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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE CAPACITORS ANTITRUST LITIGATION	**MDL No. 17-md-02801** **Case No. 3:14-cv-03264-JD**
This Document Relates to: **All Indirect Purchaser Actions**	**INDIRECT PURCHASER PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF REVISED SETTLEMENTS WITH SHINYEI AND TAITSU DEFENDANTS AND FOR APPROVAL OF THE PLAN OF ALLOCATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** **Date:** August 12, 2021 **Time:** 10:00 a.m. **Place:** Courtroom 11, 19th Floor

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on August 12, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable James Donato, United States District Judge for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, the Indirect Purchaser Plaintiffs ("IPPs") will and hereby do move for entry of an order granting preliminary approval of revised proposed settlements with: (1) Defendants Shinyei Technology Co., Ltd. and Shinyei Capacitor Co., Ltd. (together, "Shinyei"); and (2) Defendant Taitsu Corporation ("Taitsu," and together with Shinyei, the "Settling Defendants"). This motion is brought pursuant to Federal Rule of Civil Procedure ("Rule") 23. The grounds for this motion are that the settlements with the Settling Defendants fall within the range of possible final approval, contain no obvious deficiencies, and were the result of serious, informed, and non-collusive negotiations.

Additionally, as they have with each of the other settlements, IPPs seek approval of their plan of allocation. IPPs' proposed plan of allocation is fair, reasonable, and adequate. IPPs propose that distribution of the settlement funds be on a *pro rata* basis based on the type and extent of injury suffered by each class member based on damage claims from the included Indirect Purchaser States—with respect to these revised settlements, the states are limited to California, Florida, Michigan, Minnesota, Nebraska, and New York.

The present settlements are revised from those previously presented to the Court in order to follow the Court's guidance provided at the March 18, 2021 hearing, in the Court's subsequent Order, and in the Court's Order denying class certification. The settlements seek certification as to only those claimants residing within the states permitting indirect purchaser claims represented by a Class Representative with a qualifying purchase in this action. This proposed plan of allocation is consistent with the claims released in these revised settlements, and so also follows the Court's guidance in the same manner. In conjunction with this Motion for Preliminary Approval, IPPs are also submitting a Motion for Approval of their Class Notice Program.

This Motion is based upon this Notice; the Memorandum of Points and Authorities in Support; the Declaration of Adam J. Zapala and the attached exhibits, which are the settlement

agreements with the Settling Defendants; the Declaration of Dr. Russell Lamb, PhD., the accompanying Motion for Approval of the Class Notice Program, the Declaration of Eric Schachter and related exhibits, and materials submitted in connection therewith, and any further papers filed in support of this motion as well as arguments of counsel and all records on file in this matter.

Dated: July 2, 2021

Respectfully Submitted,

COTCHETT, PITRE & McCARTHY, LLP.

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STATEMENT OF THE ISSUES TO BE PRESENTED

1. Whether this Court should grant preliminary approval of IPPs' revised settlements with Shinyei and Taitsu; and

2. Whether the Court should preliminarily approve IPPs' plan of allocation for the settlements, which is consistent with the Court's guidance at the last preliminary settlement approval hearing and its Order regarding IPPs' motion for certification of the litigation class.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Indirect Purchaser Plaintiffs ("IPPs") move for an order preliminarily approving their revised settlements with Defendant Shinyei Technology Co., Ltd. and Shinyei Capacitor Co. (hereinafter "Shinyei") and Defendant Taitsu Corp. (hereinafter "Taitsu") (collectively, "Settling Defendants"). The settlements were reached after more than six years of hard-fought litigation, significant discovery, summary judgment briefing, an adverse decision on class certification, and a prior denial of a motion for preliminary approval of the prior settlements, and are the result of arm's-length negotiations. *See* Declaration of Adam J. Zapala ("Zapala Decl.") ¶¶ 3-4. IPPs believe the settlements are in the best interests of the proposed classes. *Id.*

