their claims at trial. Though these arguments are clothed under Rule 23, they are nothing more than an attempt to advance the merits phase of this case to class certification. This Court, like all other courts of the Ninth Circuit, should reject this invitation.

Instead, the inquiry here turns on whether Indirect-Purchaser Plaintiffs ("Plaintiffs") have satisfied the elements of Rule 23:

Numerosity: unchallenged and satisfied.

Commonality: unchallenged and satisfied.

Typicality: satisfied with qualifying class representatives whose claims are typical of the class members.

Adequacy: satisfied with competent class representatives who are free of disabling conflicts, and whose claims will be ably prosecuted by the interim co-lead counsel, whose adequacy is not challenged.

Appropriateness of Injunctive Relief: demonstrated by the threat of continuing violations of the nation's competition laws by convicted conspirators who have broken the laws before and offer

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[4] Epson Imaging Devices Corp., a named co-conspirator in the Indirect-Purchaser Plaintiffs' operative complaint. is not currently named as a Defendant.

[5] *United States v. Sharp Corp.* Sentencing Hearing Transcript (Dec. 16, 2008) 23:11-16; Zahid Supp. Decl. Ex. 5.

no assurances of their compliance with such laws in the future.

Ascertainability of Class Members: encompassing only those consumers who have been harmed by the alleged price-fixing conspiracy, the class definitions here are more than adequate, especially in light of the fact that class membership can be easily determined.

Predominance: amply satisfied due to the existence of class-wide issues relating to the existence of the conspiracy, the impact of that conspiracy on class members as articulated in workable economic models, and the damages to class members caused by that conspiracy through reliable means.

Superiority: demonstrated by Plaintiffs' opening brief, the proposed classes here are manageable and superiority is unchallenged by Defendants, who do not suggest that any other forum or mechanism exists that would better address the claims of those consumers injured by the conduct alleged here.

For all of these reasons, as explained below and in Plaintiffs' opening brief, the motion should be granted.

II. THE APPLICABLE STANDARDS

On this motion, the Court should be guided by the recent Ninth Circuit reversal of the district court's denial of certification to a consumer class under the Hawaii consumer protection statute. *Yokoyama v. Midland Nat. Life Ins. Co.*, __F.3d__, 2009 WL 2634770 (9th Cir. Aug. 28, 2009). The same statute is at issue here (Haw. Rev. Stat. § 480-2, *see* Pls.' Mot. at 33), and is representative of the other state-law claims asserted under the Indirect-Purchaser State-Wide Classes. In *Yokoyama*, the district court failed, under Rule 23, to follow the binding state court precedent establishing a preference for consumer protection claims to proceed on a class action basis: "Hawaii's state courts have made clear that Hawaii's consumer protection laws are flexible and may be enforced through the class action mechanism. Accordingly, this class should have been certified." 2009 WL 2634770 at *6.

Yokoyama was bound by the fact that "Hawaii's consumer protection laws expressly consider class actions to be appropriate enforcement mechanisms . . . [and] Hawaii's courts recognize that its

consumer protection laws can be enforced through class actions." *Id.* at *5. Likewise, this Court, consistent with the *Erie* doctrine, in exercising jurisdiction over state law claims under CAFA,[6] must follow the binding pronouncements from the courts of those various states favoring class action treatment for the claims at issue here. Plaintiffs' opening brief collects that authority, which applies across the board. *See* Pls.' Mot. at 26-48. By way of brief examples:

- **California**: "The right to seek classwide redress is more than a mere procedural device in California," *Klussman v. Cross Country Bank*, 134 Cal.App.4th 1283, 1296 (2005); it is the express public policy of California courts to encourage use of the class action device "for the protection of consumers against exploitative business practices." *State of California v. Levi Strauss & Co.*, 41 Cal.3d 460, 471 (1986).
- **Florida**: "[W]e read [the Florida Deceptive and Unfair Trade Practices Act] as a clear statement of legislative policy to protect consumers through the authorization of such indirect purchaser actions." *Mack v. Bristol Myers Squibb*, 673 So.2d 100, 108 (Fla. 1st DCA 1996).
- **North Dakota**: "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 v. Microsoft Corp.*, 656 N.W.2d 285, 288 (N.D. 2003).

Defendants never substantively discuss Plaintiffs' state law authority in support of certification of the Indirect-Purchaser State-Wide Classes, which, in light of *Yokoyama*, further confirms that this Court should apply these presumptions in favor of class certification to the instant motion.

Of particular relevance to the question of "predominance" of common issues in an antitrust class action is the Third Circuit's recent decision in *In re Ins. Brokerage Antitrust Litig.*, __F.3d__, 2009 WL 2855855 (3rd Cir. Sept. 8, 2009), affirming the district court's certification of settlement classes under Rule 23. There, the court stated that, for an antitrust claim, "common questions abound with respect to whether defendants engaged in illegal, concerted action" because the focus is,

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[6] Class Action Fairness Act ("CAFA"), 119 Stat. 4, Pub. L. 109-2, as codified, 28 U.S.C. § 1332 (d).

necessarily, "on the conduct of the defendants." *Id.* at *19. Turning to antitrust impact and damages, the court explained that "although the fourth element [of an antitrust claim] focuses on whether the plaintiffs were injured by the defendants' conduct, it may still involve common questions of law and fact if proof of injury can be established on a class-wide basis.... [W]e are satisfied that the element of antitrust injury – that is, the fact of damages – is susceptible of common proof, even if the amount of damages that each plaintiff suffered could not be established by common proof." *Id.* at *19-20; *accord Yokoyama*, 2009 WL 2634770 at *6 ("In this circuit, however, damage calculations alone cannot defeat certification. We have said that '[t]he amount of damages is invariably an individual question and does not defeat class action treatment.'" (citing *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975))).

Moreover, the cardinal rule that class certification cannot be converted into a decision on the merits was reaffirmed most recently by Judge Richard Posner of the Seventh Circuit. *Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009), affirmed certification over objections that the district court failed to reach the question of damages to class members: "PIMCO argues that before certifying a class the district judge was required to determine which class members had suffered damages. But putting the cart before the horse in that way would vitiate the economies of class action procedure; in effect the trial would precede certification." The defendant's argument, identical to the one made by Defendants here, that no class could be certified without verifying the injury to all class members was soundly rejected: "What is true is that a class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many members of the class be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification . . ." *Id.* at 677.

These recent, on-point appellate decisions confirm that the Court must view this Rule 23 motion in light of the relevant state law favoring class certification, the continuing viability of class action treatment for antitrust claims, and the requirement that class certification decisions be kept separate from an adjudication of the merits of Plaintiffs' claims. With this legal framework set, the facts of this case fill in the details of Defendants' conduct towards the class members.

- The cartel was effective at raising prices—Defendants themselves congratulated themselves on the success of their conspiracy:
  - [redacted], CORRECTED CPT0004015.01E - CPT0004015.02E. Declaration of Judith A. Zahid in Support of Indirect-Purchaser Plaintiffs' Motion for Class Certification ("Zahid Supp. Decl.") Ex. 8.
  - [redacted], CORRECTED CPT0004020.01E - CPT0004022E, p. 1 of Translation. Zahid Supp. Decl. Ex. 9.
  - [redacted], GRN000010 - GRN000021, at 000010. Zahid Supp. Decl. Ex. 10.
  - [redacted] CORRECTED CPT0004008.01E-4011E at 4008.02E [translated]. Zahid Supp. Decl. Ex. 11.
- The cartel affected the prices of finished LCD Products incorporating the LCD Panels:
  - [redacted] Declaration of Chien-Ming ("Milton") Kuan ¶¶2-3.
  - [redacted] SECm00226720. Zahid Supp. Decl. Ex. 12.
- The cartel monitored the pass-through effect of the LCD Panel price-fix:
  - [redacted] GRNE-B-0369742 - GRNE-B-0369750 at GRNE-B-0369747. Zahid Supp. Decl. Ex.13.
  - [redacted] (Deutsche Bank October 22, 2003 report). GRNE-P-0012042 - GRNE-P-0012060 at GRNE-P-0012052. Zahid Supp. Decl. Ex. 14.
  - [redacted] SECm00992549 - SECm00992561 at SECm0092550. Zahid Supp. Decl. Ex. 15.

Thus, certification of proposed classes is appropriate here.

III. RULE 23(B)(3) CLASSES SHOULD BE CERTIFIED BECAUSE COMMON ISSUES OF LAW AND FACT PREDOMINATE

A. Plaintiffs Have Shown Common Issues Predominate As To The Antitrust Violation

The central issue in this price-fixing conspiracy case, by its very nature, deals with common legal and factual questions about the existence, scope and effect of the alleged conspiracy. The overriding need to prove an antitrust conspiracy and anticompetitive prices in the TFT-LCD market satisfies the predominance requirement. *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 167 (C.D. Cal. 2002) ("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.").

1. The Single Conspiracy Alleged By Plaintiffs Will Be Proven With Common Evidence of Defendants' Conduct

Defendants argue that the *liability evidence* of their alleged horizontal price-fixing conspiracy will not be susceptible of common proof. This argument fails for at least three reasons. First, proof of an antitrust price-fixing conspiracy is a class-wide issue, because it is the defendants' conduct that defines the alleged conspiracy. *See, e.g., In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244, 250 (S.D. Tex. 1978) ("Whether the proof ultimately adduced will establish the existence of a national conspiracy among the defendants is not in issue here; it is not the court's function to weigh this evidence for its truth but merely to ascertain whether it is of a type suitable for classwide use. The court is persuaded that the conspiracy issue . . . is susceptible of generalized proof, since it deals primarily with what the defendants themselves did and said.").[7] Here,

[7] *Accord In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. C 07-01819 CW, 2008 WL 4447592, at *5 (N.D. Cal. Sep. 29, 2008) ("whether a conspiracy exists is a common question that predominates over other issues in this case and has the effect of satisfying the first prerequisite of FRCP 23(b)(3)." (internal quotation and citation omitted)); *Mularkey v. Holsum Bakery Inc.*, 120 F.R.D. 118, 122 (D. Ariz. 1988); *Cordes & Co. Financial Services Inc. v. A.G. Edwards & Sons Inc.*, 502 F.3d 91, 105 (2d Cir. 2007) ("Cordes and Creditors Trust's allegations of the existence of a price-fixing conspiracy are susceptible to common proof"); Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 1781 ("In short, whether a conspiracy exists is a common question that is thought to predominate over the other issues in the case and has the effect of satisfying the first prerequisite in Rule 23(b)(3).").

Plaintiffs' conspiracy allegations, supported by evidence gathered to date, present exactly the kind of issue that is well suited for class-wide treatment. *See* Pls.' Mot. at 6-8 (describing single conspiracy allegation and citing documents).[8]

Second, Defendants' attempt to recast the allegations of a single conspiracy in Plaintiffs' complaint is improper. Plaintiffs have alleged, and this Court has sustained, a single unified conspiracy among all Defendants spanning the entire class period. *See In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 265 (D.D.C. 2002) ("[Defendants] claim there were multiple conspiracies, if any existed at all. The defendants improperly re-characterize the plaintiffs' allegations. The plaintiffs have not alleged multiple conspiracies—they have alleged a single price fixing conspiracy….").[9]

Like many other defendants facing significant liability due to a price-fixing conspiracy, Defendants now seek to divide the alleged conspiracy into smaller pieces. This tactic has been rejected by other courts, and should be rejected here as well. "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts but only by looking at it as a whole." *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 699 (1962). "This principle should not to be discarded in the context of a class determination. Defendants' liability to the potential class members is not to be determined by dismembering the conspiracy." *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 348 (E.D. Pa. 1976); *accord In re Vitamins*, 209 F.R.D. at 265. Defendants' opposition does not provide any evidence that is inconsistent with—let alone forecloses the possibility of—a single conspiracy. Whether there was one conspiracy or multiple conspiracies is itself a class-wide issue. Accordingly, Defendants' speculation about the possibility of multiple conspiracies is inadequate to refute Plaintiffs' showing

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[8] *See also* Declaration of Yin-Hua ("Asuka") Hsu.

[9] Defendants cite *State of Ala. v. Blue Bird Body Co., Inc.*, 573 F.2d 309 (5th Cir. 1978), but that case does not hold that a defendant can recast a conspiracy claim into one that is easier to defend. That case reversed the certification of a single, nationwide class because "it does appear from the limited record before us that the plaintiffs plan to proceed state by state and prove by varying evidence fifty different price-fixing conspiracies." *Id.* at 323. By contrast, Plaintiffs have pled and moved to certify classes based on a single alleged conspiracy to fix prices for LCD panels.

that the existence of the alleged conspiracy creates a common question that predominates over individual questions.

