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Co-Lead Class Counsel for Indirect-Purchaser Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	Case No. 3:07-md-1827 SI **CLASS ACTION**
This Document Relates to: All Indirect-Purchaser Actions *State of Missouri, et al. v. AU Optronics Corporation, et al.*, Case No. 10-cv-03619 SI; *State of Florida v. AU Optronics Corporation, et al.*, Case No. 10-cv-3517 SI; and *State of New York v. AU Optronics Corporation, et al.*, Case No. 11-cv-0711 SI.	**INDIRECT-PURCHASER CLASS PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES AND INCENTIVE AWARDS** Hearing Date: November 29, 2012 Time: 3:30 p.m. Courtroom: 10, 19th Floor Judge: Honorable Susan Illston

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 29, 2012, at 3:30 p.m. or as soon thereafter as the matter can be heard, Counsel for the Indirect-Purchaser Plaintiffs ("Class Counsel" or "IPP counsel"), through their appointed Co-Lead Counsel, Zelle Hofmann & Voelbel Mason LLP ("Zelle Hofmann") and The Alioto Law Firm ("Alioto"), will and hereby do move for the following awards of attorneys' fees to Class Counsel and incentive awards for class representatives, to be paid from the total common Settlement Fund of $1,082,055,647:

1. Attorneys' fees to Class Counsel of 28.5% of the Settlement Fund, which equals $308,385,859. IPP counsel are not seeking additional costs other than those sought by the pending Motion for Interim Reimbursement of Expenses (Dkt. 5157), and the Supplemental Motion for Reimbursement of Expenses filed herewith. The pending cost petitions are limited to common litigation costs paid for by assessments, and include payments to third-party vendors, including experts, court reporters, and document management services. IPP counsel are not petitioning or seeking reimbursement of any firm-specific costs, such as travel, meals, photocopying, legal research, etc.[1]

2. Incentive awards of $15,000 for each of the 40 Court-appointed class representatives, and $7,500 for 8 additional named plaintiffs who produced documents and were deposed, but were not appointed as class representatives. The total amount of incentive awards sought is $660,000.[2]

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[1] The states of Arkansas, California, Florida, Michigan, Missouri, New York, West Virginia and Wisconsin (the "Settling States"), which settled together with the IPP class, are concurrently filing a separate fee petition seeking $11,095,357.21, which is approximately 1.03% of the Settlement Fund. Added to the amount sought by class counsel, the total amount sought (including costs absorbed by IPP counsel) by all attorneys seeking fees from the common fund is less than 30% of the Settlement Fund.

[2] The 40 Court-appointed class representatives are: Gladys Baker, Scott Beall, Christopher Bessette, Lisa Blackwell, Thomas Clark, Tom DiMatteo, Scott Eisler, Robin Feins, Chris Ferencsik, William Fisher, Donna Jeanne Flanagan, Bob George, Rex Getz, Patricia Giles, Judy Griffith, Chad Hansen, Robert Harmon, Byron Ho, Ling-Hung Jou, Allen Kelley, Robert Kerson, Joe Kovacevich, Benjamin Larry Luber, Steven Martel, Dr. Robert Mastronardi (recently deceased), John Matrich, Martha Mulvey, Christopher Murphy, Ben Northway, John Okita, Jai

This motion is brought pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, the Order Granting Final Approval of Combined Class, *Parens Patriae* and Governmental Settlements (Dkt. 6130), the Order Granting Preliminary Approval of Class, *Parens Patriae*, and Government Entity Settlements (Dkt. 6311), and the Amended Order Appointing Martin Quinn as Special Master (Dkt. 6580). It is based on this Notice, the accompanying Memorandum of Points and Authorities; the Declaration of Craig C. Corbitt ("Corbitt Decl."); the Compendium of Counsel Declarations in Support of Indirect-Purchaser Class Plaintiffs' Motion for Attorneys' Fees and Incentive Awards ("Compendium"); the combined Declaration of Zelle Hofmann attorneys Francis O. Scarpulla, Craig C. Corbitt, Judith A. Zahid, Patrick B. Clayton, Qianwei Fu, and Heather T. Rankie ("Zelle Hofmann Decl."), which is attached as Exhibit A to the Compendium; the Declaration of Brian T. Fitzpatrick; the Declaration of Richard M. Pearl; the arguments and any additional evidence to be presented to the Special Master or the Court on this motion; all transcripts of prior proceedings before this Court; and all other pleadings and papers on file in this action.[3]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY

In achieving ten cash settlements in this case, for a total of $1,082,055,647 for the certified state damage classes, Class Counsel for the IPPs and the Settling States obtained what we believe to be the largest cash recovery in the history of indirect purchaser antitrust litigation, and one of the largest in the history of all private antitrust litigation. While we cannot predict the claims rate with certainty at this time, there should be sufficient money to highly compensate the ultimate victims of the conspiracy—the members of the IPP class. In addition, all of the settlement agreements provide for injunctive relief, prohibiting the defendants from engaging in conduct that

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Paguirigan, Allan Rotman, Frederick Rozo, Cynthia Saia, Joe Solo, Kou Srimoungchanh, David Walker, Robert Watson, Marcia Weingarten, and Dena Williams. The 8 additional named plaintiffs are: Michael Ayers, Oscar Cintron, Claire Coleman, Janet Figueroa, Richard Granich, Timothy Lauricella, Shawn Stern, and Frederick Waki.

[3] We have been advised by the Special Master that in light of his appointment by the Court to prepare reports and recommendations on this motion, it is unnecessary to submit a Proposed Order.

violates the antitrust laws at issue in this case, and requiring them to engage in education programs for employees and to provide cooperation to the IPPs and the Settling States.[4]

In achieving these settlements, Class Counsel overcame virtually unrelenting opposition from the defendants, despite the fact that all of them (with the exception of Toshiba) eventually either were found guilty by a jury in a criminal trial (AUO), pleaded guilty only to part of the conspiracy (LG Display, Hannstar, CMO, Chunghwa, Hitachi, Sharp, Epson), or received amnesty (Samsung).[5]

IPP Class Counsel have litigated this case for nearly six years on a wholly contingent basis. They have collectively devoted approximately 313,000 hours, thus far uncompensated, and have advanced out-of-pocket costs of over $8 million, thus far unreimbursed. Throughout, there was no guarantee that any fees would be awarded, or that any costs would be recovered. Class Counsel will continue to devote significant time to administration of the settlement, ensuring proper payments are made to class members, and defending the settlement against appeals, a process which could take years. This future time of course is not included in this petition.

The risk in the IPP case was particularly acute because the damage claims were indirect, based not on federal antitrust law, but on the laws of two dozen states. The Supreme Court barred indirect purchaser claims under the Sherman Act in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), in part "to avoid weighing down treble-damages actions with the 'massive evidence and

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[4] The Proposed Settlements for the first six Settling Defendants were attached as exhibits "A" through "G" to the declaration of Francis O. Scarpulla in support of the motion for preliminary approval (Dkt. 4424-2 through 4424-8), and the Proposed Settlements for the remaining three Settling Defendants were attached as exhibits "A" through "C" of the declaration of Mr. Scarpulla in support of the second motion for preliminary approval (Dkt. 6141-2 through 6141-4). *See also* Fitzpatrick Decl., ¶ 19. After deductions for the Court-awarded fees and costs to the IPPs and Settling States, and approved notice and administrative expenses, approximately 4% of the net balance will be allocated to the government entities represented by the Settling States, with the rest going to class members.

[5] Samsung eventually cooperated by providing liability evidence, as it was required to do to obtain amnesty, but it continued to insist before it settled that the conspiracy had no class-wide impact and that damages were minimal to non-existent. The sole exceptions to this united opposition were Chunghwa, with which Class Counsel agreed to settle early in the litigation for a relatively modest amount, in exchange for valuable cooperation, and Epson, which also settled for a modest amount, but had discontinued the panel business and had no apparent involvement in the Crystal Meetings.

complicated theories' involved in attempting… to trace the effect of the overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer." *Id.* at 741 (internal citation omitted). The defendants, supported by some of the nation's most preeminent economists, forcefully contended that there was no method of common proof of impact and damages. They contended that the indirect purchaser distribution channels were so complicated that it was virtually impossible to establish that any overcharge was passed through to the ultimate consumers, and for that reason a class could not be certified. They contended that the IPPs could never ascertain whether individual class members had standing, because they could not establish that price-fixed panels manufactured by the defendants were actually contained in the products bought by class members.