The cumulative settlement fund established by these settlements is $300,000. IPPs' settlements in this action – those from prior rounds plus this round – total $81,150,000. *See* IPPs' Statement Regarding Status of Settlements, ECF No. 2261, MDL ECF No. 444. These settlements should be preliminarily approved because they represent a recovery within the range of reasonableness for the classes in light of the facts of the case, the present procedural posture, Shinyei and Taitsu's volume of affected commerce and damages attributable to each, and IPPs' expected damages, as more fully described below. Both Shinyei and Taitsu have each made a cash payment of $150,000 for their very small U.S. film capacitor market shares, for a cumulative payment of $300,000. IPPs alleged that Shinyei and Taitsu were among the Defendants who sold film capacitors into the United States during the relevant period. Shinyei and Taitsu sell only film capacitors. The IPPs brought claims on behalf of eleven Class Representatives who purchased capacitors indirectly from each of seven states, including film capacitors that were purchased

from each of six states.[1] The releases cover the affected commerce in those six states. These settlements meet the standard for preliminary approval and for that reason should be approved.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from alleged conspiracies by the Defendants to fix, raise, maintain and/or stabilize the price of capacitors sold in the United States. Zapala Decl. ¶ 4. This case has been heavily litigated, with multiple rounds of motions to dismiss and for summary judgment, as well as a class certification denial currently on appeal before the Ninth Circuit. *Id.*

A. Settlement Efforts

IPPs engaged in extensive and protracted settlement negotiations with each of the Settling Defendants. Zapala Decl. ¶¶ 5-7. Negotiations were already well underway at the time when the Court ruled on the IPPs' motion for certification of the litigation class. *Id.* Thereafter, the parties held telephonic meetings and exchanged information and settlement proposals for close to six months to reach agreement on the previous versions of the settlements. *Id.* After the Court denied preliminary approval of those versions, the parties engaged in further rounds of negotiations. *Id.* The present proposed settlements were reached only after both sides became fully informed of the relative strengths and weaknesses of their positions, and corresponding litigation risks. *Id.*

B. Settlement Class Definitions

The class definitions in the proposed settlement agreements are limited to only states in which IPPs alleged a Class Representative made a relevant purchase *and* for which IPPs sought to certify a litigation class. IPPs' Fifth Consolidated Complaint ¶¶ 29-39 (listing the Class Representatives and from which states); ¶¶ 394(a)-(g) (similarly listing the state classes and including California, Florida, Michigan, Minnesota, Nebraska, and New York); ¶¶ 415-442 *et seq.* (bringing state law indirect purchaser claims for states including California, Florida, Michigan, Minnesota, Nebraska, and New York); IPPs' Mot. for Class Certification at 2 (ECF No. 1681), *id.* App'x B (ECF No. 1681-2). There are no references to a nationwide class in the settlement class definition. The class is defined, in relevant part, as:

[1] The six states are California, Florida, Michigan, Minnesota, Nebraska, and New York. IPPs' Iowa Class Representative purchased electrolytic capacitors. IPPs' Mot. for Class Certification at 2 (ECF No. 1681); *id.* App'x B (ECF No. 1681-2).

> All persons and entities in the Indirect Purchaser States (as defined herein) who, during the period from January 1, 2002 to February 28, 2014, purchased one or more Capacitor(s) from a distributor (or from an entity other than a Defendant) that a Defendant or alleged co-conspirator manufactured . . . . .
> . . .
> "Indirect Purchaser States" means California, Florida, Michigan, Minnesota, Nebraska, and New York.

Zapala Decl., Ex. 1, Shinyei Settlement Agreement, ¶¶ 1(f), 1(u); Zapala Decl., Ex. 2, Taitsu Settlement Agreement, ¶¶ 1(f), 1(u).

C. Settlement Consideration

Shinyei and Taitsu have each paid $150,000, for a total of $300,000. These settlements do not require cooperation in the ongoing litigation because with Shinyei and Taitsu departing from the case, the only remaining Defendants will be those that have defaulted (*i.e.*, Nissei and Toshin Kogyo). *See* Zapala Decl., ¶ 13. Approval of these settlements will make possible the prompt and efficient coordinated distribution to class members of all settlement proceeds from all Defendants.