Third, Defendants' suggestion that varying details in the *criminal* convictions of many of the Defendants can be used to defeat or narrow *civil* liability is wrong. Plaintiffs' claims against Defendants are not circumscribed by the prosecutorial decisions made by the government in its criminal investigation into the TFT-LCD industry. *See, e.g., In re Vitamins Antitrust Litig.*, 2000 WL 1475705, at *18, No. Misc. 99-197 (D.D.C. May 9, 2000) ("the criminal guilty pleas do not establish boundaries for this civil litigation").[10] Several Defendants (and a named co-conspirator) here have made binding admissions before this Court that, at least since 2001, they violated United States antitrust laws by fixing LCD panel prices. These Defendants' criminal admissions cannot shield them from civil liability for anticompetitive conduct spanning a longer period of time, whether by virtue of the "late joinder" rule for conspiracies, or by evidence of their own conduct under the civil action standard of proof. *See In re Lower Lake Erie Iron Ore Antitrust Litig.*, 710 F.Supp. 152, 153 (E.D. Pa. 1989) ("one who joins an existing conspiracy is equally liable with the other conspirators for all damages occasioned by the conspiracy, including damages caused before joinder."); *Harmsen v. Smith*, 693 F.2d 932, 942 (9th Cir. 1982) (same).

2. The Applicability, If Any, Of The FTAIA Will Be Resolved With Common Evidence Of Defendants' Conduct

As a further attempt to manufacture individualized issues, Defendants contend that the Court's subject matter jurisdiction over the claims asserted in the Indirect-Purchaser State-Wide Classes cannot be determined on a class-wide basis. Specifically, the opposition suggests that because some class members bought LCD panels that took different paths into the United States, the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, creates issues requiring individual and not class-wide treatment.

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[10] *Accord In re Marine Hose Antitrust Litig.*, No. 08-MDL-1888, 2009 U.S. Dist. LEXIS 71020 (S.D. Fla. July 31, 2009) (certifying class running from 1985 to 2007 where related criminal conviction covered conduct from 1999 to 2007); *see also In re Polypropylene Antitrust Litig.*, 178 F.R.D. 603, 620 (N.D. Ga. 1997) ("the Court is aware of no authority that requires a civil antitrust plaintiff to plead only the facts of a prior criminal indictment. To the contrary, several cases flatly

Defendants never clearly explain why application of the FTAIA to the claims of the Indirect-Purchaser State-Wide Classes would involve individualized questions of fact or law. Defendants' own chart, purportedly listing the percentage of panels sold from 2001-06 with a "ship to" address outside of the U.S., reveals that "almost all" (Def. Opp. at 13) of the class members' purchases of LCD panels would be subject to the threatened FTAIA defense. *See* Chart, Def. Opp. at 13 (listing non-U.S. "ship to" percentages as 100%, 99%, 98%, 96%, 93% or 91%). Thus, even under Defendants' own flawed reasoning, the applicability of the FTAIA can be decided for "almost all" class members here in one fell swoop. *See Kruman v. Christie's Int'l*, 284 F.3d 384, 398 (2nd Cir. 2002) (the FTAIA "clearly reveals that its focus is not on the plaintiff's injury but on the defendant's conduct, which is regulated by the Sherman Act.").

Even if the FTAIA were applicable and relevant to the claims at issue here, Defendants would have to show that, despite expressing exclusive applicability to the Sherman Act, the statute should be read to also extend, impliedly, to the traditional state regulations at issue here.[11] *See California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) ("Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States."); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" (citations omitted)).[12]

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reject this theory." (citing *In re Aluminum Phosphide Antitrust Litig.*, 160 F.R.D. 609, 615-16 (D. Kan. 1995); *In re Folding Carton Antitrust Litig.*, 75 F.R.D. 727 (N.D. Ill. 1977))).

[11] Neither of the two reported cases to touch this question offer any guidance to this Court. *Amarel v. Connell*, 202 Cal.App.3d 137, 150 (1988), held that the question could not be resolved on a demurrer. *In re Intel Corp. Microprocessor Antitrust Litig.*, 476 F.Supp.2d 452 (D. Del. 2007), granted a motion to dismiss certain state-law monopoly claims under the FTAIA to the same extent granted in a parallel motion to dismiss federal monopoly claims under the FTAIA. The claims in the parallel motion were based upon the lost sales of foreign-manufactured microprocessors to *foreign* customers. *Id.* at 457-58 (citing *Advanced Micro Devices Inc. v. Intel Corp.*, 452 F.Supp.2d 555 (D. Del. 2006)). The procedural posture and differences in substantive allegations make this non-binding decision unpersuasive here.

[12] *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), a maritime taxation case, provides no substitute for the kind of close statutory preemption analysis that Defendants omitted. Citing to this case implies, without support, that the *ad valorem* property tax held unconstitutional for the risk

If and when Defendants bring a procedurally proper motion raising an FTAIA-based challenge to the claims asserted in the Indirect-Purchaser State-Wide Classes, Defendants will have to overcome several significant obstacles before usurping, under the guise of the FTAIA, the substantive laws of 23 sovereign jurisdictions. The FTAIA is irrelevant with respect to "import trade or import commerce."[13] *See* 15 U.S.C. § 6a; *F. Hoffman La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161-62 (2004). This exception applies where a defendant is engaged generally in foreign manufacture and import, without regard to the volume of those imports. *Carpet Group Int'l v. Oriental Rug Importers Ass'n Inc.*, 227 F.3d 62, 72 (3d Cir. 2000). Here, *every* Defendant (except, perhaps, Defendant Chunghwa) shipped *some* panels directly to the U.S. *See* Chart, Def. Opp. at 13. Neither the statute nor the case law requires more to trigger the "import trade or import commerce" exception and render the FTAIA irrelevant.

Even if the claims in the Indirect-Purchaser State-Wide Classes were found to be subject to the FTAIA's "domestic effects" test, the egregious facts of this case would easily meet the test.[14] In the words of the U.S. Justice Department, "[t]he participants in the LCD conspiracy committed a serious fraud upon American consumers by fixing the prices of a product that is in almost every American home."[15] The "direct, substantial and reasonably foreseeable" (15 U.S.C. § 6a(1)) effect of Defendants' alleged price-fixing conspiracy was the payment, by U.S. consumers, of higher prices

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of double-taxation there is akin to enforcing the antitrust and consumer protection laws. The analogy is inapposite.

[13] By its express terms, the FTAIA provides that the Sherman Act does not reach "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations" unless such trade or commerce has a "direct, substantial and reasonably foreseeable effect" on U.S. trade or commerce (often referred to as the "domestic effects test"). *Id.*

[14] The "domestic effects" cases cited by Defendants bear no resemblance to this case. *United Phosphorous Ltd. v. Angus Chem. Co.*, 131 F.Supp.2d 452 (N.D. Ill. 2001) concerned claims about prospective chemical manufacturing opportunities allegedly thwarted; the court held no actual effect on the plaintiff had obtained. *Papst Motoren GMbH v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F.Supp. 864, 869 (S.D.N.Y. 1986) involved a Japanese corporation's claims for conduct occurring solely in Japan, to the detriment of sales in Japan.

[15] Department of Justice Press Release, "Korean Executive Agrees to Plead Guilty and Serve One Year in Prison for Participation in LCD Price-Fixing Conspiracy" (April 27, 2009); Zahid Supp. Decl Ex. 4.

for LCD Products.[16] *See Metallgesellschaft AG v. Sumitomo Corp.*, 325 F.3d 836, 842 (7th Cir. 2003). Accordingly, inasmuch as it is relevant for purposes of this motion, Plaintiffs meet any "domestic effects" requirement under the FTAIA, and do so based on common evidence applicable to the classes as a whole.

B. Plaintiffs Have Met Their Burden of Proof In Establishing Common Impact On Indirect Purchasers Through Common Evidence

With respect to showing impact of the price-fixing conspiracy on members of the Indirect-Purchaser State-Wide Classes, the task before this Court is straightforward: "The operative question here is not whether the plaintiffs can establish class-wide impact, but whether class-wide impact may be proven by evidence common to all class members." *In re Bulk (Extruded) Graphite Products Antitrust Litig.*, 2006 WL 891362 at *10 (D.N.J. Apr. 4, 2006); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 340 (E.D. Mich. 2001) ("*Cardizem II*") ("To show impact is susceptible to class-wide proof, Plaintiffs are not required to show that the fact of injury actually exists for each class member.").

Here, Plaintiffs propose methods to show impact upon the class members by proof that is common to all of the classes. As demonstrated in Plaintiffs' supporting papers, the generalized evidence that will be presented on the antitrust impact issue includes qualitative economic opinions, the structure of the market, the characteristics of the industry, the homogeneity of the product, and the competitive nature of the distribution channels. Declaration of Janet S. Netz, Ph.D. ("Netz Decl.") at 32-90; *see also* exhibits submitted with Plaintiffs' moving papers, attached to Zahid Supp. Decl.

The methodologies for quantifying overcharges to the direct-purchaser, and for quantifying the magnitude of pass-through to the class members, utilize sound, reliable, and widely-accepted economic analysis. *See* generally Netz Decl. at Section VII. While Defendants are free to rebut the findings of Plaintiffs' methods, the time for doing so is at trial. What Defendants have failed to do, however, is show that the economic analyses proposed by Plaintiffs are *not* workable. *See In re*

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[16] For a collection of Defendants' documents illustrating the primacy of the U.S. market to their business activities, see Zahid Supp. Decl. Exs. 22-52.

EPDM Antitrust Litigation, 256 F.R.D. 82, 100 (D. Conn. 2009) ("The real question before this court is whether the plaintiffs have established a *workable* multiple regression equation, not whether plaintiffs' model actually *works*, because the issue at class certification is not which expert is the most credible, or the most accurate modeler, but rather have the plaintiffs demonstrated that there is a way to prove a class-wide measure of damages through generalized proof." (emphasis in original)).

Defendants challenge Plaintiffs' showing of impact on grounds that: (1) Dr. Netz has presented insufficient classwide formulas for assessing impact on the class members; and (2) Plaintiffs' impact analysis does not account for allegedly divergent distribution chains, pricing, sales, products and class members. Both of these arguments are without merit.

The basis for Defendants' challenges to Plaintiffs' ability to show impact using predominantly generalized proof is the Expert Report of Edward A. Snyder, Ph.D. ("Snyder Rpt."). Dean Snyder's disagreements with Dr. Netz are primarily focused on the merits of whether Plaintiffs can ultimately prove antitrust impact and damages. Similar arguments by Snyder were soundly rejected in *In re EPDM*, 256 F.R.D. at 94-95 ("Snyder's disagreements with Asher are primarily focused on the merits of whether the plaintiffs can ultimately demonstrate the three necessary elements of an antitrust claim on the merits. That is not the issue for this motion for class certification. I need only determine that the plaintiffs have demonstrated that the issue of antitrust impact is susceptible to proof applicable to the whole class."). Dean Snyder's analysis is further undermined by: (1) his failure to review Defendants' documents that were made available to him (Snyder Rpt. Appendix C, at 2; Snyder Tr. 38:6-40:3, 51:7-53:2 (Zahid Supp. Decl. Ex. 52)); (2) his reliance on observations from a very small, cherry-picked portion of data (Rebuttal Declaration of Janet S. Netz, Ph.D. ("Netz Rebuttal" at 4, 46-57, 69-70, 80); (3) his lack of understanding of the overcharge methods that Plaintiffs propose (*id.* at 66-68); and (4) his obliviousness to the overwhelming majority of antitrust economics literature and the voluminous documentary evidence from industry participants (*id.* at 67-68, 70, 85, 86). None of the criticisms directed by Dean Snyder against Plaintiffs' expert, Dr. Netz, have caused her to modify her conclusions. *See id.* at 4, 7-8, 13, 24, 26, 30, 41, 46, 51, 63, 68, 87.

Regardless of Defendants' attempt to misdirect this Court to minutiae and away from the big picture, the economic evidence is the same for all class members. Thus, this same economic evidence would be offered by the proposed class representatives and by every single individual class member to prove impact and the amount of damages if their claims were tried separately. Accordingly, the proof is common to all class members.

1. Dr. Netz Has Satisfactorily Demonstrated That Impact and Measure of Damages Can Be Established with Common Proof

Notwithstanding Defendants' attempts to confuse and complicate, the existence of the alleged horizontal price-fixing conspiracy is the *overriding* predominant issue in this class action, and impact on indirect purchasers where a price-fixing is established is presumed under California and the other states' laws (*see*, *infra*, Section III.B.3.). However, Plaintiffs have not rested on this presumption, but also have demonstrated through the work of Dr. Netz that impact and a reasonable measure of damages can be shown at trial by proof common to all members of the class. As this court evaluates Dr. Netz' work, it is appropriate to note that this is not the trial, where each conflicting assertion and view point must be resolved. At the class certification stage, Plaintiffs need only make a "threshold" showing that predominantly common proof will be used to establish that class members were injured, and "it is not necessary for Plaintiffs to show that every single class member was injured by the alleged price-fixing conspiracy." *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 353 (N.D. Cal. 2005). "Plaintiffs need only advance a plausible methodology to demonstrate that antitrust injury can be proven on a class-wide basis." *SRAM*, 2008 WL 4447592, at *5 (quotations omitted). Dr. Netz' work more than meets this modest requirement.