The defendants also contended that the Foreign Trade Antitrust Improvement Act ("FTAIA"), 15 U.S.C. § 6a, barred any recovery by the IPPs. Despite the guilty pleas and admissions, they contended (heavily relying on a statement to the Court by the U.S. Department of Justice ("DOJ")) that there were three narrow conspiracies, not one overarching one as the IPPs alleged, and that none of those conspiracies resulted in any measurable higher prices even to direct purchasers, much less to end-user individuals and businesses. They contended that the IPPs' experts' opinions should be excluded under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). They argued that as a matter of law, the IPPs could not satisfy the elements of many of the state laws at issue. The IPPs overcame all of these arguments and more. Class Counsel reviewed millions of pages of documents, many in foreign languages, deposed scores of witnesses, and answered hundreds of detailed interrogatories and requests for admission. They provided significant assistance to the Direct Purchaser Plaintiffs ("DPPs"), Direct Action Plaintiffs ("DAPs"), the Settling States, and the DOJ. They retained prominent experts to opine on class certification, impact, damages and other issues. They analyzed the reports of the defense experts and deposed all of them.

Perhaps most importantly, Class Counsel were prepared to try this case. The final three settlements, with LG Display, AUO and Toshiba, were reached after the final Pretrial Conference

and only a few weeks before trial was scheduled to begin. Class Counsel by then were fully prepared to go to trial, having honed their trial strategy with several mock jury presentations, filed a joint pretrial statement, designated trial exhibits and deposition excerpts, prepared proposed jury instructions and jury questionnaires, and prepared for direct and cross examination of live witnesses, including experts. This preparation, coupled with the relentless focus of Class Counsel throughout this case on preparing for an anticipated trial, was a major factor in maximizing the amount of settlements.

Class Counsel for the IPPs request a fee of 28.5% of the total recovery of the ten settlements, which is $308,385,859. The historic result achieved by Class Counsel in this case warrants an upward departure from the normal 25% benchmark of the Ninth Circuit. This Court previously awarded a fee of 30%, plus incentive awards and additional non-common costs, which the IPPs are not seeking, to counsel for the DPPs. The Court found: "Given the high risks involved in this case, the effort put forth by [DPP] counsel, the level of sophistication of the work done, and the extraordinary results achieved for the [DPP] Class, an upward departure from the Ninth Circuit's benchmark of 25% is justified." (Dkt. 4662, ¶4)[6] The IPP case was even more challenging, and the amount recovered is far greater. Nevertheless, Class Counsel are seeking a lower percentage of the IPP common settlement fund than the DPPs were awarded on theirs.

The total reported historical rate lodestar for IPP counsel is approximately $148.0 million, which would equal a multiplier of 2.08 on a $308.4 million fee award. In recognition of the likelihood that some of the reported hours were inefficient, duplicative, unauthorized or otherwise

[6] The Ninth Circuit has approved a benchmark of 25% of the amount recovered for the class as "a starting point for analysis." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002). In *Vizcaino*, 290 F.3d at 1048-51, *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) and other cases, the Ninth Circuit has explained that this benchmark may be adjusted upward or downward in the District Court's discretion based on a number of factors, including (1) the length of time required; (2) the results achieved; (3) the complexity of the case; (4) the risks involved; (5) any non-monetary benefits obtained; (6) the percentages awarded in other class actions; (7) the typical contingent fee percentages in similar individual cases; and (8) class counsels' lodestar. Each of these factors strongly supports the percentage and amount of fees requested here by the IPPs. *See* Sec.V, *infra.*

questionable (and following the example of the DPPs), for purposes of the lodestar cross-check, Class Counsel alternatively have assumed a hypothetical 20% reduction of the reported lodestar, which would result in a lodestar of approximately $118.4 million, and yield a multiplier of approximately 2.60 for the fee requested. Using current hourly rates instead, as is commonly done in class action common fund cases, (and again following the example of the DPPs), the corresponding lodestar is approximately $159.6 million, the lodestar applying a 20% reduction would be $127.7 million, and the corresponding multipliers would be 1.93 applied to current rates, and 2.42, applied to historic rates. (By assuming the 20% lodestar reduction, Class Counsel do not represent that this percentage is appropriate or that any reductions should apply equally to all IPP firms.)

However the lodestar cross-check is applied, the requested fee is well within the range approved by the Ninth Circuit and other courts for outstanding results in complex cases such as this one. The Corbitt Declaration, Zelle Hofmann Declaration, the Declarations of other IPP Counsel, and of two noted experts on class action attorneys fees, Professor Brian Fitzpatrick and Mr. Richard Pearl, further support the reasonableness of the amount of fees requested. IPP Counsel are prepared to submit any additional information requested by the Court or the Special Master, including underling contemporaneous time records for *in camera* review.

II. THE EXTRAORDINARY SETTLEMENTS ACHIEVED BY IPP CLASS COUNSEL

The $1.082 billion Settlement Fund shatters the record for cash recovered in IPP antitrust litigation and is among the highest settlements ever achieved in any antitrust case. There are no coupons or vouchers involved, and there will be no reversion or refund to any defendant under any circumstances. No *cy pres* distribution is presently contemplated. All of the net proceeds after fees and expenses are expected to be paid to class members.

The amount recovered is approximately half of the single damages sustained by the class members in the 24 certified class states, averaging the estimates of plaintiffs' two damage experts, Dr. Janet Netz and Prof. William Comanor. Corbitt Decl., ¶ 6.

The following chart summarizes the amounts of each settlement, the dates when agreements in principle were reached (which were usually several months before a formal agreement was signed), and the non-monetary relief obtained.

Defendant	Date Agreement in Principle Reached	Class Settlement Amounts	Civil Penalty Amounts	Total Settlement Payments
Chunghwa	Oct. 2008	$ 5,305,105	n/a	$ 5,305,105
Epson	May 2010	$ 2,850,000	$ 150,000	$ 3,000,000
Chimei	June 2011	$ 110,273,318	$ 5,737,948	$ 116,011,266
Hitachi	June 2011	$ 38,977,224	$ 1,494,760	$ 40,471,984
Samsung	Aug. 2011	$ 240,000,000	n/a	$ 240,000,000
Hannstar	Oct. 2011	$ 25,650,000	$ 1,350,000	$ 27,000,000
Sharp	Nov. 2011	$ 115,500,000	$ 6,000,000	$ 121,500,000
AUO	Apr. 2012	$ 161,500,000	$ 8,500,000	$ 170,000,000
LG Display	Apr. 2012	$ 361,000,000	$ 19,000,000	$ 380,000,000
Toshiba	Apr. 2012	$21,000,000	n/a	$21,000,000
GRANT TOTALS		**$ 1,082,055,647**	**$ 42,232,708**	**$ 1,124,288,355**

There is also significant non-monetary relief, largely beyond what was required by the DOJ. The value to the class members of this relief cannot be readily quantified, but it conveys real benefits to them by promoting future competition. In addition, all defendants other than Toshiba, which to the end denied all involvement in or knowledge of the conspiracy, agreed to provide cooperation to assist the IPPs in litigation against the other defendants, and to provide trial witnesses if needed. This assistance, particularly from Chunghwa and Samsung, was very valuable in developing the case and thereby maximizing the monetary recovery against the other defendants. All defendants manufacturers other than Toshiba, Chunghwa and Epson agreed to refrain from discussing LCD prices for illicit purposes for a period of 5 years (others no longer manufacture LCD panels), and all defendants agreed to initiate or maintain antitrust compliance programs for periods of 3-5 years. Corbitt Decl., ¶ 7; *see* Settlement Agreements, Dkt 4424-2 through 4424-8 and Dkt. 6141-2 through 6141-4. The following chart summarizes the non-monetary relief:

Defendant	Date Agreement in Principle Reached	Anticompetitive bar	Compliance	Cooperation
Chunghwa	Oct. 2008	None	3 years	Yes
Epson	May 2010	None	3 years	Yes
Chimei	June 2011	5 years	5 years	Yes
Hitachi	June 2011	5 years	5 years	Yes
Samsung	Aug. 2011	5 years	5 years	Yes
Hannstar	Oct. 2011	5 years	5 years	Yes
Sharp	Nov. 2011	5 years	5 years	Yes
AUO	Apr. 2012	5 years	5 years	Yes
LG Display	Apr. 2012	5 years	5 years	Yes
Toshiba	Apr. 2012	None	3 years	No

III. THE WORK DONE BY CLASS COUNSEL TO ACHIEVE THE SETTLEMENTS

A. The IPPs Intensively Litigated This Case For Over Five Years With Little Benefit from the Government Case.

The first IPP complaint in this District and the second nationwide was filed by the Zelle Hofmann firm and the former Furth Firm on December 12, 2006, and was assigned to this Court. Dkt. 1. Over one hundred IPP and DPP complaints followed over the next few months, and all were transferred by the Judicial Panel to this Court, which appointed interim co-lead counsel for the IPPs. Dkt. 224. The final and largest settlement, with LG Display, was not achieved until late in the evening of April 26, 2012, with the scheduled May 21 trial date looming. In the five and a half years in between, IPP counsel devoted extraordinary effort and resources on behalf of the IPP class members.