D. Information on the Settlements – Northern District of California Guidance[2]

1. Differences Between Settlement Class and Class Defined in Complaint

Scope of the Settlement Class. The class definition in the proposed settlements conforms to the Court's directive and guidance provided at the initial preliminary approval hearing on March 18, 2021, and in the Court's subsequent order. *See* MDL ECF No. 1490. All references to a nationwide class have been removed from the revised settlement agreements. The Settlement Class is limited to cover only those states which permit indirect purchaser claims and in which IPPs alleged a Class Representative made a relevant purchase *and* for which IPPs moved for certification in their Motion for Class Certification. *See* IPPs' Fifth Consolidated Complaint ¶¶ 29-39 (listing the Class Representatives and from which states); ¶¶ 394(a)-(g) (similarly listing the state classes and including California, Florida, Michigan, Minnesota, Nebraska, and New York); ¶¶ 415-442 *et seq.* (bringing state law causes of action under each of these six states' laws); *see also* IPPs' Mot. for Class Certification at 2 (ECF No. 1681); *id.,* App'x B.

[2] To the extent information considered by the Northern District Guidelines is not included in this filing, it is included in the concurrently filed Motion for Approval of Class Notice Program.

Scope of the Class Period. In the operative complaint, the Settling Defendants are alleged to have participated in the film capacitor conspiracy from January 1, 2002 through such time as the anticompetitive effects of defendants' conduct ceased. Zapala Decl. ¶ 11; *see also* IPPs' Fifth Consolidated Complaint ("Complaint") ¶¶ 2, 392, 394 (ECF No. 1589). In connection with IPPs' motion for class certification, IPPs identified that the end date of the conspiracy and its effects on the classes was February 28, 2014. Zapala Decl. ¶ 12; ECF No. 1681. The settlement with each of these Settling Defendants covers the time period from April 1, 2002 to February 28, 2014—the same time periods in IPPs' motion for class certification. *See* Zapala Decl. ¶ 12.

2. Differences Between Claims Released and Claims in Complaint

There are no material differences between the claims released in the settlements and the claims in IPPs' Complaint. *See* Zapala Decl., Ex. 1, Shinyei Settlement Agreement, ¶ 1(bb); Ex. 2, Taitsu Settlement Agreement, ¶ 1(bb). The released claims are all antitrust and consumer protection claims the classes could have brought against the Settling Defendants. *Id.* The releases are not nationwide. No claims for damages have been released for states other than California, Florida, Michigan, Minnesota, Nebraska, or New York. *Id.* ("nothing herein shall release . . . claims for damages under the state or local laws of any jurisdiction other than an Indirect Purchaser State, as defined herein . . . ."). IPPs have not released any claims against the Settling Defendants for product liability, breach of contract, breach of warranty, or any other claim unrelated to anticompetitive conduct or to the allegations in the Actions. Zapala Decl., Ex. 1, Shinyei Settlement Agreement ¶ 14; Ex. 2, Taitsu Settlement Agreement ¶ 14.

3. Settlement Recovery Versus Potential Trial Recovery

The table below compares the settlement values obtained to the estimated individual damages attributable to each of Shinyei and Taitsu's sales based on overcharge and pass-through calculations by IPPs' economist expert, Dr. Russell Lamb. Estimated damages attributable to each Settling Defendant are calculated by multiplying their affected commerce by the overcharge.[3]

[3] Dr. Lamb explained that to calculate damages, defendants' sales to distributors should be multiplied by the overcharge rate and then by the passthrough rate (100%). ECF No. 1682-46 (Lamb February 24, 2017 Expert Declaration) at pp. 111, 146, 172-173. For film capacitors, Dr. Lamb calculated a 7.9% overcharge. *Id.* 152, 172; Lamb Decl. ¶ 3.

Defendant	Estimated Affected Commerce[4]	Estimated Damages	Settlement Amount	Settlement Percentage of Est. Damages
Shinyei	$262,192.00	$24,234.41	$150,000.00	618.95%
Taitsu	$9,787.00	$904.61[5]	$150,000.00	16,581.73%

The table demonstrates that despite these settlements being lower in absolute value, they nonetheless compare favorably given Shinyei and Taitsu's very modest sales in the U.S. film capacitor market. IPPs' analysis, as informed by their economist experts, has confirmed that Settling Defendants had very limited film capacitor sales to distributors during the relevant period and were small players in the U.S. market. The settlement value reflects the balance of this fact against the broader harm inflicted by the conspiracy, as well as the parties' respective assessments of the IPPs' chances on the pending appeal, ability to pay, likelihood of success at trial, joint and several liability, and other factors. Here, while $300,000 is a smaller monetary amount when compared with total settlement proceeds to date exceeding $80,000,000, the Shinyei settlement reflects well over 600 percent of estimated damages attributable to Shinyei's sales, and the Taitsu settlement over 16,500 percent, *i.e.,* 165 times, damages attributable to Taitsu's sales.