Regression analysis, the principal technique Dr. Netz employed, has long been accepted by courts as a valid scientific method for estimating overcharges in price-fixing cases. Courts routinely recognize that econometrics are useful and reliable for assessing impact and damages to class members. *See, e.g., In re Bulk [Extruded] Graphite Prods.*, 2006 WL 891362, at *15 (recognizing multiple regression analysis as "widely accepted" and "recognized by the Third Circuit as a means of proving impact and estimating damages.") (citing *In re Linerboard Antitrust Litigation*, 305 F.3d 145, 153-54 (3d Cir. 2002)); *Conwood Company, L.P. v. United States Tobacco Company*, 290 F.3d

768, 793 (6th Cir. 2002) (rejecting a Daubert challenge to the plaintiff's antitrust expert, noting that regression analysis is a "generally accepted method[] for proving antitrust damages."); *In re Propylene Carpet Antitrust Litig.*, 996 F.Supp. 18, 26 (N.D. Ga. 1997) (recognizing the value of using regression analysis in antitrust cases).

Dr. Netz used a sound methodology to determine whether the prices for LCD panels were related via a "price structure" and concluded that they were. Netz Decl. at VI.C. The existence of a price structure is evidence that Defendants' price-fixing conspiracy artificially inflated the prices paid by direct purchasers. The reason being, that a price structure indicates that prices for different products and to different direct purchasers are related by market forces, and an impact on one means an impact on all. Netz Rebuttal at 30. Dean Snyder agrees with this concept. *See* Zahid Supp. Decl. at Ex. 52 attaching Snyder Tr. 166:4-167:22.

Dr. Netz reached this conclusion after conducting a hedonic regression analysis that showed the majority of price variation at the direct level is explained by common factors. Netz Decl. at 67-68. She also calculated tens of thousands of price correlations that show that prices for LCD panels move together across different applications, different sizes, different resolutions, different customers, different models, and different manufacturers. *See* Netz Decl. Ex. 32.

Dr. Netz' regression analysis is based in large part on extensive data representing individual sales and purchase transactions, including third-party data collected from OEMs, distributors and retailers. Armed with this arsenal of data, Dr. Netz conducted 53 different pass-through studies: 5 complete pass-through studies that measure pass-through from Defendants down the channels of distribution to the end user; and 48 partial pass-through studies that measure pass-through in different segments of the distribution channel. Netz Rebuttal at 70-86. Dr. Netz ran separate regression analyses for each of the three LCD products at issue, which took into account panel size, panel manufacturer and resolution, when that data was available. *See* Netz Decl., Section VIII.A.2.

For the majority of the pass-through studies presented by Dr. Netz, the results are based on data representing individual transactions. *See id.* at 68-86.[17]

Dr. Netz' Rebuttal Declaration provides a detailed response to each and every criticism that defendants and their expert, Dean Snyder, have leveled at her work. She explains how her analysis of Dean Snyder's conclusions and her re-evaluation of her own methodolgy in light of his differing opinion has reinforced her findings that the alleged price-fixing conspiracy had a common impact on indirect purchaser class members, and most importantly, that the analysis used to make this determination "involves an examination of the conduct of Defendants and of the characteristics of the industry, not of individual class members." *Id.* at 2.

The structure of Dr. Netz' analysis is straightforward and uncomplicated. It involves using both data obtained from Defendants and from public sources to first answer "three questions, the sum of which lead to common impact on class members: (1) Was the cartel as alleged effective at increasing the price of LCD panels? (2) Was this impact common to all direct purchasers of LCD panels? (3) Was the overcharge imposed on direct purchasers passed through to end-users (class member) that purchased products containing LCD panels (monitors, notebooks, and TVs) such that the impact was common to all indirect purchasers?" *Id.* Her work demonstrated that the answer to all three questions was yes, from which she "concluded that there was common impact to class members." *Id.*

Dr. Netz then considered whether damages to class members could be quantified "using common evidence on a formulaic basis." *Id.* at 3. Looking at proof of overcharges to direct purchasers of LCD panels and the pass-through of those overcharges to consumers, she proffers three methods that can be used with common evidence to calculate classwide overcharges. *Id.* at 4.

Plaintiffs will not attempt a lengthy summary of Dr. Netz' Rebuttal Declaration in this Memorandum. Neither will Plaintiffs engage in a lengthy critique of Dean Snyder's opinion that

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[17] Defendants contend that Dean Snyder's analyses of different data sets using Dr. Netz' methodology yielded different pass-through rates. However, a closer look at the process shows that Dean Snyder's analyses are based upon only a small portion of the data (some of which is wrong) from which he then draws class-wide conclusions. Dr. Netz explains why Dean Snyder's results are invalid in her Rebuttal at pages 68-86.

demonstrating that Defendants' conspiracy resulted in overcharges that were passed-through to consumers is tantamount to impossible. The Court is respectfully referred to Dr. Netz' Rebuttal Declaration for this discussion. However, Plaintiffs will make a few legal and factual observations about Defendants' principal criticisms of Dr. Netz' regressions-- that her use of average prices, publicly available data, her treatment of certain variables and the periods she selected as competitive benchmarks are fatal flaws which undermine the validity of her analysis.

Averages. Defendants assert that Dr. Netz use of average data results in "regressions [that] further mask relevant differences in the individual transactional data." Def. Opp. at 37.[18] While Dr. Netz addresses this criticism as a matter of economics, Plaintiffs note that it has also been addressed and has been repeatedly rejected as a matter of law. The court in *Gordon v. Microsoft Corp.*, No. MC 00-5994, 2003 WL 23105550, at *3 (Minn. Dist. Ct. Dec. 15, 2003) ("*Gordon II*") explained this point:

> The damages question for trial is presumably not about whether a specific Microsoft price increase found its way through the distribution chain and resulted in an increase in the price paid by a specific class member. Rather, the question is how a series of Microsoft price increases, and/or a series of Microsoft failures to reduce prices, impacted the price each consumer paid. The question of what would have happened but for Microsoft's monopoly overcharge is a hypothetical, and a hypothetical question generally cannot be answered by historical data about what actually happened, but must often be answered by general principles about what generally tends to happen. Thus, average pass through rates appear reasonable and even necessary to prove damages here.

As the court in *Gordon II* noted, this view is consistent with federal decisions applying Rule 23. *See, e.g., Cardizem II*, 200 F.R.D. at 345; *In re NASDAQ Market Makers Antitrust Litig.*, 169 F.R.D. 493, 506 (S.D.N.Y. 1996); *Presidio Golf Club of San Francisco, Inc. v. National Linen*

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[18] Interestingly, Dean Snyder uses average prices in his own analysis, across the very same dimensions (models, customers, time periods) that he criticizes Dr. Netz for doing. Netz Rebuttal at 74. Dean Snyder is able to render opinions regarding pass-through from his use of average prices, but inconsistently claims that Dr. Netz' opinions based on average data are flawed. *See id.* at 71-73. Six of Dean Snyder's exhibits use this *exact* type of averaging of transactional data to make claims about the LCD industry. *Id.* at 43 (citing to Snyder Rpt. Exs. 17-19, 21.1, 21.2, 24). Most of these exhibits employ the same level of aggregation that Dean Snyder criticizes Dr. Netz for using in her correlations: the transactional prices each customer paid for a single product model, averaged over a particular month. *Id.* at 43. Likewise, Defendants themselves routinely used average selling prices (ASPs) of LCD panels to make pricing decisions. *See id.* at 73-74, fn. 302-303.

Supply Corp., No. C 71-431 SW, 1976 WL 1359, at *5 (N.D. Cal. Dec. 30, 1976). It is also supported by other state Microsoft cases.[19]

Defendants erroneously assert that a regression analysis that relies on averages can not support class certification because it can not demonstrate that each and every person within the class definition paid an illegal overcharge. This misconstrues the legal requirement for common proof of impact. It has long been the law that "[t]he fact that certain members of the class may not have been injured at all does not defeat class certification." *Rosack v. Volvo of America Corp.*, 131 Cal.App.3d 741, 754 (Cal. App. Ct. May 18, 1982).

As noted above, this concept was recently reaffirmed by the Seventh Circuit in *Kohen v. Pacific Investment Management Company LLC and PIMCO Funds*, *supra*, 571 F.3d at 677: "What is true is that a class will often include persons who have not been injured by the defendant's conduct. . . ... Such a possibility or indeed inevitability does not preclude class certification, [citations omitted].

Further, the instant cases arise under state antitrust laws, whose substantive provisions obviate even the theoretical need to determine the damages of any individual class member. The antitrust laws at issue provide that damages may be calculated on an aggregate basis. *See e.g.*, Cal. Bus. & Prof. Code § 16760(d) (aggregate calculation of damages under Cartwright Act expressly permitted); *Bruno v. Super Ct.*, 127 Cal.App.3d 120, 129 n.4 (1981) ("In many cases, such an aggregate calculation will be far more accurate than summing all individual claims.").

Third-Party Data. Dr. Netz made appropriate use of the DisplaySearch data—which, in this situation, were "more" and not "less" reliable than the data sets produced in the on-going discovery. Moreover, there is substantial evidence demonstrating how each and every Defendant regularly relies on DisplaySearch data in the normal course of its business. Netz Rebuttal fn.165. Further, Defendants' criticism of Dr. Netz for using DisplaySearch data instead of Defendants' allegedly "more precise" transactional data (Def. Opp. at 39) ignores the fact that one of the main reasons Dr.

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[19] *See, e.g., Microsoft I-V Cases*, J.C.C.P. No. 4106, 2000-2 Trade Cas. (CCH) ¶ 73,013 at 88,563-64 (Cal. Super. Ct. Aug. 29, 2000); *In re South Dakota Microsoft Antitrust Litig.*, 657 N.W.2d 668, 674

Netz had to rely on the third-party data was Defendants' failure to provide Plaintiffs with timely answers to their data interpretation questions.[20]

Variables. Defendants' argument that Dr. Netz uses different variables for different regressions is partly incorrect and wholly irrelevant. While it is correct that Dr. Netz' regressions used somewhat different control variables, the variables measure the same determinants of price in each case—cost of producing the product and characteristics of the product. Some variables simply cannot be included in every regression for technical reasons; regression analysis does not permit the inclusion of a variable if all observations have (or do not have) that particular characteristic. Dr. Netz explains that "[t]he available data determine which attributes I can control for in my regressions, and including these additional regressors does not affect the interpretation of the pass-through coefficient, nor does it constitute a different method." *See* Netz Rebuttal at 84. Dr. Netz included additional variables to control for different product attributes that may have an impact on the price level whenever there was sufficient available data. *See id.* at 84-85; *Netz* Decl. at Section VIII.A.2. By calculating pass-through separately for different product types, Dr. Netz was able to provide the pass-through rates by product type and reseller. *See* Netz Rebuttal at 83-86. Finally, there is no requirement that pass-through be estimated for every reseller. The use of a representative sample is accepted econometric practice, and can be used to prove pass-through for a group of similar resellers.

Competitive Benchmarks. Defendants' criticism of Dr. Netz' use of competitive benchmark periods to calculate overcharges to direct purchasers – "the before-and-after method" – is that her selection of data, while consistent with the class definition in this motion, is "inconsistent

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(S.D. 2003); *Sherwood v. Microsoft Corp.*, No. 99C-3562 (Tenn. Cir. Ct), 2003 WL 21780975, at *18 (Tenn. Ct. App. July 31, 2003).

[20] At the time Dr. Netz submitted her original Declaration, there were significant outstanding questions that were still unanswered by the majority of Defendants. Netz Rebuttal at 37-40, 45. Indeed, despite Plaintiffs' best efforts to obtain this information, several Defendants either have yet to provide answers to out-standing data questions or they just answered days ago. *Id.* AUO withheld its complete and corrected data set until it was too late to be of use to Dr. Netz in her initial report, even though Plaintiffs had been discussing deficiencies in its data with AUO for six months, and a corrected data set was provided to Dean Snyder more than two months before it was produced to Plaintiffs. *See* Zahid Supp. Decl. Ex. 7

with plaintiffs' allegations [in the Second Amended Complaint]." Def. Opp. at 41.[21] This is not a claim of a substantive deficiency in Dr. Netz' expert opinion, but rather a tweak at Plaintiffs' counsel: "Plaintiffs cannot contend that Dr. Netz' regression analyses are reliable and simultaneously allege that the 'competitive period[s]' on which she relies were not, in fact, competitive." *Id.*[22]

Dr. Netz selected two periods as competitive benchmarks, 1996 through 1998 and 2007 to the present, for reasons that are empirically sound. The evidence supporting Plaintiffs' motion for certification of the damages class indicates that Defendants' price-fixing agreement may not have begun to affect prices until 1999, hence the class requested begins with purchases made on January 1, 1999. The Department of Justice's investigation into LCD price-fixing became public at the end of 2006, which should have had a chilling effect on Defendants' illegal activities. Moreover, to the extent that either of these possible benchmark periods was not competitive, either because the conspiracy was effective prior to 1999 or because its effects may have lingered after the proposed class period, this would mean that the prices in those periods were actually higher than competitive prices would have been. Thus, the overcharge estimates would understate (to Defendants' benefit) the overcharges that actually occurred. Netz Rebuttal at 63-66.