IPP Counsel faced tremendous risks throughout this case. The DOJ eventually indicted most of the defendants, but that did not occur until several years after the case had been filed, and those indictments, especially of the Japanese defendants Hitachi and Sharp, were on much narrower grounds than the IPP allegations. The DOJ did not require any defendant to pay restitution to the victims of the conspiracy, leaving it to the civil class action cases to recover money for the consumers. The Court accepted those pleas on that basis.[7]

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7 *See, e.g.*, LG Display Plea Agreement, No. CR 08-0803 SI (Dec. 8, 2008) (Dkt. 9-1), at 8 (¶12): ("In light of the civil class action cases filed against the Defendants…the United States agrees that

Since criminal discovery is much more limited than civil discovery, particularly of foreign defendants, the DOJ relied on discovery conducted by the IPPs, and did not obtain access to this discovery until well after the IPPs had obtained and analyzed it. The IPPs sought damages under the laws of 23 states and the District of Columbia,[8] from the beginning of 1999 through the end of 2006, a much broader time period than the conspiracies prosecuted by the DOJ. Moreover, none of the defendants ever admitted liability to the IPPs for any damages, even for the periods for which they pleaded guilty, and none admitted that the conspiracy caused any increase in prices to class members. All of the defendants, who include some of the largest corporations in the world, retained large law firms and prominent antitrust lawyers to aggressively defend them. *See* Corbitt Decl., ¶¶5-8; Zelle Hofmann Decl.

B. Chunghwa Settlement

In the fall of 2008, the IPPs agreed to settle with Chunghwa Picture Tubes (Chunghwa), for a relatively small amount of money but a significant amount of cooperation. Chunghwa's counsel provided an extensive proffer of information about the conspiracy, including details of the Crystal Meetings, the functioning of the cartel, and other essential facts about the industry. This cooperation proved invaluable in drafting the second amended complaint, moving for class certification, and pursuing discovery against Chunghwa and the other defendants. Corbitt Decl., ¶ 9; Zelle Hofmann Decl. ¶ 53.

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it will not seek a restitution order for the offenses charged in the Information."); Sharp Corporation Plea Agreement, No. CR 08-0802 SI (Dec. 8, 2008) (Dkt. 9-1), at 8; Chunghwa Plea Agreement, No. CR 08-0804 SI (Jan. 5, 2009) (Dkt. 10-1), at 8; Hitachi Plea Agreement, No. CR 09-0247 SI (May 17, 2009) (Dkt. 6-1), at 7; Chimei Plea Agreement, No. CR 09-1166 SI (Feb. 2, 2010) (Dkt. 15), at 8; Hannstar Plea Agreement, No. CR 10-0498 SI (July 22, 2010) (Dkt. 1900-1), at 7-8; LG Display Sentencing Hearing (Dec. 15, 2008), Reporters Transcript ("R.T."), p. 41:17-21; Sharp Sentencing Hearing (Dec. 16, 2008), R.T., p. 23:11-16 ("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.")

[8] The Missouri class subsequently was added by motion, supported by the Missouri Attorney General. The Court granted that motion on July 28, 2011 (Dkt. 3198). Arkansas classes were added as part of the Settlement Agreements, with the support of the Arkansas Attorney General.

C. Pleadings and Motions to Dismiss

After the filing of the IPP Consolidated Amended Complaint on November 5, 2007 (Dkt. 367), the defendants filed motions to dismiss many of the state law claims. Class Counsel briefed and argued in opposition to those motions. In an order issued August 25, 2008, the Court granted in part and denied in part those motions, but the bulk of the IPP damage claims survived intact. Dkt. 121. With the aid of information provided by Chunghwa, the IPPs filed a Second Consolidated Amended Complaint on December 5, 2008 (Dkt. 746), the defendants again filed motions to dismiss, and the same process was repeated. On March 3, 2009, the Court again granted in part and denied in part defendants' second round of motions to dismiss, eliminating a handful of state law antitrust and unjust enrichment claims, but preserving the majority of the IPP damage claims. Dkt. 870.

D. Document Production and Review

Pursuant to Pretrial Order No. 5 (Dkt. 301) the IPPs and DPPs established a joint document depository and coordinated with each other on discovery. Corbitt Decl., ¶ 10-12; Zelle Hofmann Decl. ¶¶ 40-41, 44-45.

The DOJ, supported by the defendants, successfully moved for a stay of merits discovery, and a stay order was issued on September 25, 2007. Dkt. 306. Initially, therefore, the document productions were limited. That stay expired on January 9, 2009 (Dkt. 631), and documents relating to the merits of the case finally were produced. However, there were numerous issues involving each defendant about the completeness of the productions, the technical form of the electronic documents, and whether document searching occurred within the files of particularly important company witnesses, or "custodians". Obtaining these documents required extensive meeting and conferring with defendants and motion practice before the Special Master. Adding to the significance of maintaining order over the massive document review, defendants continued to produce documents from select custodians up until the month before the IPP trial. The defendants eventually produced over 8 million documents and 40 million pages, a large portion of which were in Japanese, Korean, or Chinese. Review of these documents was a massive project, continuing

throughout this case, and accounting for a substantial portion of the total hours devoted by the IPPs throughout this case. Indeed, approximately 100,000 hours were devoted to this effort. Together with the DPPs, the IPPs retained a third-party vendor, Autonomy, which provided the software necessary to maintain an electronic document depository and efficiently conduct the document reviews. The IPPs share alone of the total cost of the Autonomy software was approximately $1,211,906.85. Corbitt Decl., ¶ 10.

In addition to acquiring millions of documents, IPPs fought for and obtained from the defendants one of the broadest sets of electronic data productions ever obtained in any comparable case. IPPs, through extensive motion practice with the Special Master and this Court, obtained worldwide transactional sales data of all TFT-LCD panels produced by defendants in the global market. They also sought and received manufacturing cost data and detailed transactional sales data of TFT-LCD finished products (TVs, monitors and notebooks) manufactured by the defendants and sold in the U.S. Corbitt Decl., ¶ 11; Zelle Hofmann Decl. ¶¶ 44-45.

To use as much of the electronic data as possible, the IPPs spent over a year negotiating with each defendant and consulting with their economic experts, in order to develop an understanding of the electronic data and the companies' databases. These technical discussions required continuous consultation with the IPPs' experts, meetings and correspondence with the defendants, and at times motion practice. Corbitt Decl., ¶ 12.

E. Class Certification

The IPPs deposed over two dozen 30(b)(6) witnesses provided by the defendants on issues relating to class certification, *e.g.*, channels of distribution, manufacturing, pricing, and sales processes, identities of witnesses, and various issues critical to the IPPs' class certification experts. Each of these depositions required extensive document review and preparation. Following negotiations and ultimately orders by the Special Master, the depositions took place in various locations throughout the country and in Asia. A deposition protocol was negotiated and disputes about that were also resolved by the Special Master. Dkt. 1546, 1730. Corbitt Decl., ¶ 13; Zelle Hofmann Decl. ¶¶ 42-43.

The IPPs served over 50 third-party subpoenas, primarily on direct purchasers of panels and distributers and sellers of products containing LCD panels. Most of these were very large entities such as Dell, Hewlett-Packard, and Best Buy. These were especially critical because the IPPs needed to demonstrate that pass through of the direct overcharge could be established on a class-wide basis. Each of these subpoenas had to be individually negotiated, with the assistance of the IPPs' expert economists. Corbitt Decl., ¶ 14; Zelle Hofmann Decl. ¶¶ 44-45.

There were 40 named plaintiffs appointed by the Court to represent class members in the certified states, and another 8 named in the IPP consolidated complaint but not appointed. All of them produced documents, and the defendants deposed them all, in various locations throughout the country. Preparing these plaintiffs and defending them in depositions also required substantial time by IPP counsel. Corbitt Decl., ¶ 15.