[4] In the IPP case, the relevant commerce is Defendants' sales of capacitors to distributors who then sold them to IPPs. This is a smaller commerce figure than Defendants' overall sales to direct purchasers, since Defendants make many direct sales to non-distributors (e.g. device makers and contract manufacturers) that bypass the distribution channel relevant to the IPP case. Moreover, the commerce figures in the above chart overstate Shinyei and Taitsu's sales *to the settlement class*, as they reflect estimated sales to distributors *throughout the United States*. This means that IPPs' recovery is even more favorable than the figures in the above chart suggest.

[5] In its Order regarding IPPs' motion seeking preliminary approval of the settlements in their earlier form, the Court stated it "will need to hear more about how it is factually possible that Taitsu's estimated damages in this case are a mere $904.61," and why if so it would be reasonable and appropriate to approve a settlement figure substantially larger than that amount. MDL ECF No. 1490 at 2. The $904.61 is the amount attributable to Taitsu's comparatively small share of Defendants' sales of film capacitors into the United States. IPPs include this metric to inform equitable considerations regarding the reasonableness of the proposed $150,000 settlement based on the limited impact Taitsu's sales had in causing harm to IPPs balanced against its risk of exposure to joint and several liability for the damages caused by the conspiracy. Moreover, IPPs are aware of no settlement that has not been approved on the basis that the plaintiffs obtained *too much* in monetary consideration. For example, in this litigation, the DPPs reached a $3.9 million settlement with Soshin where Soshin reported negligible U.S. sales. *See* ECF No. 1989 at 7-8.

Viewed through this lens, these settlements are excellent. For example, in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, Judge Susan Illston referred to plaintiffs' settlement of "approximately 50% of the potential recovery" as "exceptional." No. M 07-1827 SI, 2013 WL 1365900, at *7 (N.D. Cal. Apr. 3, 2013). And in *CRTs*, the Court stated that a settlement representing 20% of potential single damages "is without question a good recovery and firmly in line with the recovery in other cases." *In re Cathode Ray Tubes (CRT) Antitrust Litig.*, No. C-07-5944-JST, 2016 WL 3648478, at *7 (N.D. Cal. July 7, 2016). This Court also approved direct purchaser settlements in *In re Resistors Antitrust Litigation*, No. 15-cv-03820-JD ("*Resistors*"), wherein recovery percentages ranged from 33% to 57% of single damages. *Resistors*, ECF Nos. 534 at 1 (DPP Motion), 542 (granting preliminary approval), 586 (granting final approval).

At the preliminary approval hearing and in the Court's subsequent Minute Entry (MDL ECF No. 1490), the Court expressed concern regarding how Shinyei or Taitsu's individual share of damages could be so small while nevertheless establishing the Rule 23 factors, such as numerosity. *Id*. IPPs should have been clearer in their presentation of this issue.

As shown below, the settlement class is undeniably numerous, based on the declaration of IPPs' expert Dr. Russell Lamb. *See* Declaration of Dr. Russell Lamb ("Lamb Decl."). IPPs respectfully submit that the full shape of the settlement process in large part answers the Court's concern. The settlement class here, as with all of the previous settlement classes certified in this case (including the direct purchaser settlements), is not limited to purchasers from Shinyei and Taitsu alone. Due to joint and several liability, class members who purchased from any conspiring Defendant are eligible to participate in the recovery, including of amounts from prior settlements. *See* Final Approval Orders (ECF Nos. 1934, 2334, 2693). This means when evaluating the issue of numerosity, the question is the numerosity of the settlement class itself—that is, how many entities and individuals from the relevant states purchased film capacitors *from any film-Defendant* during the 12-year period. As shown below, many class members made qualifying Class Period purchases such that the classes are numerous. *See infra* § III.A.3.a. The $300,000 from these settlements will be added to amounts collected for claimants from California, Florida, Michigan, Minnesota, Nebraska, and New York in the previously-approved IPP settlements.

4. Reversions

The settlements are non-reversionary: There is no circumstance under which money designated for class recovery will revert to any Defendant following final approval.