2. The Alleged Divergent Market Conditions Are No Impediment To Assessing Pass-Through With Use Of Predominately Generalized Proof

This Court should reject Defendants' attempt to obscure their wrongful conduct by describing the purportedly divergent distribution chains, pricing levels, and sales practices. Defendants devote most of their briefing to arguing that the divergent market conditions predominate over common issues, precluding certification under Rule 23(b)(3). Their arguments regarding common proof of impact depend upon a series of legal and factual assertions that are

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[21] Defendants' reference (at 40:20-41:2) to Plaintiffs' counsel's refusal to comment on any potential further amendment to the Second Amended Complaint during colloquy at Dr. Netz' deposition is irrelevant. It is well settled that a complaint may be conformed to proof at any time before or after trial. Rule 15, F.R.Civ.P.

[22] Plaintiffs' class period may ultimately differ from what they alleged in their complaint. *Pitt v. City of Portsmouth, Va.*, 221 F.R.D. 438, 443 (E.D. Va. 2004); *In re Select Comfort Corp. Securities Litigation*, 202 F.R.D. 598, 604 (D. Minn. 2001); *Shin v. Cobb County Bd. of Educ.*, 248 F.3d 1061, 1065 (11th Cir. 2001).

either untrue or wildly overstated. Those propositions are that: (1) the complexity of the distribution chain and product differentiation preclude common proof of impact (Def. Opp. at 26, 30); (2) variations in price levels and in price negotiations preclude common proof of impact (*id.* at 29, 32-33); and (3) the changes in the LCD industry and distribution channels over the class period preclude common proof of impact (*id.* at 30).

a. Distribution Chain Complexity And Product Differentiation

"'[C]ontentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected.'" *Rosack*, 131 Cal.App.3d at 753 (1982) (quoting *In re Folding Carton*, 75 F.R.D. at 734*)*. Courts readily look past "surface distinctions" in "marketing mechanisms" in certifying indirect purchaser classes; "'[i]dentical products, uniform prices, and unitary distribution patterns are not indispensable for class certification in this context.'" *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal.App.3d 1341, 1350-51 (1987) (quoting *Shelter Realty Corp. v. Allied Maintenance Corp.*, 75 F.R.D. 34, 37 (S.D.N.Y. 1977)). As noted in *B.W.I.*, these principles have been applied to markets "characterized by individually negotiated prices, varying profit margins, and intense competition." 191 Cal.App.3d at 1351. *See In re Cipro Cases I & II*, 121 Cal.App.4th 402, 413 (2004). Microsoft unsuccessfully raised these arguments in opposition to class certification in California and numerous other state indirect purchaser suits, with respect to a distribution system similar to the one here involving computer manufacturers, distributors and retailers.[23]

Defendants and their expert obfuscate the true manner in which LCD panels flow from Defendants to class members. Def. Opp. at 23-28; Snyder Rpt. Exhs. 20.1-20.3. By dissecting the distribution chain into unnecessary channels and steps, Defendants attempt to portray an overly complex distribution channel. Defendants make false distinctions between firms having the same functions in the distribution channel whereas Defendants themselves and intermediary firms do not

make such distinctions in the real world. Netz Rebuttal at 54-57. Other than grossly exaggerating the number of steps in the distribution channel, Defendants have offered no economic explanation why the number of steps precludes a classwide determination of pass-through. In fact, Dr. Netz has put forth feasible methodology to show that the channel-length pass-through rate is greater than 100% regardless of the path or the number of steps the panel went through from Defendants to class members. Netz Decl. at 104-112; Netz Rebuttal at 57-59. Therefore, these false distinctions are meaningless to the analysis of whether there is a classwide impact.

In re Methionine Antitrust Litig., 204 F.R.D. 161 (N.D. Cal. 2001) ("*Methionine I*"), cited by Defendants, is readily distinguishable. Def. Opp. at 23. The class of indirect purchasers in that case included "indirect purchasers who are resellers at various levels in the distribution chain *and* indirect purchasers who are ultimate consumers (emphasis added)," in contrast to Plaintiffs' proposed nationwide and state classes of end users only. 204 F.R.D. at 162. Defendants' reliance on *In re Methionine Antitrust Litig.*, 2003 WL 22048232 (N.D. Cal. Aug. 26, 2003) ("*Methionine II*") is equally unavailing. There, the court granted defendants' motion to decertify the class because plaintiffs' expert's proposed method was "so insubstantial as to amount to no method at all." 2003 WL 22048232, at *5. Rather than basing its reasoning on the complex characteristics of the methionine market, as Defendants suggest, the court clearly identified plaintiffs' expert's failure to propose an adequate methodology as the primary basis for its decision. *Id.* at *4-5.

Defendants erroneously contend that Dr. Netz' methodology for determining class-wide proof of impact is "similar" to that of the plaintiff's expert in *Somers v. Apple*, 2009 WL 2137148 (N.D. Cal. July 17, 2009). In *Somers*, the court concluded that the plaintiff failed to meet her burden of establishing a reliable method for proving common impact because of the failures of its expert, who: "has done nothing more than make a vague five-paragraph long collection of proposals for accomplishing what the Court sees as a daunting task"; whose testimony was "limited to making

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[23] *See, e.g., Microsoft I-V Cases*, 2000-2 Trade Cas. (CCH) ¶ 73,013 at 88,561, Ex. 9 to plaintiffs' previously-submitted "Request for Judicial Notice" ("RJN"); *In re Fla. Microsoft Antitrust Litig.*, No. 99-27340, 2002 WL 31423620, at *13-15 (Fla. Cir. Ct. Aug. 26, 2002); *Gordon v. Microsoft Corp.*, No. 00-5994, 2001 WL 366432, at *12 (Minn. Dist. Ct. Mar. 30, 2001), *review denied*, 645 N.W.2d 393 (Minn. 2002), *opinion on remand*, 2003 WL 23105552 (Minn. Dist. Ct. Mar. 14, 2003)

unspecified proposals as to how he might be able to prove damages"; who "proffered no specific economic model and has examined no set of data, and has never accomplished what he purports to accomplish in an indirect purchaser antitrust class action"; and who did not address "how his method would address the problem of overcharge pass-through from iPod resellers to members of the putative class." 2009 WL 2137148, at *7. In stark contrast to the *Somers* plaintiff's expert, Dr. Netz has (1) submitted a comprehensive expert report of her analysis of the relevant LCD market; (2) opined on the feasibility of calculating the overcharge to indirect purchasers of LCD products; (3) proposed several specific methodologies for determining class-wide impact and damages; and (4) conducted 53 separate pass-through analyses measuring pass through from Defendants to the class members, as well as within discrete portions of the distribution channel, using individual transactional sales and purchase data obtained from Defendants and third parties; and (5) examined a wide range of data produced in this litigation to perform regression analyses.

Defendants also ask this Court to ignore the overwhelming evidence of product homogeneity. In doing so, Defendants grossly exaggerate the level of product differences and conflate the distinct concepts of customization and product differentiation. Def. Opp. at 31-32. As Dr. Netz states, products may be customized to buyers' specifications and still be homogeneous. Netz Rebuttal at 15-16. Not only do Defendants' own records and business practices show that they themselves have treated LCD panels as essentially interchangeable commodities, Defendants acted in concert to standardize key characteristics of LCD panels, in order to enhance panel fungibility.[24]

("*Gordon I*").

[24] *See* Netz Decl. at 11 and nn.38-39; *see also* Declaration of Morgan Tai ¶ 5 [redacted]

Defendants' reliance on *In re Graphics Processing Units (GPUs) Antitrust Litig.*, 253 F.R.D. 478 (N.D. Cal. 2008), is also misplaced. Their warning that the Court would be obliged to analyze "for each purchase all the individual pricing decisions by every reseller at each level of the distribution chain" is not well taken in light of the unique factual circumstances of GPUs. Judge Alsup noted the "highly heterogeneous" nature of the market for GPU products: "Hundreds if not thousands of GPU products were sold during the limitations period. As stated, each graphics product varied not only as to performance level but also as to its ultimate application. Many of the graphics products sold were particularly customized to the needs of a specific purchaser, meaning they could not be interchanged with any other GPU product sold by defendants.... In short, these products were *not* fungible commodities." 253 F.R.D. at 49 (emphasis in original). In contrast, LCD panels are highly fungible, often interchangeable, and largely homogeneous. Moreover, Dr. Netz has thoroughly explained the applicability of her proposed regressions on a class-wide basis, and has applied data produced in this case to formulate those analyses.[25] Another significant distinction between *LCDs* and *GPUs*, is the fact that the court there elected to disregard the *Microsoft* class certification cases—despite acknowledging that the *Microsoft* cases "dealt with a market not unlike the one at issue," and that the "vast majority" of state courts with jurisdiction over the *Microsoft* cases certified the indirect-purchaser classes. *GPUs*, 253 F.R.D. at 500. The court

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[25] Defendants cite *In re Industrial Diamonds Antitrust Litig.*, 167 F.R.D. 374 (S.D.N.Y 1996) for the proposition that individual issues regarding impact predominate because the defendants did not use price lists for their products. In *Industrial Diamonds*, the court held that plaintiffs had established predominance with respect to those products which had list prices, and those products whose individually-negotiated prices were related to list prices. *Id.* at 383-84. However, the court found predominance lacking with regard to the products whose prices, the parties agreed, were individually negotiated without regard to list prices. *Id.* at 384.

Unlike the plaintiffs in *Industrial Diamonds*, plaintiffs in the instant case do not agree that defendants' prices were unrelated to list prices. On the contrary, plaintiffs contend that defendants did maintain price lists for their products, which either set the prices for panels or formed the basis for price negotiations. According to Dr. Netz, [redacted] Netz Decl. at 63-65. *See also NASDAQ* 169 F.R.D. at 523 ("Proof of a conspiracy to establish a 'base' price would establish at least the fact of [class-wide] damage, even if the extent of the actual damages suffered by the plaintiffs would vary.") (citation omitted).

considered the *Microsoft* litigation to be "*sui generis*" because the prior government adjudication against Microsoft constituted "extrinsic evidence of harm," while in *GPUs*, the government ended its investigation without returning any indictments. *Id.* Certainly, here, in light of the criminal guilty pleas (Microsoft never pleaded guilty to a criminal violation) and the government's ongoing investigation, there is no question that the *Microsoft* cases are persuasive authority on class certification of the state-law damages classes.

b. Variations In Price Levels And Negotiations

Defendants' arguments that class member negotiating ability and value added to LCD products as they move through the distribution chain require individualized proof of impact lack merit. Def. Opp. at 29, 32-33. The fact that identical products might have been sold for different prices does not defeat class certification because pass-through is consistent with price variation across firms and/or products, and discounts or sales pricing. Netz Decl. Section VI.D.2; Netz Rebuttal at 59-62. As explained in *In re Commercial Tissue Prods. Antitrust Litig.*, 183 F.R.D. 589, 595 (N.D. Fla. 1998) (citations omitted):

> First, many cases have held that even if there is considerable individual variety in pricing because of individual price negotiations, class plaintiffs may succeed in proving classwide impact by showing that the minimum baseline for beginning negotiations, or the range of prices which resulted from negotiation, was artificially raised (or slowed in its descent) by the collusive actions of the defendants. In the instant case, as in the *Corrugated Carton*, *NASDAQ*, *Plywood*, *Glassine* and *Small Bags* cases, the plaintiffs allege that any individual price negotiations for commercial tissue products began from price lists or guidelines which plaintiffs allege were artificially and unlawfully inflated by the conspiracy. Thus defendants' argument that diversity of pricing destroys predominance is unavailing.

Accord, e.g., In re Cardizem CD Antitrust Litig., 200 F.R.D. 297, 319 (E.D. Mich. 2001) ("*Cardizem I*") (a case brought under, *inter alia*, Michigan law); *Industrial Diamonds Antitrust Litig.*, 167 F.R.D. at 378; *NASDAQ.*, 169 F.R.D. at 523 ("[n]either a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that . . . the price range was affected generally.").

The result is the same in indirect-purchaser class actions in state court. Illustrative in this respect is *Romero v. Philip Morris, Inc.*, 137 N.M. 229, 109 P.3d 768 (N.M.App. 2005), where the

defendants showed different pricing strategies among cigarette retailers, different prices paid for cigarettes by class representatives, and "retail price data collected from a sample of twenty-five stores between 1996 and 2000 show[ing] that retail cigarette prices for the same brand varied as much as seventy-five percent from one New Mexico retail outlet to another." *Id.* at 235, 109 P.3d at 774. The court nonetheless affirmed certification of an indirect purchaser class. *Id.* at 256, 109 P.3d at 795.