The IPPs retained Dr. Janet Netz of applEcon LLC in Ann Arbor, Michigan to render an opinion on class certification, in part because of her and applEcon's prior extensive experience in successful IPP class litigation against Microsoft. She filed two reports totaling hundreds of pages on this issue, and was deposed twice on class certification. Her defense counterpart was Dean Edward Snyder, then of the University of Chicago, now at Yale. He also produced lengthy reports, and was deposed by Class Counsel. Corbitt Decl., ¶ 16; Zelle Hofmann Decl. ¶ 46.

Counsel successfully briefed and argued the motion for class certification. The defendants vigorously opposed class certification, arguing that the conspiracy and amount of direct overcharge were not susceptible to class-wide proof, that it was impossible to establish pass through, class-wide impact, or to measure damages on a class-wide basis. The outcome was by no means certain, given the extremely fact and case-specific nature of the predominance inquiry. The Court certified 23 statewide damage classes and a nationwide injunctive relief class on March 28, 2010. Dkt. 1642. The defendants filed a Rule 23(f) petition with the Ninth Circuit challenging the Court's class certification order on April 12, 2010 (Dkt. 1682); this was denied on June 14, 2010 (Dkt. 1805, 1806). Obtaining class certification, and defending it against the 23(f) petition and the

subsequent motion to decertify, needless to say was vital to the IPPs case. The IPPs surmounted a much more difficult hurdle on this score than did the DPPs.

F. Merits Discovery

After the class was certified, the IPPs focused intensively on merits discovery. In addition to the ongoing review of documents, IPP counsel drafted requests for admission and interrogatories that led to significant additional information about the conspiracy, particularly from Samsung, the amnesty applicant. Teams of IPP document reviewers located the most significant conspiracy documents produced by each defendant, in foreign languages as well as English. The IPPs divided responsibility for taking depositions with the DPPs, and IPP counsel often provided the DPPs with many of the documents they used for their examinations. Over 100 merits depositions of the defendants were taken; 32 in Asia, most of which required foreign language translators. Gradually, a record was developed that implicated every defendant in virtually all aspects of the conspiracy, for the entire eight-year damage period alleged. Corbitt Decl., ¶ 17; Zelle Hofmann Decl. ¶¶ 44-45.

Discovery disputes led to numerous letters, conferences, and motions before the Special Master, involving disputes ranging from the number and location of depositions, to the scope of transactional data productions, to how to address defendant witnesses' invocation of the 5th Amendment or departure from their employment, to production of particular defendant witnesses for deposition. Corbitt Decl., ¶18 (list of key contested motions). The Settling States joined in several of these motions.

G. Testifying Experts

The IPPs retained Dr. Netz to provide opinions relating to the amount of the overcharge, class-wide impact, pass through, and damages to class members resulting from the conspiracy. Subsequent to class certification, the IPPs retained another prominent economist. Professor William Comanor of UCLA, to provide opinions on damages. Class Counsel had numerous conferences and calls with these experts, and provided extensive information to them and their staffs. Initial merits expert reports were served on May 25, 2011. Depositions of the IPP experts

were taken, prepared for and defended by IPP counsel. The defendants responded with reports from 12 testifying experts. In addition to Dean Snyder, they included other prominent economists such as Prof. Dennis Carlton of the University of Chicago, Prof. Daniel Rubinfeld of U.C. Berkeley, and Prof. Robert Hall of Stanford. Class Counsel, working with their experts, prepared for and deposed all of them. Dr. Netz and Prof. Comanor served reply reports, and both were deposed again. Zelle Hofmann Decl.

The average of the single damage estimates of the two damage experts that the IPPs planned to present at trial was approximately $2.2 billion. Corbitt Decl., ¶ 6. Although the defendants and their experts vigorously disputed that there were any damages at all, and contended that damages at most were minimal, Class Counsel were able to provide reliable estimates that survived a *Daubert* motion. This was vital to achieving settlements of the magnitude that resulted.

H. Summary Judgment Motions, Motion to Decertify, and Daubert Motion

The defendants filed 11 summary judgment motions. The IPPs challenged one of the motions on procedural grounds, which resulted in the Court striking the motion (Dkt. 3195), and a second was withdrawn (Dkt. 4027). The IPPs successfully opposed the remaining 9 motions.

The most significant summary judgment motion, in terms of its potential impact on the scope of the case, the relative uncertainty of the governing law, and the emphasis that the defendants placed on it, was that the FTAIA precluded application of the various state laws to the cartel. Dkt. 3833. Had it been granted, this motion could have eliminated virtually all of the IPP damage claims. Defendants moved to certify for interlocutory appeal the Court's order denying their FTAIA motion; that motion too was denied. Dkt. 4346.

Another motion that would have gutted the IPP case had it been granted was one claiming lack of antitrust standing by indirect purchasers of panel-containing products. Dkt. 4301. The defendants also variously contended that LG Display had withdrawn from the conspiracy, that there was insufficient evidence of any agreement to restrict capacity or production, that there was no evidence that "sole-source panels" were included in the cartel, that Toshiba was not involved in the conspiracy, and that the IPPs failed to provide sufficient evidence on a number of required

elements of state law violations. The Court largely denied all of these motions, and the scope of the damages was not significantly reduced. Dkts. 3628, 3690, 3733, 3734, 4107, and 4123.

In an effort to establish a precedent that if successful could have been applied to defeat the damage claims of most of the class members, the defendants moved for an order that Larry Luber, a Missouri class representative, could not establish damages under the IPP experts' methodologies. To respond to this argument, the IPPs obtained additional declarations from their experts explaining their methodologies as applied to Mr. Luber's purchases, and the Court denied the motion in reliance on that expert testimony. Dkt. 3591.

After the close of merits discovery and the submission of merits expert reports, the defendants moved to decertify the class. They repeated most of the arguments made in the initial class certification opposition, vigorously contending in particular that the class members could not ascertain whether the TVs, monitors and notebooks they purchased contained LCD panels manufactured by one of the defendants. Additional reports were filed by the IPP experts, as well a declaration by an applEcon staff member, John Metzler, pertaining to the identification of finished products containing defendant-made panels, that the defendants unsuccessfully moved to strike. The Settling States provided research to assist the IPPs in opposing the motion. The matter was briefed and argued, and the Court denied the motion to decertify on January 26, 2012. Dkt. 4683. The defendants again unsuccessfully sought Ninth Circuit review of the Court's rulings. The Ninth Circuit denied the writ on April 12, 2012. Dkt. 5467.

Prior to trial, the defendants attempted yet another knockout motion, contending that the IPP experts' testimony should be disallowed at the trial because of purported failure to meet the *Daubert* standard. Class Counsel also successfully briefed, argued, and opposed this motion, and the Court denied it on February 21, 2012. Dkt. 4848.

I. Trial Preparation

The Court directed that there be a single joint trial of both the DPP and IPP cases, against all remaining defendants in either case. The IPPs coordinated trial preparation with the DPPs. Class counsel drafted, negotiated and submitted proposed jury instructions. They drafted and filed

more than 20 motions *in limine*, and opposed a comparable number filed by the defendants. They met with and prepared preliminary trial testimony for class representatives. They selected live trial witnesses from the defendants, and filed a trial witness list with descriptions of testimony. They designated trial exhibits and deposition testimony, responded to objections by the defendants, and prepared objections to the defendants' corresponding trial evidence designation. They negotiated and filed several admissibility stipulations for proposed trial exhibits, and negotiated hundreds of disputes concerning foreign language translations. They drafted, negotiated, and filed a proposed jury verdict form. They filed a Joint Pretrial Statement on March 13, 2012. Dkt. 5121. Trial preparation was intensively ongoing when the case settled. Corbitt Decl., ¶ 19; Zelle Hofmann Decl. ¶¶ 48-49.

IV. MEDIATION, SETTLEMENT NEGOTIATIONS, AND SETTLEMENT

As discussed above, IPP Co-Lead counsel negotiated the first settlement with Chunghwa, for a cash payment ultimately agreed to be $5.3 million, and significant assistance with the prosecution of the case. A smaller settlement followed with Epson, ultimately agreed to be $2.85 million; Epson was not involved in the Crystal Meetings and had a very low market share.[9] Corbitt Decl., ¶ 20; Zelle Hofmann Decl. ¶ 55. The Court then appointed Eric Green as a mediator for all MDL cases. The Settling States also began actively participating in these discussions, in cooperation with the IPPs. Representatives of the California, Florida, and Missouri Attorneys General participated in person on behalf of their states and other Settling States. A number of sessions were held under Mr. Green's auspices, and eventually the Hon Daniel Weinstein (Ret.) of JAMS also assisted the parties. Corbitt Decl., ¶ 21; Zelle Hofmann Decl. ¶¶ 60-61. As a result of these discussions, additional cash settlements were reached during the period from April through November 2011 with Chimei, Hitachi, Hannstar, Samsung and Sharp, bringing the total settlement amount to $538,555.647. The Court has granted final approval of these settlements. Dkt. 6130.