5. Class Action Fairness Act

Pursuant to the terms of the Settlement Agreements and the requirements of the Class Action Fairness Act, 28 U.S.C § 1715, all notices required will be, or already have been, provided by the Settling Defendants. *See* Zapala Decl., Ex. 1, Shinyei Settlement Agreement ¶ 53; Ex. 2, Taitsu Settlement Agreement, ¶ 53. The Settlements substantively comply with the Class Action Fairness Act. They do not include coupons. *See* 28 U.S.C. § 1712. No class member will be "obligated to pay sums to class counsel that would result in a net loss to the class member[.]" *See* 28 U.S.C. § 1713. The Settlements do not "provide for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court." *See* 28 U.S.C § 1714.

6. Comparable Class Settlements

Information regarding comparable settlements is included in **Appendix A** to this motion.

III. ARGUMENT

A. The Court Should Grant Preliminary Approval of the Proposed Settlements

1. Legal Standard for Class Action Settlements

"The Ninth Circuit maintains a 'strong judicial policy' that favors the settlement of class actions." *G.F. v. Contra Costa County*, 2015 WL 4606078, at *8 (N.D. Cal. July 20, 2015). When asked to grant preliminary approval of a class action settlement, the Court must determine whether proposed settlements: (1) appear to be the product of serious, informed, non-collusive negotiations; (2) have no obvious deficiencies; (3) do not improperly grant preferential treatment to class representatives or segments of the class; and (4) fall within the range of possible approval. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

2. The Settlements Meet the Standards for Preliminary Approval

The settlements meet the standards for preliminary approval because they were the result of serious, informed, and non-collusive negotiations. There are also no obvious deficiencies in the

settlements—the settlements do not grant preferential treatment to the class representatives or any subset of the class and fall within the range of possible approval. As such, preliminary approval of the settlement is appropriate and warranted.

a. The Settlements are the Result of Non-Collusive Negotiations

IPPs and the Settling Defendants are represented by skilled antitrust counsel who are knowledgeable regarding the law and have extensive experience with complex antitrust lawsuits. IPPs and the Settling Defendants have litigated this case for well over six years. The parties have conducted over 130 depositions and Defendants have produced over 11 million documents consisting of over 28 million pages to IPPs. Zapala Decl. ¶ 8. *Id.* At the time of reaching these settlements, the parties had engaged in expert discovery and fully briefed the Defendants' motions for summary judgment, as well as the IPPs' petition for Rule 23(f) appeal of the Court's denial of class certification. *Id.* ¶ 9. Therefore IPPs and the Settling Defendants were well-informed about the relevant facts, damages, and defenses. Moreover, throughout this litigation, the Settling Defendants (and Defendants who settled previously) have vigorously contested, *inter alia,* IPPs' legal theories of liability, Defendants' level of involvement in the conduct alleged, the suitability of the class action mechanism here, the volume of commerce at issue, relevance of related civil and criminal proceedings, and damages. Zapala Decl. ¶ 10. These proposed settlements, therefore, are the result of serious and informed negotiations over a protracted period after significant litigation and discovery. Additionally, there has been no collusion among settling parties.

b. There are No Obvious Deficiencies in the Settlements

As set forth above, the settlements were the result of serious analysis and consideration of the risks faced by both sides and there are no obvious deficiencies in the settlements. The size of the settlements is commensurate with the Settling Defendants' involvement in the capacitors industry affected by the alleged antitrust conspiracy, and as the calculations above reveal, commensurate with (and well exceeding) their shares of the affected volume of commerce. The settlements were reached with full appreciation of the risks faced by both sides.

c. There is No Preferential Treatment

No class representative or segment of the classes will receive preferential treatment. All

indirect purchasers in the relevant states will have an equal ability to submit a claim for a *pro rata* share of the settlement funds for their purchases of Defendants' price-fixed film capacitors. This element in favor of preliminary approval is met.

d. The Settlements Fall Within the Range of Possible Approval

For the reasons stated *supra* at 4-7, IPPs strongly believe that the proposed settlements fall within the range of possible approval and should be preliminarily approved.

e. The Proposed Settlements Satisfy the Rule 23(e)(2) Factors

Interim lead class counsel for IPPs has adequately represented the class. *See* § III.A.3.d *infra.* The Court has presided over this case continuously since inception in 2014 and has had ample opportunity to observe the hard-fought nature of the litigation. The proposal was negotiated at arm's length. Zapala Decl. ¶ 3. The relief provided under the proposed settlements is adequate in light of the attendant prudential and equitable considerations, including the present procedural posture. *Id.* ¶¶ 4, 10-14; *and* § II.D.3 *supra.* And there are no agreements required to be identified under Rule 23(e)(3). Accordingly, the proposed settlements satisfy the updated standard.