Here, regardless of variations in prices paid by class members, Dr. Netz' analysis clearly demonstrates that the overall price for LCD panels increased as a result of Defendants' alleged illegal conduct.[26] Even assuming, *arguendo*, that the price differentials will necessarily result in individualized inquiries, such individualized examinations "will relate to the quantum of damages, not the fact of injury." *In re Terazosin Hydrochloride*, 220 F.R.D. 672, 697 (S.D. Fla. 2004) (quoting *Cardizem I*, 200 F.R.D. at 307).[27]

Defendants cite *City of St. Paul v. FMC Corp.*, 1990 WL 259683 (D. Minn. Nov. 14, 1990) to argue that "[a]s intermediaries add value to a product, it becomes increasingly difficult to determine whether a price change is attributable to an alleged overcharge for the original product or to differences in value intermediaries added later." Def. Opp. at 32. There, the court concluded that certification of the indirect purchaser class was inappropriate "[b]ecause substantial value is added to the chlorine at various points in the chain of distribution." The same is not true for LCD panels that are ultimately incorporated into LCD products as a primary or significant cost component and the panels retain their value through the course of distribution. 1990 WL 259683, at *2; *see also Gordon I*, 2001 WL 366432 at *10.

c. Change In The LCD Market Over Time

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[26] *See* Netz Decl. at 61-65 (Section VI-C-1-b): "Negotiations started from a common basis") and n.180; 66 (Section VI-C-2: "A price structure exists") and nn.191-93; Netz Rebuttal at 58-59.

[27] Defendants cite *California v. Infineon Techs. AG*, 2008 WL 4155665 (N.D. Cal. Sept. 5, 2008). However, the *Infineon* court's concerns centered on the difficulties raised by the proposed class, which comprised indirect and direct purchasers. The court denied certification of the class because, notwithstanding the presence of these "widely divergent factors," plaintiff's expert failed to explain "how his proposed methodologies would trace any pass-through to these ultimate class members with recourse to common proof." *Id.* at *10.

Defendants' assertion that Plaintiffs' proposed methodology for establishing common proof of class-wide impact fails to "account for changes in the LCD markets over time" is incorrect and unsupported by their authorities. Def. Opp. At 30.[28] *In re Fresh Del Monte Pineapples Antitrust Litig.*, 2008 WL 5661873 (S.D.N.Y. Feb. 20, 2008), the court denied certification, in part, based on its finding that plaintiffs' expert failed to present a reliable methodology for determining class-wide damages because plaintiffs "declined to offer evidence" to support any such methodology, and because plaintiff's expert's damages report assumed a uniform pass-through rate with respect to overcharges to indirect purchasers. 2008 WL 5661873, at *5-6. In contrast, Dr. Netz evaluated whether cartel members had sufficient control of the market to successfully increase panel prices above competitive levels by examining the portion of the market controlled by cartel members over time (Netz Decl. 21-22, 35; Netz Rebuttal at 8-9), and by examining the extent to which alternative technologies were available as substitutes to direct purchasers (Netz Decl. 35; Netz Rebuttal at 9-11). Dr. Netz considered whether the characteristics of the industry facilitated the formation and operation of a cartel (Netz Decl. 37-51; Netz Rebuttal at 11-23). After thorough evaluations and careful analyses, Dr. Netz concluded that Defendants' cartel was effective at increasing the prices of LCD panels above competitive levels throughout the class period. This determination, along with the rest of her analyses, led her to conclude that there was common impact to class members.

3. State Substantive Laws Regarding Inference Of Impact Apply

Defendants argue that no inference of common impact is appropriate because the inference is procedural, not substantive, and therefore governed by federal rather than state law. Defendants are wrong and, not surprisingly, do not cite a single case supporting their position

"Under the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive'" *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446-47 (1959); *Johnston v. Pierce Packing Co.*, 550 F.2d 474, 476, n.1 (9th Cir. 1977); *U.S. v. McCombs*, 30 F.3d 310, 323-24 (2d Cir. 1994).

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[28] The Alabama State court's decision in *McCarter v. Abbott Labs.*, 1993 WL 13011463 (Ala. Cir. Ct. Apr. 9, 1993),cited by the Defendants, is not relevant or controlling on the point for which it is cited as the Plaintiffs have not asked this Court to certify an Alabama state class. *See In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 276 (D. Mass. 2004) (court must examine plaintiffs' claims under governing state law).

("Presumptions and other matters related to the burden of proof are considered matters of substantive law, governed by the law of the jurisdiction whose substantive law applies to the merits of the question in issue.") *Computer Economics, Inc. v. Gartner Group, Inc.*, 50 F.Supp.2d 980, 990 (S.D. Cal. 1999).

That rule applies to the inference of common impact applicable to state antitrust claims. As Judge Hornby held in *In re New Motor Vehicles Canadian Export Antitrust Litig*, 235 F.R.D. 127 (D. Me. 2006), *rev'd on other grounds*, 522 F.3d 6 (1st Cir. 2008): "California substantive antitrust law permits an inference of antitrust impact, even as to indirect purchasers, from the existence of the conspiracy." *Id.* at 133. While reversing on other grounds, the First Circuit stated that the inference of common impact is substantive and therefore governed by state law. *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d at 22 & n.12 (recognizing that "what level of proof of consumer impact each state required and what inferences were acceptable to show impact" were "issues of state substantive law.")[29] Defendants cite no contrary authority.[30]

Defendants erroneously assert that the inference of class-wide impact under California law "applies only if the product reaches the end-user unchanged from its original sale." Def. Opp. at 35. Defendants' assertion is not supported by the two cases they cite: *Cipro* and *B.W.I. B.W.I* .'s holding that the inference of common impact applied to Cartwright Act indirect purchaser cases was not limited to cases where the product was unchanged. "[W]hen a conspiracy to fix prices has been

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[29] The state law inference of common impact applies specifically to antitrust actions, which dispels any doubt that it is substantive. *See Cole v. Chevron USA, Inc.*, 554 F.Supp.2d 655, 670-71 (S.D. Miss. 2007) ("Where, as here, the state rule at issue is limited to a particular substantive area of law, the case is especially strong for applying the state rule."); *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F.Supp.2d 404, 416 (D. Del. 2007) ("[A] contrary result would alter the character of this litigation and provide a result that is at odds with the result that would be reached by the respective state courts had this action been brought in those jurisdictions.").

[30] Defendants' carefully edited quotation from *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984) is not persuasive. *Affholder* addressed the far different situation where state law is directly contrary to one of the Federal Rules of Civil Procedure: "When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice . . . the court need not consider whether *Erie* commands the enforcement of an allegedly substantive state rule seemingly in conflict with the federal procedural rule." *Id.* at 307-08. Here no Federal Rule covers the substantive issue of inference of common impact in antitrust cases. Moreover, California law is fully consistent with federal law on this issue. *See B.W.I*, 191 Cal.App.3d at 1350-51.

proven and plaintiffs have established they purchased the price fixed goods or services, the jury can infer plaintiffs were damaged." 191 Cal.App.3d at 1351. In fact, the inference has been broadly applied in antitrust cases with markets "characterized by individually negotiated prices, varying profit margins, and intense competition." *Id.*

Cipro also did not limit the inference to cases where the product is sold unchanged. *Cipro*, like *B.W.I*, recognized the broad applicability of the inference and held that "injury to the class may be assumed when a horizontal market wide restraint of trade is alleged." 121 Cal.App.4th at 413. As *Cipro* explained, this inference "is ordinarily a permissible assumption in cases where consumers have purchased products in an anticompetitive market, even if some consumers did not actually have to pay the overcharge because of their individual circumstances." *Id.* (citing *B.W.I.*, 191 Cal.App.3d at 1350-53).

Cipro distinguished two cases declining to apply the inference of common impact: "*Global Minerals* and *J.P. Morgan* declined to apply this assumption to the particular facts of those cases, because of the unique peculiarities of the copper market and the dual roles played by members of the class as both buyers and sellers." 121 Cal.App.4th at 416. The inference did not apply in *Global Minerals* and *J.P. Morgan* because those cases were brought on behalf of copper purchasers and "there was no showing that changes in COMEX [copper future] prices necessarily caused changes in the physical or cash copper markets." *Id.* at 415.

Here, as in *B.W.I.* and *Cipro*, the effects of the price-fixing are not obscured by any difference between the price-fixed product and the product purchased by the class members. The class members here purchased LCD panels which are the "the price fixed goods or services," as identifiable, discrete physical objects that do not change form or become an indistinguishable part of the TVs, computer monitors, and laptops. *B.W.I.*, 191 Cal.App.3d at 351. Moreover, as in *Cipro,* the extensive evidence and comprehensive expert testimony clearly establishes that Defendants' horizontal restraints caused higher prices to end-users.[31]

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[31] *Cipro* distinguished the *Global Minerals* and *J.P. Morgan* cases based on myriad "unique peculiarities" including 1) the classes in those cases included both end-users and resellers; 2) there was no showing that alleged price-fixing in the market for copper futures affected prices in the

Defendants' argument that Minnesota does not recognize the inference of impact is also incorrect. In *Gordon I*, the court held that "in 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." 2001 WL 366432, at *11 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969)). *Gordon I* thus clearly involved an inference of common impact and damage, not merely the amount of damages. As *Gordon I* recognized, this inference effectuates the intent of the Minnesota Legislature in enacting a repealer antitrust statute by establishing a standard of proof that indirect purchasers can meet. *Id.* at *4. In applying the inference, *Gordon I* relied on expert testimony, similar to Plaintiffs' expert's here, that the structure of the market was such that overcharges would be passed on to indirect purchasers. *Id.* at *8-10.

Defendants' attempt to distinguish *Florida Microsoft* fails for similar reasons. In *Florida Microsoft*, the inference of impact was appropriate because it was supported by expert testimony setting forth "reasonable methods, based on standard economic principles, for establishing with common evidence that each class member was impacted to some extent by Microsoft's alleged behavior." 2002 WL 31423620 at *14. Here, as in *Florida Microsoft*, Plaintiffs do not ask the Court to merely assume impact in a vacuum but instead present sound expert economist methodologies through which impact can be proved by common evidence in a market conducive to passing through antitrust overcharges.[32]

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market for copper; 3) the classes were vague and overbroad; 4) differences in state law prevented certification of a nationwide class including both repealer and non-repealer states and 5) plaintiffs' economist experts merely "assumed causation of injury for purposes of his analysis." 121 Cal.App.4th at 415-16. Here as in *Cipro*, none of those factors could prevent application of the inference of class-wide impact or the predominance of common issues.

[32] *Florida Microsoft* cited but reached contrary result from *Execu-Tech Business Systems, Inc. v. Appleton Papers Inc.*, 743 So.2d 19 (Fla. App. 1999), relied upon by Defendants, where the plaintiff offered no expert testimony of any "reasonable methodology for generalized proof of class wide impact and damages." *Id.* at 22. *Relafen,* also cited by Defendants, confirms the distinction between *Florida Microsoft*, where the inference was applied, and *Execu-Tech*, where it was not. The plaintiff in *Execu-Tech* failed to offer any viable methodology for common proof. *Execu-Tech* is inapposite to this case where Plaintiffs have offered sound methodologies for showing impact by common evidence presented by Dr. Netz.

Application of state substantive law in motions for class certification of state law claims is even more critical since CAFA was enacted because state antitrust and unfair competition claims are now litigated almost exclusively in federal court. The Ninth Circuit's recent decision in *Yokoyama v. Midland Nat. Life Ins. Co.*, ___ F.3d___, 2009 WL 2634770 (9th Cir. Aug. 28, 2009) underscores the importance of a state's policy of favoring class action enforcement of statutory claims in deciding class certification under Rule 23. In *Yokoyama*, the Ninth Circuit reversed denial of certification of a state unfair competition claim where the district court failed to apply the state substantive rule allowing deception to be proved on an objective class-wide basis. As the Ninth Circuit noted, these state law substantive standards had to be honored in order to effectuate the intent of the state legislature favoring class certification of consumer protection claims:

> Hawaii's consumer protection laws expressly consider class actions to be appropriate enforcement mechanisms. Haw.Rev.Stat. § 480 13(c) ("The remedies provided in subsections (a) and (b) shall be applied in class action and de facto class action lawsuits or proceedings, including actions brought on behalf of direct or indirect purchasers...."). Hawaii's courts recognize that its consumer protection laws can be enforced through class actions. *See Fuller v. Pac. Med. Collections, Inc.*, 78 Hawai'i 213, 891 P.2d 300, 309 (Haw.App.1995). Retaining the class action feature likely helps bolster the "flexibility" of the consumer protection laws.

Id. at *5

Here, similarly, proper application by federal courts of state substantive law governing the inference of antitrust impact and damages effectuates the state policy favoring class action enforcement of state antitrust laws. The antitrust statutes enacted by the Indirect Purchaser States represent "a legislative mandate to avoid interpreting procedural requirements in such a way as would thwart the legislative intent ... to retain the availability of indirect purchaser suits as a viable and effective means of enforcing [state] antitrust laws." *B.W.I.*, 191 Cal.App.3d at 1355 (quoting *Union Carbide Corp. v. Superior Court*, 36 Cal.3d 15, 21-22 (1984)). Here, as is most often the case, indirect purchaser claims are only viable and effective if class certification is granted. Application of the substantive state law inference of common impact effectuates this legislative intent of viable enforcement of state antitrust and unfair competition claims.