[9] The initial agreements with Chunghwa and Epson were for $10 million and $5 million respectively, but the amounts were proportionately reduced when the parties agreed to limit the damages release to the certified states, in order to eliminate potential objections and respond to a concern expressed by the Court over the propriety of damage releases for non-certified states.

The last three settlements were not achieved until April 2012, a few weeks before the scheduled May trial. Co-Lead Counsel negotiated the Toshiba settlement directly, along with the California Attorney General. The AUO and LG Display settlements were reached with the assistance of the Hon. Vaughn Walker (Ret.), former Chief Judge of the Northern District of California. No doubt due to the IPPs' demonstrated focus on trial preparation, their successes in defeating the various summary judgment motions, the motion to decertify the class, and the *Daubert* motion, and with the persistence of the Settling States, the last three defendants to settle ended up collectively agreeing to pay more than did the first seven. The grand total of the Settlement Fund is $1,082,055,647. In addition to that amount, the Settling States recovered a total of over $42 million in civil penalties from most of the defendants. (Class Counsel are not seeking fees on these civil penalties, but do deserve some credit for their achievement.) Corbitt Decl., ¶ ¶20-23; Zelle Hofmann Decl., ¶¶50-74. The chart above on p. 7 summarizes the dates and amounts of the various settlements.

These settlements are believed to be the largest all-cash settlements ever achieved in indirect-purchaser litigation. The average of the final single damage estimates for all certified state damage classes that would have been offered at trial by Dr. Netz and Prof. Comanor was approximately $2.2 billion. Corbitt Decl., ¶ 6. Therefore, the IPPs, assisted by the Settling States, recovered approximately half of single damages for injured consumers, and more than half counting the civil penalties. Given the uncertainty of the overcharge estimates and especially of the 100% pass through assumed by plaintiffs' experts, and in light of the assault on the experts that the defendants would have mounted at trial, this was an extraordinary result. Since not all class members will file claim forms, we anticipate that class members who file a valid claim forms will be highly compensated for the amount of the conspiratorial overcharges on the products they purchased. Corbitt Decl., ¶ 8.

V. THE APPLICABLE LEGAL STANDARDS FOR COMMON FUND FEE AWARDS

Counsel who represent a class and produce a benefit for class members are entitled to compensation. As the Supreme Court stated, "this Court has recognized consistently that a litigant

or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). *See also Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 393 (1970); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 123 (1885). The purpose of this doctrine is that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("*WPPSS*").

The Supreme Court has repeatedly recognized the importance of private antitrust litigation as a necessary and desirable tool to assure the effective enforcement of the antitrust laws. *See, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 331 (1979); *State of Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Substantial fee awards in successful cases, such as this one, encourage meritorious class actions, and thereby promote private enforcement of, and compliance with, the antitrust laws. As noted by the Second Circuit in *Alpine Pharmacy, Inc. v. Charles Pfizer & Co., Inc.*, "[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced . . . ." 481 F.2d 1045, 1050 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 653-54 (1985), the Supreme Court explained:

> What we have described as "the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," is buttressed by the statutory mandate that the injured party also recover costs, "including a reasonable attorney's fee." 15 U.S.C. § 15(a). The interest in wide and effective enforcement has thus, for almost a century, been vindicated by enlisting the assistance of "private Attorneys General"; we have always attached special importance to their role because "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress.
> (Citations omitted)

The amount of the award of reasonable attorneys' fees and expenses is within the sound discretion of the district court. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998); *WPPSS*, 19 F.3d at 1296. In *Blum v. Stenson*, the Supreme Court recognized that under the

"common fund doctrine" a reasonable fee may be based "on a percentage of the fund bestowed on the class." 465 U.S. 886, 900 n.16 (1984). In the Ninth Circuit, the district court has discretion in a common fund case to choose either the "percentage-of-the-fund" or the "lodestar" method in calculating fees. *Fischel v. Equitable Life Assur. Soc'y*, 307 F.3d 997, 1006 (9th Cir. 2002); *Wininger v. SI Management L.P.*, 301 F.3d 1115, 1123-24 & n.9 (9th Cir. 2002); *Vizcaino*, 290 F.3d at 1047; *WPPSS*, 19 F.3d at 1296.

Modern courts exhibit a clear preference for the "percentage-of-the-fund" method. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. Pa. L. Rev. 2043, 2052 (2010). The lodestar approach is used more often in "employment, civil rights and other injunctive relief class actions . . . because there is no way to gauge the net value of the settlement or any percentage thereof." *Hanlon*, 150 F.3d at 1029.

Virtually all of the major recent antitrust cases in the Northern District of California have applied the percentage of the fund approach. *See, e.g., Meijer v. Abbott Laboratories*, C-07-05985 (N.D. Cal. Aug. 11, 2011) (Wilken, J.) (33⅓%); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, M-02-1486, 2007 WL 2416513 (N.D. Cal. Aug. 16, 2007) (Hamilton, J.) (25%); *In re Methionine Antitrust Litig.*, Nos. C-00-3961, C-01-0944, C-01-2629, C-01-2759, C-01-3447, C-01-4292 (N.D. Cal. Oct. 3, 2002) (Breyer, J.) (22.6%); *In re Sorbates Direct Purchaser Antitrust Litig.*, No. 98-4886 (N.D. Cal. Nov. 20, 2000) (Legge, J.) (25%); *Van Vranken v. ARCO*, 901 F. Supp. 294 (N.D. Cal. 1995) (25%); *In re Sodium Gluconate Antitrust Litig.*, No. C-97-4142 (N.D. Cal. 1999) (Wilken, J.) (30%). This Court in particular has applied the same approach in a number of recent cases. *See, e.g., In re CV Therapeutics, Inc. Sec. Litig.*, 2007 WL 1033478 (N.D. Cal. April 4, 2007) (30%) (Illston, J.); *Ross v. U.S. Bank Nat. Ass'n*, 2010 WL 3833922 (N.D. Cal. Sept. 29, 2010) (25%) (Illston, J.). Often, this Court applies the percentage of the fund method with a lodestar cross check. *See, e.g., Satchell v. FedEx Exp.*, 2007 WL 2343904 (N.D. Cal. Aug. 14, 2007) (finding fee reasonable under both the "lodestar" and the "common fund" methods).

In applying the percentage fee approach, the Ninth Circuit has established 25% as a benchmark that a Court may adjust upward or downward as the circumstances of a case warrant.

In *Vizcaino*, for example, an employment law case, a 28% fee was upheld on the basis of five factors: (1) the exceptional results for the class, (2) the risk for its counsel, (3) whether any individual non-monetary benefits were obtained, (4) whether the fee is at or below market rates, and (5) the burden on class counsel of prosecuting the case. 290 F.3d at 1048-50.

While 25 percent is the benchmark in the Ninth Circuit, "a district court may exceed the benchmark if it makes clear how it arrives at the figure ultimately ordered." *Brailsford v. Jackson Hewitt, Inc.*, C06-00700 CW, 2007 U.S. Dist. LEXIS 35509, at *14 (N.D. Cal. May 3, 2007) (awarding 30% of the common fund and citing *Graulty*, 886 F.2d at 271).

The Ninth Circuit has not endorsed the so-called "megafund" limitation on fees, although it has stated that courts may consider the size of the fund. In *Vizcaino,* the court rejected an argument that the district court erred by not reducing the fee under the "megafund" concept, explaining, "we did not adopte this [principle]…" 290 F.3d at 1047. The "megafund" limitation on percentage fees has been criticized. *See, e.g., In re Cendant Corp. Litig.,* 264 F.3d 201, 284 n. 55 (3d Cir. 2001) ("[The megafund] position . . . has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply."); *Allapattah Servs. Inc. v. Exxon Corp.,* 454 F.Supp.2d 1185, 1213 (S.D. Fla. 2006) ("By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little."). Professor Fitzpatrick's opinion is that the megafund concept should not be applied in this case. Fitzpatrick Decl., ¶¶ 21-24.