3. The Proposed Settlement Classes Satisfy Rule 23

In addition to the substantive and procedural fairness of the settlements, the settlement classes are appropriate for class treatment. Settlement class certification is appropriate when the proposed class and the proposed class representatives meet the four prerequisites of Rule 23(a): (1) numerosity; (2) common questions of law or fact; (3) typicality; and (4) fair and adequate class representation. Fed. R. Civ. P. 23(a). Additionally, a class must satisfy one of the criteria in Rule 23(b). Fed. R. Civ. P. 23(b). The Settlement Classes meet all Rule 23 requirements.

a. Fed. R. Civ. P. 23(a)(1) – Numerosity

The first prerequisite for certifying a class is that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "There is no exact class size that meets the numerosity requirement; rather, where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." *Bellinghausen v. Tractor Supply Co.*, 303 F.R.D. 611, 616 (N.D. Cal. 2014) (cleaned up). Here, IPPs seek to certify of a settlement class of indirect purchasers from six states: California, Florida,

Michigan, Minnesota, Nebraska, and New York. As explained in the Lamb Declaration, analysis of distributors' sales records produced in this case indicate purchases over 23,000 distinct indirect purchasers. Lamb Decl. ¶ 11. The settlement classes are, therefore, undeniably numerous.

Even if the states were analyzed separately, the settlement classes are numerous. IPPs' experts analyzed records of Class Period purchases from Defendants and found over 11,000 film purchasers in California; over 3,500 film purchasers in Florida; over 2,000 film purchasers in Michigan; over 2,000 film purchasers in Minnesota; over 300 film purchasers in Nebraska; and over 3,500 film purchasers in New York. Lamb Decl. ¶ 12. Each is a potential claimant to the settlements, such that joinder of all would be impracticable. The notion of 22,300 separate individual trials over liability claims comprising the same elements and that turn on the same facts is impractical, and demonstrates that this action fulfills the efficiency goals the class action mechanism is intended to facilitate. Numerosity is established.

b. Fed. R. Civ. P. 23(a)(2) – Commonality

The second prerequisite for certifying a class is that "there are questions or law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Courts have consistently found that "[c]ommon issues predominate in proving an antitrust violation 'when the focus is on the defendants' conduct and not on the conduct of the individual class members.'" *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 1530166, at *7 (N.D. Cal. June 5, 2006). Commonality "does not require an identity of claims or facts among class members; instead, [t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 451 (S.D.N.Y. 2004). Rule 23(a)(2) is generally considered a "'low hurdle' easily surmounted." *In re Prudential Sec. Inc. Ltd. P'ships. Litig.*, 163 F.R.D. at 206 n.8.

IPPs have alleged that Defendants engaged in a conspiracy to fix, raise, maintain and/or stabilize the price of capacitors—conduct that violates the laws of the six states at issue. *See generally* App'x B. Common questions include whether the Defendants in fact entered into an illegal agreement to fix, raise, maintain and/or stabilize the price of capacitors; whether the antitrust conspiracy did result in the artificial inflation of the price of capacitors; and whether

those overcharges were passed on to the classes. The second prerequisite of Rule 23(a) is met.

c. Fed. R. Civ. P. 23(a)(3) – Typicality

The third prerequisite for certifying a class is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is easily satisfied in price-fixing cases because "in instances wherein it is alleged that the defendants engaged in a common scheme relative to all members of the class, there is a strong assumption that the claims of the representative parties will be typical of the absent class members." *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1035 (N.D. Miss. 1993). Class representatives from the six states indirectly purchased film capacitors from a distributor who purchased directly from an alleged conspiring Defendant. Since the class representatives' claims are typical of the members of the class, the third prerequisite of Rule 23(a) is met.