The viability of a state law class action should not depend on the federal forum because it would "provide a result that is at odds with the result that would be reached by the respective state

courts had this action been brought in those jurisdictions." *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F.Supp.2d 404, 416 (D. Del. 2007).

C. Plaintiffs Have Adequately Shown That Damages Can Be Measured Through Common Proof

As discussed in Section III.B, *supra*, Plaintiffs have met their burden of proof in establishing that impact can be shown using predominately common proof. "Once an antitrust violation and its causal relation to plaintiffs' injury have been established, the burden of proving the amount of damages is much less severe." *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1579 (11th Cir. 1983); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995). The fact that the damage calculation may involve individual analysis is not by itself sufficient to preclude certification when liability can be determined on a class-wide basis. *See SRAM,* 2008 WL 4447592, at *6. At the class certification stage, a plaintiff need only offer a method for calculating aggregate damages for overcharges paid by the class members; damages need not be calculated at the class member level. *See Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 246 F.R.D. 293, 312-13 (D.D.C. 2007) (recognizing that aggregate class damage is a feasible approach and has been widely used in antitrust, securities, and other class actions) (citing *NASDAQ*, 169 F.R.D. at 524-26). Further, California law unequivocally provides that class certification is proper without proof that each class member was overcharged or the amount of the overcharge. *See, e.g., Bruno, 1*27 Cal.App.3d at 129 n.4 ("In many cases such an aggregate calculation will be far more accurate than summing all individual claims"); *Cipro*, 121 Cal.App.4th at 413 (class certification was appropriate where "some consumers did not actually have to pay the overcharge because of their individual circumstances.") (citations omitted).

Yet, Defendants chose to ignore these legal principles, and argue that Dr. Netz must be proposing a "fluid recovery" formula for damages. Def. Opp. at 42-43. Even so, fluid recovery is permitted under the laws of California. For the California state-wide damages class, the total overcharge can be placed in a fluid recovery fund and, after payment to those class members who prove their individual claims, the residue can be distributed as authorized by statute. *See Corbett v. Superior Court*, 101 Cal.App.4th 649, 667-68 (2002); Code Civ. Proc. § 384. Regardless,

Defendants' argument is unpersuasive at this juncture. As is appropriate for class certification under the case law cited above, Dr. Netz' methodology adequately calculates the total damages on a formulaic basis. In fact, Dr. Netz explained several mainstream methodologies that can be utilized to measure the portion of the overcharges that is passed through to end-purchasers. Netz Decl. at 102-114. Her analysis evidences the feasibility of calculating the overcharge and estimating pass-through, which permits formulaic calculation of damages with reasonable certainty. *Id.* at 115-117.

The Defendants appear to be arguing that the case would be unmanageable as a class action because eventually class members would have to submit individual damages claims. Def. Opp. at 41-45. But courts manage that process in class actions all the time. *See, e.g., South Carolina Nat. Bank v. Stone*, 139 F.R.D. 325, 331 (D.S.C. 1991) ("The only individual issue present in this case is the computation of each class member's damages, which are easily computed by having the class members supply the necessary purchase and sale information on a proof of claim form.").

Moreover, because manageability is subsumed within the superiority requirement of Rule 23(b)(3), manageability difficulties cannot defeat certification unless there is another more manageable method of litigating the claims is available. *In re NASDAQ*, 169 F.R.D. at 528 ("difficulties in management are of significance only if they make the class action a less 'fair and efficient' method of adjudication than other available techniques."); *In re Sugar Indus.*, 73 F.R.D. at 358 ("Manageability problems are significant only if they create a situation that is less fair and efficient than other available techniques . . ."). Defendants fail to argue that there is any more manageable method for adjudicating the class members' claims than a class action. Indeed, class litigation is the only viable method adjudicating these claims. Without class certification, a majority of class members would likely abandon their claims even though Defendants' liability in fixing the LCD prices can clearly be proven.

Here, because Plaintiffs have established that common issues of antitrust impact will predominate and presented expert methodology for proving damages through common evidence, damage issues "will not create manageability problems." *In re Vitamins*, 209 F.R.D. at 270.[33]

IV. THE PROPOSED CLASSES ARE ASCERTAINABLE UNDER RULE 23(A)

In arguing that the Classes are not ascertainable, Defendants misstate the law and ignore the fact that, as part of the claims process, it will be relatively simple to determine whether a claimant purchased an LCD product containing a panel made by one of the Defendants. The Classes are defined using objective criteria, which is the primary requirement for ascertainability.[34] *Whiteway v. FedEx Kinko's Office and Print Services*, 2006 WL 2642528, at *3 (N.D. Cal. Sep. 14, 2006) ("An identifiable class exists if its members can be ascertained by reference to objective criteria."); *Carrier v. American Bankers Life Assur. Co. of Florida*, 2008 WL 312657, at *5-6 (D.N.H. Feb. 1, 2008) (certification has only been denied based on ascertainability where definition was subjective or indefinite); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litig.*, 209 F.R.D. 185, 337 (S.D.N.Y. 2007).

Where, as here, the class is objectively defined, identification of the class members is a matter for the claims process, not class certification. As Judge Posner recently stated:

> What is true is that a class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable

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[33] The cases Defendants cite do not support Defendants' argument. Defendants rely on *Windham v. American Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977) and *Abrams v. Interco Inc.*, 719 F.2d 23 (2d Cir. 1983)—older cases that have been widely and soundly distinguished on grounds applicable here. *See Potash,* 159 F.R.D. at 696 n.17 (distinguishing *Windham*); *In re Folding Carton Antitrust Litig.*, 88 F.R.D. 211, 217 (N.D. Ill. 1980) (same); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001) (distinguishing *Abrams* and holding that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored...."). *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare*, 247 F.R.D. 156 (C.D. Cal. 2007) and *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974) also do not help Defendants. *Allied Orthopedic Appliances, Inc.* did not involve a horizontal price-fixing conspiracy. *Hotel Telephone* is inapposite because it involved a suit against over 600 defendants with extreme manageability difficulties not present here. *See, e.g., Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 435 (D.N.M. 1988) (declining to follow *Hotel Telephone* because it involved "virtually every manageability question possible").

[34] [redacted] Netz Rebuttal at 88; fn. 356. Each product either has one of Defendants' LCD panels or it does not; the definition is not subjective.

> because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification, despite statements in some cases that it must be reasonably clear at the outset that all class members were injured by the defendant's conduct.

Kohen, 571 F.3d at 677 (internal citations omitted). *See also In re OSB Antitrust Litig.*, 2007 WL 2253418, at *9 (E.D. Pa. Aug. 3, 2007) ("Because the proposed class *need only be ascertainable by some objective criteria, not actually ascertained, challenges to individual claims based on class membership may be resolved at the claims phase of the litigation.*") (emphasis added).

Defendants do not dispute that the Classes here are defined using purely objective criteria. Moreover, Defendants make no showing that identifying class members during the claims process would be administratively unfeasible.[35] Determination of class membership using information submitted by class members with their claims will be straightforward and objective.

Whether a claimant is a class member will be determined by whether the product she bought contains an LCD panel made by a Defendant, a determination that can be readily made based on the model number or serial number of the product submitted by each claimant.[36] Typically, this determination can be made based on the model number alone because most models contain panels made by a single manufacturer.[37] Defendants rely exclusively on data showing that certain OEMs

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[35] Defendants cite only to the Snyder declaration which states: "I am not aware of any sources of information available to end users which consistently identify the entity that manufactured the LCD panel contained in the finished product." Snyder Rpt. ¶ 35. Dean Snyder's ignorance is meaningless, however, because he is an economist who has no expertise on this issue.

[36] Ascertainability does not require determining which Defendant made the panel since each Defendant is liable for the overcharges by each other Defendant. *In re NASDAQ Market Makers Antitrust Litig.*, 169 F.R.D. 493, 506 (S.D.N.Y. 1996) (rejecting challenge to ascertainability and certifying antitrust class where claimants may be required to make evidentiary submissions with their claim to determine whether they used a non-defendant broker).

[37] For example, TFT Central (available at http://www.tftcentral.co.uk/panelsearch.htm) lists 1,945 monitor models. It has panel manufacturer information for 829 monitors. Of the panels for which they have manufacturer information, only 60 indicate that the given monitor model was manufactured using a variety of panels (that is, for 769 of the 829 panels, knowing the monitor model is sufficient to identify the panel manufacturer). Importantly, of the 60 monitors indicating a variety of panels were used for the model, only 4 used panels from a combination of defendants and non-defendants. Thus, for 825 of the 829 panels for which TFT Central has manufacturer data, knowing the monitor brand and model is sufficient to ascertain class membership.

bought panels from different manufacturers without any evidence that panels from different manufacturers were used in the same models of LCD products. Even for the very few models using panels from different panel manufacturers, however, the model number will determine class membership unless the model used both Defendant and non-Defendant panels.[38]

Defendants grossly exaggerate the difficulty of determining whether a model with more than one source of panels includes a panel made by one of the Defendants. Defendants' suggestion that determining panel origin would be complex and require tracing the product through the entire chain of distribution is erroneous.[39] The OEMs maintain records identifying the panel source by model and serial number for service and warranty purposes and to enable tracking of common mode failures. For example, Defendants rely heavily on data about Dell notebooks as an example of unascertainable products. Dell's website, however, allows a consumer to identify the maker of the panel in her laptop simply by inputting the service tag number displayed on the notebook itself.[40] Owners of Lenovo notebooks can also use the company website to look up the panel maker.[41] Defendants also rely on data showing that Samsung used multiple panel sources for LCD televisions.

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[38] *See* Declaration of Fu-Chia ("Morgan") Tai ¶¶5, 8 [redacted]

[39] *See* Def. Opp. at 52:17-53:2. OEMs maintain records of panel sources by model number and serial number. Thus, Defendants' assertion that variations in distribution channels will make class member identification harder is incorrect. Obtaining the necessary information from the OEMs will not be difficult.

[40] *See* www.dell.com. Click on the "support" link. This takes you to http://support.dell.com/support/index.aspx?~ck=pn. Click on "system configuration." Enter the "Service Tag" code for your Dell laptop. The original configuration of your laptop is displayed, showing all major components. The LCD panel size and manufacturer are listed.

[41] *See* http://www-307.ibm.com/pc/support/site.wss/warrantyLookup.do?type=8932&serial=l3m4722&warrantySubmit2.x=0&warrantySubmit2.y=0&template=%2Fresults%2FpartsLookupResults.vm&country=897&iws=off.

Models of Samsung LCD televisions with different panel sources, however, have a sticker showing the "version number" which identifies the panel maker by alphabetic code.[42]

While it would be relatively easy for class members to determine the origin of the panel in their notebooks and other LCD products, it will not be necessary to require them to determine whether their products contain a panel made by one of the Defendants. Plaintiffs will obtain information from the OEMs identifying models using LCD panels made by non-Defendants and the serial numbers of units with panels made by non-Defendants for the rare model that used panels from both Defendants and non-Defendants. This information can be included in the Claims Administrator's database.

As recognized in *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311 (C.D. Cal. 1998), a case cited by Defendants, "[a]s long as the general outlines of the membership of the class are determinable at the outset of the litigation, a class will be deemed to exist." *Id.* at 319. The ascertainability test requires only that the court be able to ascertain the "general boundaries of the proposed class" at the time of class certification." *Bullock v. Board of Educ. of Montgomery County*, 210 F.R.D. 556, 561 (D. Md. 2002). The possibility that a class definition includes certain members who were ultimately found to have not been injured by defendants' conduct does not preclude class certification. *See Kohen*, 571 F.3d at 677.

Even where identification of class members is burdensome or requires individual proof, an objectively defined class is still ascertainable. *See, e.g., Dunnigan v. Metropolitan Life Ins. Co.*, 214 F.R.D. 125, 136 (S.D.N.Y. 2003) (The fact that identification of class members "may be slow and burdensome cannot defeat the ascertainability requirement.").[43] Defendants' reliance on *Mazur v.*

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[42] *See* http://www.avsforum.com/avs-vb/showthread.php?t=1097915&page=26. The panel makers for LCD televisions can also generally be determined from the service manual or parts listing. *See, e.g.* ,http://samsungparts.com, http://www.eserviceinfo.com/equipment_mfg/Vizio_2.html; http://www.eserviceinfo.com/download.php?fileid=33223; http://www.eserviceinfo.com/download.php?fileid=34657.