In general, as Professor Fitzpatrick explains in his accompanying Declaration, there are at least eight factors this Court can reasonably consider in connection with an upward adjustment of the 25% benchmark:

(1) the results achieved by class counsel, *see Six Mexican Workers*, 904 F.2d at 1311; *Vizcaino*, 290 F.3d at 1048;

(2) the complexity of the case, *see Six Mexican Workers*, 904 F.2d at 1311; *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995);

(3) the risks the case involved, *see In re Pacific Enters. Sec. Litig.*, 47 F.3d at 379; *Vizcaino*, 290 F.3d at 1048-49;

(4) the length the case has transpired, *see Six Mexican Workers*, 904 F.2d at 1311; *Vizcaino*, 290 F.3d at 1050;

(5) the non-monetary benefits obtained by class counsel, *see In re Pacific Enters. Sec. Litig.*, 47 F.3d at 379; *Vizcaino*, 290 F.3d at 1049; *Staton v. Boeing Co.*, 327 F.3d 938, 946 (9th Cir. 2003).

(6) the percentages awarded in other class action cases, *see Vizcaino*, 290 F.3d at 1050;

(7) the percentages in standard contingency-fee agreements in similar individual cases, *see id*. at 1049; and

(8) class counsel's lodestar, *see id*. at 1050-51.

Each of these factors strongly supports a significant upward adjustment in this case.

VI. THE FEES REQUESTED BY CLASS COUNSEL ARE REASONABLE

A. A Significant Upward Adjustment From The 25 Percent Benchmark Is Reasonable

This case meets all of the criteria discussed in *Vizcaino* and other cases for a significant upward adjustment to the 25% benchmark. Although the Settlement Agreements all provide that the defendants will not object to a fee petition of up to one-third of the fund, and the Court already has approved 30% for the DPP case (plus additional reimbursement of travel and other expenses that the IPPs are not seeking), IPP Class Counsel have limited their request to 28.5%. A fee award of this magnitude is fully justified.

The IPPs are filing herewith declarations from two prominent experts on attorneys fees in class actions. Professor Brian Fitzpatrick of Vanderbilt Law School was a law clerk for Justice Antonin Scalia of the U.S. Supreme Court and Judge Diarmuid O'Scannlain of the Ninth Circuit. He is the author of *An Empirical Study of Class Action Settlements and Their Fee Awards,* 7 J.

Empirical L. Stud. 811 (2010), which has been relied upon by a number of courts. His additional qualifications are described in his declaration. Richard Pearl, an Adjunct Professor at U.C. Hastings College of the Law, is the author of *California Attorney Fee Awards*, 2d Ed. (CEB 2005). His expert testimony on attorneys fee issues has been relied upon by a number of courts. His additional qualifications are also described in his declaration. Both experts agree that the requested attorneys fees are reasonable and are within the range that has been approved in class action settlements.

1. The Results Were Extraordinary

Class Counsel are aware of no antitrust case brought on behalf of indirect-purchaser consumers that achieved anything comparable to the $1.086 billion in non-reversionary cash recovered in this case, or recovered half of the estimated class-wide damages. Indeed, the percentage of estimated damages recovered far exceeds nearly all reported direct purchaser cases. Simply stated, there are no indirect cases of which counsel are aware that even come close to the result achieved here.

Money will be paid to all class members who submit valid claim forms. Class Counsel are committed to a notice process designed to generate the maximum number of claims possible. Whether or not this case results in an above-average percentage of class members who file valid claims, the unprecedented size of the fund means that payment of the requested fees should in no way diminish Class Counsel's ability to fairly and adequately compensate all claimants. In addition, the non-monetary relief described above is also significant, and will help ensure that a resurrection of the LCD cartel does not occur.

In addition to the Ninth Circuit's consideration of this factor in *Vizcaino*, the Ninth Circuit has long looked to exceptional results as highly relevant to fee awards. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1377 (9th Cir. 1993) (considering counsel's "expert handling of the case"); *Six Mexican Workers*, 904 F.2d at 1311 (noting plaintiffs' "substantial success"); *In re Prudential Ins. Co. Sales Practice Litig.*, 148 F.3d 283, 339 (3d Cir. 1998) (observing that "results

achieved were 'nothing short of remarkable'" (quoting *In re Prudential Ins. Co. Sales Practices Litig.*, 962 F. Supp. 572, 585-86 (D.N.J. 1997))).

The percentage of damages recovered in this case is remarkable, and this is an important factor in upwardly adjusting the benchmark fee. *See, e.g.*, *In re Medical X-Ray Film Antitrust Litig.*, 1998 WL 661515, at *7-8 (E.D.N.Y. Aug. 7, 1998) (court increased 25% benchmark to 33.3% where counsel recovered 17% of damages); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (court increased 25% benchmark to 33.8% where counsel recovered 10% of damages); *In re General Instr. Sec. Litig.*, 209 F. Supp. 2d 423, 431, 434 (E.D. Pa. 2001) (one-third fee awarded from settlement fund that was 11% of the plaintiffs' estimated damages); *In re Corel Corp., Inc. Sec. Litig.*, 293 F. Supp. 2d 484, 489-90, 498 (E.D. Pa. 2003) (one-third fee awarded from settlement fund that equaled about 15% of damages). These were all cases that involved far less difficulty in proving damages than this one. Recovery of half of estimated damages in an indirect purchaser case is truly unprecedented.

The results achieved by the IPP Class Counsel warrant an upward adjustment from the 25% benchmark. Fitzpatrick Decl., ¶15; Pearl Decl., ¶17.

2. The Case Was Exceedingly Complex

Antitrust cases in general are highly complex, and the IPP case in particular was about as complex as an antitrust case can get. The IPPs had to plead and establish evidence of violations of law of two dozen jurisdictions, obtain class certification for each of those jurisdictions, conduct world-wide discovery in multiple languages, and last but certainly not least, analyze complex economic evidence and expert testimony, develop proof of injury and damages on a class-wide basis to indirect-purchasers at the bottom of the distribution chain, who purchased many different products at many different prices from many different sources, over an eight-year period. This last challenge alone added an order of magnitude in complexity beyond that in the DPP case and the typical direct-purchaser case. It also supports the upward adjustment requested by Class Counsel. *See* Fitzpatrick Decl., ¶ 16; Pearl Decl., ¶17.

3. The Risks Were Enormous

Even though most of the defendants either pleaded or were found to be guilty of unlawfully conspiring to fix LCD panel prices, none admitted the full scope of the conspiracy alleged by the IPPs, none admitted that the fix on panels caused prices of products containing those panels to increase, and class certification, class-wide impact and damages were hotly contested by all defendants throughout the case until the time each of them settled. Accordingly, proof of conspiracy, even to the relatively limited extent established by the criminal guilty pleas, was only part of the challenge of this case. "Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial or on appeal." *In re NASDAQ Market-Makers Antitrust Litig.,* 187 F.R.D. 465, 476 (S.D.N.Y. 1998). This already large risk was magnified in the IPP case. Although the Court granted plaintiffs' motion for class certification, the issue was far from a foregone conclusion. One needs to look no further than the outcomes of similar indirect-purchaser class actions in this district and others, where class certification was denied in similar circumstances. *See, e.g., In re Graphics Processing Units Antitrust Litig.,* C 06-07417 WHA, 253 F.R.D. 478 (N.D. Cal. July 18, 2008); *In re Flash Memory Antitrust Litig.,* C 07-0086 SBA, 2010 WL 2332081 (N.D. Cal. June 9, 2010). Areeda *et al.* have observed that "most of the putative [IPP] classes are not certified" due to judicial perception of their complexity, and that whether a class-wide approach to proving damages "will work in an indirect purchaser case is highly questionable." IIA Areeda *et al.*, Antitrust Law, ¶ 396e (3d ed. 2006). The standards to be applied for Rule 23(b)(3) class certification in federal courts are likewise uncertain, pending the Supreme Court's decision next term in *Comcast v. Behrend,* No. 11-864 (U.S.), in which *certiorari* was granted from a Third Circuit decision on the question of "whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." Similarly, although the Court denied most of the defendants' summary judgment

motions, many of the issues, particularly the FTAIA, are unsettled and might be decided the other way on appeal.