[43] *See also Sadler v. Midland Credit Management, Inc.*, 2009 WL 901479 (N.D. Ill. Mar. 31, 2009) (ascertainability requirement met where class was objectively defined although identification of class members would require "administratively burdensome" review of records); *Peoples v. Wendover Funding, Inc.*, 179 F.R.D. 492, 496 (D. Md. 1998) ("Defendant argues the class is not 'administratively ascertainable' because the Court would have to undertake an individualized inquiry as to the existence of each member's forbearance agreement. These arguments fail to justify denial

eBay Inc., 257 F.R.D. 563 (N.D. Cal. 2009) is misplaced. In *Mazur*, the court rejected a class defined as 1) all persons who won certain eBay auctions; and (2) all persons who would have won auctions but for a shill bidder entering the highest bid. Judge Patel held that the first subgroup *was ascertainable* because it was objectively defined and likely identifiable through business records, but that it was overbroad because it included unharmed winners of auctions with no floor price and non-consumers who could not recover. *Id.* at 567.[44] The second group—those who would have won the auctions but for shill bidders—was not ascertainable because no one could predict who would have won an auction had it not been fixed and "plaintiffs were unable to devise any sort of objective system for screening out such persons from the auctions themselves." *Id.* at 567-68.

Tableware Antitrust Litig., 241 F.R.D. 644, 650 (N.D. Cal. 2007) also does not support Defendants' position. There, Judge Walker held that an antitrust class was sufficiently ascertainable despite defendants' assertion that certain class members were not entitled to damages:

> A class definition is "definite enough" to satisfy FRCP 23(a)(1) if it "is administratively feasible for the court to ascertain whether an individual is a member." *O'Connor v. Boeing North American, Inc.*, 184 F.R.D. 311, 319 (C.D.Cal.1998). Yet defendants' complaint regarding casual tableware does not even concern administrative feasibility; it deals with the provability of damages. As such, this theory is appropriately presented in a motion for summary judgment or directed verdict, not one for class certification.

Id. Here, as in *Tableware*, the class is objectively defined and it is administratively feasible to identify its members. As in *Tableware*, Defendants' arguments against ascertainability go to proving entitlement to damages which cannot defeat class certification.[45] Accordingly, Defendants'

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of class certification."); *Stoffels v. SBC Communications, Inc.*, 238 F.R.D. 446, 451 (W.D. Tex. 2006) (class defined based on objective criteria ascertainable although class members would need to be identified in part through data obtained from third-party); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 22-25 (D.D.C. 2001) (the complexities of the pharmaceutical market did not make purchasers of drugs in antitrust case unascertainable).

[44] *Accord Kesler v. Ikea U.S. Inc.*, 2008 WL 413268, at *3 (C.D. Cal. Feb. 4, 2008) (holding that a class was ascertainable even though "each putative class member's right to recovery depends on the fact that he or she is a 'consumer' for the purposes of the FCRA").

[45] Defendants also cite *Whiteway*, 2006 WL 2642528, at * 3, in which Judge Armstrong held that a class of employees denied overtime wages was sufficiently ascertainable because they could be identified by analyzing various employment records. *Id. See also Quintero v. Mulberry Thai Silks*, Inc., 2008 WL 4666395, at *2 (N.D. Cal. Oct. 22, 2008) (Judge Patel held that a class including former employees was ascertainable). *Jones v. National Sec. Fire & Cas. Co.*, 2006 WL 3228409

argument that certification should be denied because class membership is not sufficiently ascertainable is unsupported by the law and the facts and should be rejected.

V. THE INJUNCTIVE CLAIMS UNDER THE SHERMAN ACT SHOULD BE CERTIFIED FOR CLASSWIDE TREATMENT UNDER RULE 23(B)(2)

Defendants make two arguments that this case cannot be certified for injunctive relief under the Sherman Act. Def. Opp. at 53-56. Neither argument, however, can prevail.

First, Defendants argue that the Nationwide Class cannot be certified because injunctive relief is "secondary" to the damages for that class (Def. Opp. at 54). The Record belies that argument. The Nationwide Class's claims involve only injunctive relief, pled solely under the Sherman Act, with no claim for damages for that Nationwide Class. *See* Indirect Purchaser Plaintiffs' Second Consolidated Amended Complaint, at 61-62. The reason is simple: under the *Illinois Brick* doctrine, indirect-purchaser plaintiffs can sue for injunctive relief under the Sherman Act, but they cannot sue for damages.[46] Indeed, an injunction is especially important under the Sherman Act precisely because indirect purchasers have no damage remedy under that statute; that is, when damages are not available, injunctive relief may be the best way for a court to remedy wrongful conduct. *Walgreen Co. v. Sara Creek Property Co.*, 966 F.2d 273, 276-78 (7th Cir. 1992); *see also Blue Cross & Blue Shield of Wisconsin v. Marshfield Clinic*, 152 F.3d 588, 594 (7th Cir. 1988).

Second, Defendants, ignoring the proper legal standard, assert that the Plaintiffs have made no showing of ongoing conduct that would require an injunction (Def. Opp. at 54-55). Under the Sherman Act, an injunction will issue upon showing of a "threat" of injury. 15 U.S.C. § 26; *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); and *Datagate Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 870 (9th Cir. 1991). Given the nature of the conspiracy charged here—a multi-

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(W.D. La. Nov. 3, 2006) also does not help Defendants. *Jones* did not involve class certification but was a motion to strike the alleged class definition. The class of injured property owners damaged by Hurricane Katrina in that case was not objectively defined and was over-inclusive with respect to liability. *See id.* at *4.

[46] *Lucas Auto Eng'g Inc. v. Bridgestone/Firestone Inc.*, 140 F.3d 1228, 1235-37 (9th Cir. 1998); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 497 F.Supp. 218, 228-29 (C.D. Cal. 1980).

company cartel, operating in a market with high barriers to entry (Netz Decl. at 37-51), causing injury to "millions of American consumers" (*see* Remarks Prepared for Delivery by Assistant Attorney General Thomas O. Barnett at A Press Conference (Nov. 12, 2008); Zahid Supp. Decl. Ex. 6), using frequent clandestine meetings, and employing sophisticated monitoring devices to ensure compliance—the evidence at trial will show a threat that the Defendants could very quickly resume their unlawful pricing activities, even on short notice. *See* collections of documents submitted under seal in support of Plaintiffs' Motion for Class Certification; *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)("Past wrongs [are] evidence bearing on whether there is a real and immediate threat of repeated injury"); *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007). That same threat of injury can be proved (or disproved) on a class-wide basis.

The fact that the government's antitrust investigation of the LCD industry came to light in December 2006 and the temporal scope of its investigation by no means defeat the likelihood of future resumption of Defendants' past practices.[47] "When defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of anti-trust laws, courts will not assume that it has been abandoned without clear proof. . . . It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. Oregon State Med'l Society*, 343 U.S. 326, 333 (1952); *U.S. v. Krasn*, 614 F.2d 1229, 1236 (9th Cir. 1980) (once existence of conspiracy shown, participation presumed to continue until last overt act unless defendant produces affirmative evidence of withdrawal).

Plaintiffs have developed significant evidence on the existence of a long-lasting conspiracy in the LCD industry that goes as far back as the 1990s. Notably, since June 2002, a number of the Defendants and/or their corporate parents or subsidiaries have been repeatedly investigated by the

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[47] Defendants appear to be arguing that some, or all, of them withdrew from the conspiracy after December 2006 (Def. Opp. at 56), but none of the Defendants set forth a valid withdrawal defense under *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978). *Gypsum* requires a withdrawing defendant to report the conspiracy to the authorities or announce his withdrawal to his co-conspirators. 438 U.S. at 463-65. *See also United States v. Loya*, 807 F.2d 1483, 1493 (9th Cir. 1987). Moreover, a class claim under Rule 23(b)(2) cannot be mooted as easily as the Defendants

Department of Justice for price-fixing in other closely-related industries; some Defendants have pled guilty and paid large fines as a result of the government's DRAM investigation. The criminal enforcement appears not to have enough deterrence to keep these Defendants from price-fixing LCD products, given the lucrative illegal profits they are able to reap. There are no affirmative acts of renunciation which would foreclose the threat of future harm to class members, who continue to purchase LCD products every day. *United States v. Sax*, 39 F.3d 1380, 1386 (7th Cir. 1994) ("merely ceasing participation in the conspiracy, even for extended periods of time, is not enough to evidence withdrawal."). Even assuming the Defendants abandoned anticompetitive conduct after 2006, there is still a dangerous possibility of resumption.

It is well settled that once a Sherman Act violation is proven, the district court "has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. …[Equitable Relief] to be effective must go beyond the narrow limits of the proven violation." *Trabert & Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477, 485 (7th Cir. 1980) (quoting *U.S. v. Ward Baking Co.*, 376 U.S. 327, 330 (1964)). Unless Defendants are enjoined from engaging in the specific anticompetitive business practices, they could simply resume their price-fixing scheme through methods more subtle and more difficult to detect. As a result, class members would continue to pay supra-competitive prices for LCD products.

Given that Plaintiffs are already seeking an injunction under the Sherman Act on their own behalf, and that such an injunction would necessarily impact the entire Nationwide Class, class-wide treatment under Rule 23(b)(2) is "peculiarly appropriate."[48] Accordingly, the Nationwide Class's injunction claim should be certified.

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suppose. *See Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 455-56 (N.D. Cal. 1994).

[48] *See Califano v. Yamasaki*, 442 U.S. 682, 700 (1979).

VI. NAMED PLAINTIFFS BAKER, FISHER, GRIFFITH, HANSEN, JOU, MURPHY, MULVEY, NORTHWAY, PAGUIRIGAN, SRIMOUNGCHANH, AND WATSON ARE ADEQUATE AND TYPICAL CLASS REPRESENTATIVES

Defendants argue that the named plaintiffs identified above are not typical of and/or are not adequate representatives for class members either because they are subject to unique standing defenses or because they have close familial or business relationships with their counsel. Def. Opp. at 58-64. Defendants rely on snippets of deposition testimony and offer an incomplete and inaccurate record in challenging these plaintiffs. The record, however, is replete with examples contradicting Defendants' assertion that these plaintiffs are inadequate and atypical.[49]

A. Class Period Redefined In Plaintiffs' Class Certification Motion Covers Plaintiffs Griffith And Hansen's Purchases[50]

Plaintiffs in their Motion for Class Certification defined a shorter Class Period than the duration of the conspiracy alleged in the Second Consolidated Amended Complaint and extend the period to end December 31, 2006. Defendants' argument that such modification is improper is groundless.

Courts routinely allow plaintiffs to modify proposed class definitions and are "not bound by the class definition proposed in the complaint." *Robidoux v. Celani*, 987 F.2d 931, 937 (2nd Cir. 1993); *Davis v. Hutchins*, 321 F.3d 641, 649 (7th Cir. 2003) ("A district court has broad discretion to certify a class and may modify a proposed class definition if modification will render the definition adequate."). This rule recognizes the necessity to modify the class definition after further discovery or other events which alter the parameters of the class because the class certification is usually made early in the case. *Irwin v. Mascott*, 2001 U.S. Dist. LEXIS 3285, at *13 (N.D. Cal. Feb. 27, 2001);

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[49] To the extent that the named plaintiffs cannot represent the class of the particular states, Plaintiffs respectfully seek leave to file an amended complaint to replace these representatives. For the states where the only named plaintiffs are challenged here (i.e., Iowa, Massachusetts, Michigan, Minnesota, and Vermont), Plaintiffs are ready to come forward with new qualifying class representatives if the Court finds it necessary to substitute these challenged plaintiffs.

[50] Plaintiffs concede that Mr. Fisher made his purchase on February 10, 2007, outside the redefined class period for state claim claims (January 1, 1999 to December 31, 2006).

[51] Plaintiffs concede that Mr. Fisher made his purchase on February 10, 2007, outside the redefined class period for state claim claims (January 1, 1999 to December 31, 2006).

In re Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 683 n.5 (N.D. Ga. 1991).[52] In their motion for class certification, Plaintiffs revised the class period for damage claims to end on December 31, 2006, and for injunctive claims to the present. Therefore, Mr. Griffith and Mr. Hansen made qualifying purchases within the redefined class period.[53]

B. Plaintiff Srimoungchanh Personally Purchased the Products At Issue

Contrary to Defendants' assertion, Mr. Srimoungchanh testified that he owns First Secure Data, a sole proprietorship (Srim. Tr. 74:20-25: "It's not a corporation. … It's a sole proprietor."). Zahid Supp. Decl., Ex. 53. As such, Mr. Srimoungchanh is the owner of these business's assets, including the LCD products he purchased. Regarding Mr. Srimoungchanh's other LCD products, he testified that he personally made these purchases although his wife's name appears on the receipts ((1) Sony Vaio laptop: wife paid out of the couple's joint account (Srim. Tr. 149:23-150:06 ("When we go shopping she's the one that controls the money to pay, to make purchase and I make the payment … Yes. That's also a shared account;" and (2) Sony LCD TV: the store's database

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[52] *Pierce v. Novastar Mortg. Inc.*, 489 F.Supp.2d 1206, 1215 (W.D. Wash. 2007) is distinguishable. Def. Opp. at 60 n.52. The court in *Pierce* declined to consider whether to redefine the class because plaintiffs raised the request for the first time in their reply to the summary judgment motion. 489 F.Supp.2d at 1215. Similarly, in *Jordan v. Paul Financial, LLC*, 2009 WL 192888, at *6 (N.D.Cal., Jan. 27, 2009), the plaintiff sought to radically redefine the class definition in his reply brief and this Court ruled that he may seek leave to file an amended complaint. Here, Plaintiffs modified the class period in their motion, giving Defendants adequate notice.

[53] Defendants also challenge the status of Ms. Baker, Ms. Jou, and Mr. Paguirigan because they do not satisfy the residency requirement of the proposed class definition. Def. Opp. at 62. Indirect purchasers who purchased the price-fixed LCD products as residents of the respective states during the class period should not be precluded from recovery, regardless of whether they moved to a different state thereafter or worked abroad for ten months on a temporary work assignment (Jou Tr. 10:1-11:15; Zahid Supp. Decl., Ex.. 54).. As such, Plaintiffs should be allowed (and respectfully ask the Court's permission if so requires) to modify the class definition to include "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. …" Defendants' comment on Ms. Baker's and Mr. Paguirigan's unfamiliarity with the complaint does not make them inadequate. Def. Opp. at 62, 64, nn. 56-57. While a class representative must be familiar with the basics of, and "understand the gravamen" of, her claims, it is not necessary that she be "intimately familiar with every factual and legal issue in the case." *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611 (N.D. Cal. 2004). Thus, a class representative "will be deemed inadequate only if she is 'startlingly unfamiliar' with the case." *Id.* (quoting *Greenspan v. Brassler*, 78 F.R.D. 130, 133-34 (S.D.N.Y. 1978)).

associated the couple's phone number with wife's name (Srim. Tr. 171:17-172:6)). Zahid Supp. Decl., Ex. 53.

C. Plaintiff Baker's Purchase Of Panel Made By A Co-Conspirator Is A Qualifying Purchase

Defendants challenge Mr. Baker's purchase as non-qualifying because he purchased a Dell computer containing a Quanta Display panel in November 2003, well before AUO acquired Quanta Display ("QDI") in October 2006. Def. Opp. at 61. Defendants' arguments are unavailing for two reasons. First, QDI is a co-conspirator which participated in the illegal price-fixing agreements. Documentary evidence demonstrates that QDI's anticompetitive contacts with competitors dated at least as far back as 2002. Prior to AUO's acquisition, QDI attended multiple group and bilateral meetings with the named Defendants.[54] Case law clearly holds that each conspirator is jointly liable for everything done during the period of the conspiracy's existence. Regardless of whether QDI was named in the Complaint, Defendants are jointly liable for all damages that the conspiracy caused, regardless of when a particular co-conspirator became a member or the extent of its participation. *In re Nissan Motor Corp. Antitrust Litig.*, 430 F.Supp. 231, 232 (S.D. Fla. 1977) (citing *Dextone Co. v. Building Trades Council of Westchester County*, 60 F.2d 47 (2d Cir. 1932)). Second, as the surviving company, AUO assumed all rights and obligations of QDI, the dissolved company, including QDI's liability for illegal overcharges. *See* Form 6-K, at 6 (filed June 15, 2006 by AU

[54] *See* Zahid Supp.Decl., Exs. 16-20 [GRNE0059163 [redacted]; SECm00400093-95 [redacted]; GRN000022-24 [uncertified translation] [redacted]; GRNE0230663-69 and GRNE0230693-700 [redacted]

Optronics Corp.). Therefore, AUO is liable as a successor corporation for the antitrust violations of QDI.[55]

D. Plaintiffs Mulvey, Murphy, Northway, And Watson Can Adequately Represent The Class

Defendants argue that the above-mentioned four Plaintiffs' business and family relationships with counsel compromise their ability to represent the class. Def. Opp. at 62-64. A familial or business relationship with class counsel, without more, however, is not necessarily disqualifying. In cases where such relationships were held inappropriate, there exists an eminent concern that the financial interests of the class representative in sharing counsel's fees—as affected by the relationship with counsel—conflict with those of the class and that the representative may allow settlement on terms less favorable to the class as a whole. *See Susman v. Lincoln American Corp.*, 561 F.2d 86, 91-95 (7th Cir. 1977); *see also Tanzer v. Sharon Tell Corp.*, 1979 WL 1226, at *17 (S.D.N.Y. June 22, 1979) (noting that "close relationship" is generally not a *per se* obstacle to certification and that court must evaluate the circumstances of each case) (citing *Susman*).

None of the factors that counseled against adequate representation in those cases exist here. *Cardizem II* is instructive. In *Cardizem II*, the court held that "the mere fact that [named plaintiff]'s son is employed as an associate with liaison counsel . . . is insufficient to create a conflict of interest and thus render him an inadequate class representative," because "as the courts routinely observe, a named plaintiff will not be disqualified simply because of a close or familial relationship with one of the attorneys representing the class . . . . [T]here must be some evidence that the relationship at issue is likely to create a conflict of interest or otherwise comprise the ability to vigorously prosecute the action on behalf of the class." 200 F.R.D. at 337. In particular, the court noted that "only Co-Lead Counsel have strategic and settlement authority in this case," and "that the courts have the power to review settlement agreements for fairness will further protect any potential conflict that may arise in that context." *Id.* at 338.

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[55] To the extent the Court finds that the class definition in the Motion for Class Certification is insufficient to include purchases from QDI, Plaintiffs respectfully seek permission to revise the class to include "LCD panels incorporated in televisions, monitors, and/or notebook computers, from one or more of the named Defendants and Quanta Display, Inc."

Here, like *Cardizem II*, none of these Plaintiffs stand to benefit from the potential fees that counsel may receive; none of these Plaintiffs or their counsel have strategic or settlement authority (none of the four challenged class representatives have any relationship with lead counsel in this case); and nothing suggests an appearance of collusion or impropriety. *Lewis v. Goldsmith*, 95 F.R.D. 15, 20-21 (D.N.J. 1982) (no impropriety where plaintiff represented by uncle and had worked two summers for uncle's law firm). Moreover, there are over 30 other named Plaintiffs, each represented by their individual counsel, none of whom has any such relationships with their counsel.[56] Defendants could not present evidence which calls into question these class representatives' loyalty to other members of the class. In fact, these Plaintiffs are engaged, able, and interested representatives. They have searched for products and documents, provided answers to written discovery, given deposition testimonies, and followed progress of this litigation through communication with counsel, all which demonstrate willingness to carry out the duties of class representatives. The testimonies of these Plaintiffs clearly demonstrate their ability to serve as class representatives. *See* Appendix A; Zahid Supp. Decl., Exh. 55-58.

Defendants' mere speculation of a conflict of interest, without more, is insufficient to defeat class certification; the conflict must be actual, not hypothetical. *Meijer Inc. v. Abbott Laboratories,* 2008 WL 4065839, at *5 (N.D. Cal. Aug. 27, 2008); *see also Goldsmith*, 95 F.R.D. at 20 ("it would seem a bit anomalous that an individual whose uncle has developed a reputation as a competent securities lawyer should be prohibited from turning to his uncle for assistance if he has a legitimate claim"); *In re Greenwich Pharmaceuticals Securities Litig.*, 1993 WL 436031, at *2 (E.D. Pa. Oct. 25, 1993) (certifying class representative whose son was attorney at class counsel firm because "[t]here is no indication that [representative] has relied or will heavily rely on his son nor that he stands to benefit from fees his son may receive"). Thus, these plaintiffs should remain the class representatives for the states they are representing.

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[56] *In re Frontier Ins. Group, Inc. Securities Litig.*, 172 F.R.D. 31, 43-44 (E.D.N.Y. 1997) (certifying niece of class counsel as representative because concerns about "independence from class counsel are mitigated by the fact that there are six other named plaintiffs in this action, none of whom has any familial relationship with counsel" and because defendants adduced "no evidence that [representative] will share in the attorney's fees recovered by class counsel")

VII. CONCLUSION

For the foregoing reasons, and for the reasons stated in Plaintiffs' opening brief, Plaintiffs submit that they have met all requirements for class certification. Plaintiffs respectfully request that the Court grant their motion for class certification.

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Respectfully submitted,

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Appendix A

PLAINTIFF NAME	DEPOSITION TESTIMONY
Ben Northway (Iowa)	Mr. Ben Northway's ability to serve as a class representative is demonstrated by his clear understanding of both the nature of this case and of his duties as a class representative. He understands his responsibility to the class he seeks to represent, including: 1) that he is representing the interests of a larger class of similarly situated Iowa consumers, and not merely his own individual interests (Northway Tr. 37:1-15, 39:18-21, 43:25, 44:1-11; Zahid Supp. Decl., Ex. 55); 2) this action is not based on his own individual recovery, but instead is being prosecuted for the benefit of many (*Id.* at 39:18-25, 40:1-16, 44:8-11); and 3) his service as a class representative is performed without any expectation of personal gain (*Id.* at 44:12-19, 45:1-10). He has reviewed the complaints filed in this matter, has consulted with his attorneys in order to remain informed of how the case proceeds, and has demonstrated an adept understanding of the claims and issues raised in this lawsuit. *Id.* at 34:2-7, 35:10-21, 36:6-25, 37:1-8, 41:2-3, 15-22, 42:13-15, 120:18-25, 121:1-25, 122:1-5, 123:21-25, 124:1-4. As if to further underscore how inaccurate Defendants' claims are, Mr. Northway is not dependent on this employer for his entire income, but instead earns additional personal income as an independent IT Consultant. *Id.* at 46:21-25, 47:1-11.
Robert Watson (Vermont)	Mr. Robert Watson, contrary to Defendants' assertion, does not derive a substantial amount of his income from his class counsel (Watson Tr. 20:8-11, 101:11-14; Zahid Supp. Decl., Ex. 56); nor is he currently seeking to be a class representative in any other action (*Id.* at 24:9-14, 26:1-3). Mr. Watson has earned between $1000 and $2000 by providing landscaping services for his counsel over the last three years. *Id.* at 18:10-15. The twenty to twenty-five dollars Watson earned every few weeks for maintaining his counsel's lawn during the short Vermont summer is not an amount that undermines Watson's independence. *Id.* at 100: 23-101:7, 116:16-20, 117:3-7. Watson has not received any extra compensation or anything of value that he has not earned at fair market rates. He has not billed any hours he did not work, and has not been promised anything in return for his actions on behalf of the class. *Id.* at 17:4-9, 116:10-15, 117:12-19, 118:15-18. Defendants conveniently ignore that Watson has demonstrated being an exemplary class representative by: producing responsive documents; appearing for his deposition; knowing the duties expected of a class representative; and diligently performing those duties. *Id.* at 8:15-24, 26:12-20, 33:13-25, 34:1-7, 35: 9-17, 36: 4-7. The limited business relationship with his counsel for lawn maintenance is not a significant enough relationship to influence his independence or to bias his decisions to the detriment of the class.

Christopher Murphy (Massachusetts)	Mr. Christopher Murphy volunteered to serve as a class representative and views such service as matter of civic duty. Murphy Tr. 68:10-14; Zahid Supp. Decl., Ex. 57. Mr. Murphy consulted with his attorneys in this matter in a manner one would expect of a competent class representative. *Id*. at 75:15-25. In addition to reviewing the complaints prior to their filing (*Id*. at 72:23-25, 73:10-12), Mr. Murphy assumed a proactive approach in the development of those complaints, spending several hours working with counsel to prepare the same and offering his own input and commentary on the claims alleged therein. *Id*. at 71:12-23, 73:13-17). Similarly, Mr. Murphy has also demonstrated the knowledge expected of a competent and informed class representative. *Id*. at 65:5-17, 67:9-25; 68: 1-8, 18-25.
Martha Mulvey (Minnesota)	Ms. Martha Mulvey has demonstrated a clear understanding of her responsibilities as a class representative. Ms. Mulvey has actively monitored the status of the case and has frequently communicated with her attorneys regarding the same. Mulvey Tr. 38:7-12, 39:21-25, 40:1-3; Zahid Supp. Decl., Ex. 58. The record demonstrates her understanding of her obligation to remain informed of the case, her responsibility to represent the interests of the Minnesota class, and that her suit is not based solely on her own recovery. *Id.* at 23:22-25, 24:7-10, 31:14-25, 32:1-2, 34:18-20, 36:3-25, 37:1, 44:20-23). Ms. Mulvey has read each of the complaints filed in this matter prior to their filing and reviewed those complaints for their substantive allegations. *Id.* at 41:10-11, 42:5-10, 85:24-25, 86:1-11, 88:6-7, 90:9-11, 90:20-25, 91:1-22, 93:5-10. While Ms. Mulvey may not have recalled the minutia of the complaints filed in this matter to the satisfaction of Defense counsel, she has demonstrated a sufficient understanding of the substantive allegations in those complaints. *Id.* at 93:17-19, 98:11-15, 99:19-21, 102:10-19, 114:4-5, 115:6-8.

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