The complexity and risk are well illustrated by the Court's observation that "[n]othing about this case in any way has been easy." Transcript, Direct Purchaser Plaintiffs' Motion for Preliminary Approval of Class Settlement (Oct. 4, 2011), at 6:18-19. Even so, IPP counsel have invested hundreds of thousands of hours, millions of dollars, and nearly six years in this effort. Professor Fitzpatrick correctly observes, "In short, the plaintiffs—as well as their lawyers who have invested millions of dollars and years of their lives in their case—could have very easily ended up with nothing." Fitzpatrick Decl., ¶17; The risk assumed by IPP counsel warrants an upward adjustment from the 25% benchmark. *Id.*; Pearl Decl., ¶18.

4. The Length Of Time Of This Case Warrants an Upward Adjustment

The first cases were filed in December 2006, and will have been pending for nearly six years when the Court holds a hearing on this motion. Multiple appeals already have been filed by professional objectors to the approval of the first round of settlements, and doubtless many more will be filed after the second round, regardless of the fees this Court awards. In Class Counsel's view all of these appeals are frivolous, but unfortunately they may take years to resolve, and may correspondingly delay the finality of the settlements, the payments to class members, and counsel's receipt of fees.

As noted above, Class Counsel have already devoted more than nearly 313,000 hours to this case since December 2006, and have spent over $8 million out of pocket in common costs, with no compensation to date. Declaration of Jack W. Lee, ¶ 8; IPP Second Motion for Reimbursement of Costs, filed concurrently with this motion. In addition, Class Counsel estimate that they will absorb at least $4 million in additional, firm-specific costs which are not included in the cost motions. Corbitt Decl., ¶ 23. Multiple courts have awarded attorneys' fees of one-third of a common fund where far less effort was expended. *See Crazy Eddie*, 824 F. Supp. at 325 (one-third fee award justified in part due to the expenditure of 30,000 hours by 11 firms); *see also*

Medical X-Ray, 1998 WL 661515, at *28 (one-third of the common fund awarded after 17 law firms spent about 30,000 hours litigating the case)

Professor Fitzpatrick correctly notes that this case was litigated much longer than is typical for class actions before settlement, and settled virtually on the eve of trial. The enormous amount this case has required is discussed above. Co-Lead Counsel certainly did not just settle this case quickly to grab fees before the value of the case was maximized. This factor also warrants an upward adjustment to the benchmark. Fitzpatrick Decl. ¶14; Pearl Decl. ¶23.

5. The Non-Monetary Benefits Obtained Are Significant

Under the terms of each settlement, each Settling Defendant agrees, for a period of up to five years, that it will not engage in price fixing, market allocation, bid rigging, or other conduct that violates Section 1 of the Sherman Act, with respect to the sale of any LCD Panels, including TVs, notebook computers, or monitors containing LCD Panels, that are likely, through the reasonably anticipated stream of commerce, to be sold to end-user purchasers in the United States. This is a significant component because of the serial price fixing cases involving many of these defendants. First, many of the defendants have been involved in criminal investigations in this District, consuming the resources of not just this Court but also the Department of Justice and grand juries which have launched investigations into price fixing of *TFT-LCD, DRAM, SRAM*, *Flash Memory, CRT, GPUs,* and *Optical Disc Drives*. In agreeing to this component, there is substantially less risk that these companies will engage in these activities, thereby protecting free market activity in the sale of critical consumer products.

Additionally, each Settling Defendant agrees to establish (or where applicable, maintain) an antitrust compliance program for the officers and employees responsible for the pricing or production capacity of LCD Panels. Each Settling Defendant will certify, through an annual written report for up to the next five years, that it is in compliance with this obligation. Similarly, this non-cash aspect of the settlements protects consumers. Evidence showed that there was alleged ignorance of the understanding and reach of antitrust laws. Some deponents testified that they had no knowledge of antitrust law, that price fixing and meeting with competitors was a

phenomenon present in daily aspects of business in the Far East; that there was little or no training in antitrust compliance, and that they did not have knowledge that discussion and agreement on pricing with competitors was illegal or against fair competition. The defendants' employees will no longer be able to claim such ignorance.

Finally, the cooperation provisions, which included agreements to bring witnesses to trial who were beyond the Court's subpoena power, were extremely important as Class Counsel continued to pursue the case against the non-settling defendants.

Professor Fitzpatrick observes that "if fees are calculated only from the cash portion of a settlement (as is the request here), and the fee percentage is not favorably adjusted to reflect the non-cash relief won by class counsel, then class action lawyers will have no incentive to pursue non-cash relief, even when it may be valuable to the class." Fitzpatrick Decl., ¶19 (citing *Staton,* 327 F.3d at 946). This factor also warrants an upward adjustment from the 25% benchmark.

6. Awards in Other Class Actions Justify A 28.5% Award Here

The most direct indication of the reasonableness of the IPPs' requested 28.5% fee is the Court's order awarding 30% to the DPPs. That award in turn, given the results achieved, was consistent with the cases examined by Prof. Fitzpatrick for percentage fee awards by all federal courts and for the Ninth Circuit in particular in 2006 and 2007. Nearly two-thirds of the awards were between 25% and 35%. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards,* 7 J. Empirical. L. Stud. 811 (2010). Professor Fitzpatrick states that "in my opinion, the awards in other class action cases both within and outside the Ninth Circuit support the fee awards requested here." Fitzpatrick Decl., ¶20.[10]

Professor Fitzpatrick also explains why it is reasonable to award the percentage fee sought by Class Counsel even though this is a so-called "megafund" settlement:

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[10] *See also* D. Martin *et al., Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?* (NERA Nov. 1996) at 12-13 (1996 analysis of 433 shareholder class actions conducted by NERA concluded that "[r]egardless of case size, fees average approximately 32 percent of the settlement."); *Allapattah, supra,* 454 F.Supp.2d at 1218 (awarding 31.33% of $1.075 billion; court concluded that an upward adjustment was reasonable based on the results achieved.).

> "The practice among some district courts to decrease fee percentages as settlement sizes increase has been criticized by many scholars and other courts, and in my opinion, courts should no longer follow it. In particular, courts and commentators have worried that lowering percentages as settlement sizes increase will blunt the incentives of class counsel to fight for the largest settlement, and, indeed, might incentivize class counsel to settle cases earlier for smaller sums." (Fitzpatrick Decl., ¶ 23)

The lodestar cross-check is significant here when considering the megafund concept. Many cases that have awarded percentage fees below 25% in megafund cases actually have awarded substantially *higher* lodestar multipliers than Class Counsel are requesting here. For example, in *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465 (S.D.N.Y 1998), the court awarded 14% of a $1.027 billion settlement, but the multiplier was 3.97. Similarly, in *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F.Supp.2d 503 (S.D.N.Y 2003), the court awarded $220 million, which was 6.5% of a $3.3 billion settlement, but the lodestar multiplier amounted to 3.5 (counsel had requested a lodestar multiplier of 9.7). *See also In re AOL Time Warner, Inc. Sec. Litig.*, 2006 WL 3057232 (S.D.N.Y. Oct. 25, 2006) (5.9% fees awarded on $2.65 billion settlement; multiplier of 3.69); *In re WorldCom, Inc. Sec. Litig.*, 388 F.Supp.2d 319 (S.D.N.Y. 2005) (fees of 5.5% of $6.133 billion settlement; multiplier of 4). Recently, the Delaware Supreme Court approved a Chancery Court fee award of 15% of a $2.03 billion recovery, approximately $305 million, despite objections that it "pa[id] the Plaintiff's counsel over $35,000 per hour worked and a multiplier of 66 times the value of their time and expenses." *Americas Mining Corp. v. Theriault*, No. 29, 2012 WL 3642345, at *34-42 (Del. Aug. 27, 2012). The Court reasoned that the tremendous result achieved by plaintiff's counsel justified this fee.

Numerous courts in this Circuit and elsewhere awarded fees exceeding 25 percent, including fee awards of one-third of the common fund generated by the work of plaintiffs' counsel. *See, e.g., In re Pacific Enters. Sec. Litig.*, 47 F.3d at 379 (upholding fee award of one-third of common fund where plaintiffs cited complexity of issues and risks involved); *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555 (C.D. Cal. June 10, 2005) (one-third was justified based on the result obtained, Class Counsel's effort, experience and skill, and the great risk assumed). Courts in other circuits similarly have approved fee awards of one-third of the common fund in

numerous cases, including in numerous antitrust actions. *See, e.g., In re Automotive Refinishing Paint Antitrust Litig.*, 2008 U.S. Dist. LEXIS 569, at *23 (E.D. Pa. Jan. 3, 2008) (one-third, where class counsel spent almost six years and more than 48,000 hours prosecuting the case); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 77-82 (D. Mass. 2005) (one-third of common fund was justified due to, *inter alia*, skill and efficiency of counsel, complexity and four-year duration of the litigation, and class counsel's expenditure of tens of thousands of hours on the case); *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25067, at *58 (D.D.C. July 13, 2001) (determining that one-third was reasonable and granting fee award of approximately 34% of the total estimated settlement amount in antitrust price fixing litigation).

Precedent in other class actions fully supports the 28.5% percentage fee requested by IPP Counsel in this case. Fitzpatrick Decl., ¶¶21-24.

7. Standard Contingent Fee Agreements in Non-Class Antitrust Cases Confirm That 28.5% Is Reasonable.

In non-class antitrust cases, it is typical for counsel to receive a percentage fee of up to one-third of the recovery. Co-Lead Counsel Zelle Hofmann has represented opt-out plaintiffs in several class actions, including Fortune 500 companies, with a one-third fee wholly contingent on the outcome. Corbitt Decl., ¶ 24. This was relied upon in *Sullivan v. DB Investments, Inc.*, CIV.A. 04-2819 SRC, 2008 WL 8747721, at *35 (D.N.J. May 22, 2008) (citing Corbitt Declaration). As Prof. Fitzpatrick explains, "standard contingency-fee percentages in individual litigation are at least 33%, which makes them greater than the awards requested here." Fitzpatrick Decl., ¶ 25. Professor Pearl agrees, stating that "a 28.5% fee from a $1.082 billion fund is entirely consistent with the legal marketplace for attorneys' services in contingency fee cases like this one" (Pearl Decl., ¶26), and that sophisticated institutional clients would be more than willing to enter into an arrangement for a 28.5% contingent fee with the lawyers advancing all the costs (*id.*, ¶27).

B. The Lodestar Cross-Check Confirms That 28.5% Is Reasonable

Class Counsel are filing along with this Motion a Compendium of IPP Firm Declarations. Each IPP firm was asked to submit a declaration from a supervising partner or owner listing and

describing the time it devoted to this case. Counsel were asked not to include any time devoted to preparing the declarations or otherwise pertaining to support for this fee petition. Co-Lead Counsel are not, by submitting them here, vouching for the accuracy of the information contained in these declarations. They will be submitted to the Special Master for his review. Corbitt Decl., ¶¶2-3.

As discussed above, the total lodestar at historical rates reported by all firms is approximately $148 million. Counsel also were asked to provide their total lodestar at current rates; that reported total is $159.6 million. If the Court awards the requested 28.5% fee, the multipliers on reported time would be 2.08 at historical rates and 1.93 at current rates. To account generously for inefficiencies, and to follow the example of the DPPs, Co-Lead Counsel alternatively have assumed a reduction of 20% to the total reported lodestar (without conceding that such a significant reduction is appropriate). The adjusted multipliers assuming these 20% reductions to historical and current rates are 2.60 and 2.42, respectively. Corbitt Decl., ¶4 and Corbitt Decl., Exhibit A.

These multipliers are well within the range that has been approved in other complex class actions with outstanding results. *See e.g., Vizcaino v. Microsoft*, 290 F.3d at 1050-51 (upholding a 28% fee award that constituted a 3.65 multiple of lodestar); *id.*, at 1052-54 (noting district court cases in the Ninth Circuit approving multipliers as high as 6.2, and citing only 7 of 34 decisions with approved multipliers below 2.0). Professor Pearl also cites a number of cases approving multipliers in this range. Pearl Decl., ¶24.

Professor Pearl states:

> "In my opinion, based on my extensive experience with attorneys' fee matters and the legal marketplace, the reasonableness of counsel's percentage-based fee is confirmed by cross-checking it against a lodestar-based fee: (1) The hourly rates utilized in the lodestar cross-check are in line with those charged by comparably qualified attorneys for comparable work in the legal marketplace; and (2) the lodestar multipliers applied under any of the four scenarios set forth above are consistent with the legal marketplace and therefore reasonable." (Pearl Decl., ¶9)

Professor Pearl fully explains the basis for his opinion in his Declaration. Professor Fitzpatrick agrees. Fitzpatrick Decl., ¶25. The lodestar cross-check also confirms that the upward adjustment to the 25% benchmark requested by the IPPs is reasonable.

In conclusion, Class Counsel's requested 28.5% fee is reasonable under all the facts and circumstances, and the outstanding outcome achieved in this case. It is well within the range of previously-approved fee awards.

VII. THE REQUESTED INCENTIVE AWARDS ARE REASONABLE

Courts within this district routinely award incentive payments to representative plaintiffs in class actions to compensate them for the time and services they provided and the risks they incurred in the litigation. "Since without a named plaintiff there can be no class action, such compensation as may be necessary to induce him to participate in the suit could be thought the equivalent of the lawyers' non-legal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable." *Staton*, 327 F.3d at 976 (citing *In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992)). Recent cases before this Court confirm that incentive awards of the type requested here are appropriate where class representatives actively participated in litigation that bestowed a benefit on absent class members.[11]

In this district and around the country, "incentive payments to named plaintiffs have become 'fairly typical' in class actions." *Harris v. Vector Marketing Corp.*, 2012 WL 381202, at *6 (N.D. Cal. Feb. 6, 2012); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (finding that courts "routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class

[11] In the DPP case, the Court approved payments of $15,000 to each of the eleven representative plaintiffs, totaling $165,000. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C-07-1827, 2011 WL 7575003, at *2 (N.D. Cal. Dec. 27, 2011). Additionally, in *Ross v. U.S. Bank Nat. Ass'n*, No. C-07-02951, 2010 WL 3833922, at *2 (N.D. Cal. Sept. 29, 2010), the Court approved $20,000 incentive awards to each of the four representative plaintiffs, concluding that "[e]ach of the class representatives made substantial contributions to the case, including reviewing document productions, having their depositions taken, and traveling to San Francisco to attend and actively participate in the mediation that led to the settlement of this case." And, in *In re CV Therapeutics, Inc. Sec. Litig.*, 2007 WL 1033478, at *2 (N.D. Cal. Apr. 4, 2007), the Court awarded the lead plaintiff $26,000 "for reimbursement of time and expenses incurred in representing the class."

action litigation"); 4 William B. Rubenstein et al., *Newberg on Class Actions* § 11:38 (4th ed. 2008); Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 U.C.L.A. L.Rev. 1303 (2006) (27.8% of class action settlements between 1993 and 2002 included an incentive award to the representative plaintiffs).

Moreover, courts recognize the social value of encouraging plaintiffs to participate in litigation that enhances enforcement of laws and deters misconduct. *Domonoske v. Bank of America, N.A.*, 790 F.Supp.2d 466, 476-77 (W.D. Va. 2011) ("[i]ncentive awards are routinely approved in class actions to 'encourage socially beneficial litigation …'"); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *18 (E.D. Pa., June 2, 2004) ("[p]ayments to class representatives …. may also be treated as a reward for public service and for the conferring of a benefit on the entire class").

Here, the 40 Court-appointed class representatives, as well as the 8 named plaintiffs who were not appointed as representatives, all voluntarily subjected themselves to extensive discovery conducted by counsel for the defendants. Each of these plaintiffs was deposed by the defendants; provided documentation of their purchases of LCD products; and reviewed and attested to discovery responses. Moreover, because this case did not fully settle until the eve of trial, the Court-appointed class representatives attended extensive trial preparation sessions with their counsel, in order to prepare to testify at trial. These activities required substantial commitments of time, and for nearly all of the plaintiffs, travel to San Francisco from points all over the country. The members of the IPP classes will reap substantial benefits on account of the time and effort expended by the Court-appointed class representatives and other named plaintiffs, and thus incentive awards to them are appropriate.[12]

[12] Incentive awards to non-class representative plaintiffs are permissible where they made contributions to the litigation or assumed risks that are not shared by the class as a whole. *See, e.g., Trujillo v. City of Ontario*, 2009 WL 2632723, at *5 (C.D. Cal. Aug. 24, 2009) (awarding incentive payments of $10,000 each to the ten plaintiffs named in the original complaint, and $30,000 each to the six class representative plaintiffs); *Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, at *37-38 (N.D. Cal. Apr. 1, 2011) (awarding incentive awards ranging between $500-$5,000 to the class representative plaintiffs, and $2,500 to a non-representative plaintiff).

VIII. CONCLUSION

For the foregoing reasons, the IPPs' motion for attorneys fees and incentive awards should be granted.

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Respectfully submitted,

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