d. Fed. R. Civ. P. 23(a)(4) – Adequate Representation

The fourth prerequisite for certifying a class is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). The interests of the class representatives and their counsel are completely aligned with the interests of the absent class members from the six states. The class representatives suffered the same injury as the absent class members in that they paid artificially inflated prices for capacitors. IPPs' counsel also has the same interest in proving the conspiracy. The vigor with which the class representatives and their counsel have prosecuted this case is well documented in the docket of this case. The fourth prerequisite of Rule 23(a) is met.

e. All Requirements of Rule 23(b) Are Met in This Case

Once the prerequisites of Rule 23(a) are met, a prospective class must satisfy only one of four Rule 23(b) requirements to continue as a class. Rule 23(b)(3) allows class actions when common questions of law or fact predominate such that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

Common questions of law or fact predominate here. "[I]f common questions are found to predominate in an antitrust action . . . courts generally have ruled that the superiority prerequisite of Rule 23(b)(3) is satisfied." *In re TFT-LCD Antitrust Litig.*, 267 F.R.D. 291, 314 (N.D. Cal. 2010), *abrogated on other grounds* ("*Flat Panel*"). To determine whether or not a class action is the superior method of adjudication, courts look to the four factors from Rule 23(b)(3): "(1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action." *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1227 (N.D. Cal. 2013); *accord* Fed. R. Civ. P. 23(b)(3). "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." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2013 WL 5429718, at *11 (N.D. Cal. June 20, 2013), *report and recommendation adopted*, No. C-07-5944-SC, 2013 WL 5391159 (N.D. Cal. Sept. 24, 2013) ("*CRT I*") (citation omitted).

The antitrust conspiracy at issue in this case is appropriate for Rule 23(b)(3) resolution. The damages of each class member are generally too small to warrant an individual lawsuit but total aggregate damages for the class are significant, which favors resolution by class action.

Moreover, predominance is met here for each of the six states' laws. The Court earlier declined to certify a litigation class expressing concern about the geographic scope of the class—reduced here—and IPPs' focus on elements of a federal Sherman Act claim, rather than the state law claims asserted in the case. The Court observed that state law differences might render indirect purchasers' claims not amenable to classwide treatment. Order, MDL ECF No. 1421 at 13. IPPs endeavor here to allay such concern. Each state's law is amenable to classwide treatment.

First, apart from the indirect purchaser rule, the six states at issue have largely harmonized their antitrust or consumer protection statutes with federal antitrust law.[6] *See In re Lidoderm*

[6] **California**: *See Tucker v. Apple,* 493 F. Supp.2d 1090, 1102 (N.D. Cal. 2006) ("The Cartwright Act has identical objectives to the federal antitrust acts, and cases construing the federal antitrust laws are permissive authority in interpreting the Cartwright Act."). **Florida**: *See Mack v. Bristol-*

Antitrust Litig., No. 14-md-02521-WHO, 2017 WL 679367, *27 (Feb. 21, 2017) (differences "not really material" because "core elements of the state laws in play are identical" to federal law). *See also* ABA SECTION OF ANTITRUST LAW, ANTIRUST LAW DEVELOPMENTS 623 (6th ed. 2007) (noting most state statutory provisions are comparable to Sections 1 and 2 of the Sherman Act).

Second, as Appendix B demonstrates, the six states' laws permit indirect purchaser claims, and there is no element of these laws that would preclude settlement class certification. *See* App'x B. All elements of the six states' laws are amenable to classwide resolution.

Third, many district courts—including district courts within this Circuit—have certified multistate indirect purchaser actions with these states included in MDL or other litigation. For example, in the *CRT*s litigation, which was an alleged price-fixing conspiracy, the Court certified an indirect purchaser action including classes of purchasers from California, Florida, Michigan, Minnesota, Nebraska, and New York among many others. The Court rejected the argument that application of multiple states' laws caused predominance or manageability issues.[7] *See CRT I*, 2013 WL 5429718, *24-27 (certifying classes of indirect purchasers under many indirect purchaser state laws and not identifying any state-specific issues that would impair predominance). The same was true with respect to the district court's opinion in *Flat Panel*, where the district court certified indirect classes of purchasers from, among many other states,

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Myers Squibb, 673 So. 2d 100, 104 (Fla. Dist. Ct. App. 1996) (antitrust violations redressable under Florida Deceptive and Unfair Trade Practices Act (FDUTPA) and satisfying Sherman Act elements also satisfies FDUTPA elements). **Michigan**: *See* Mich. Comp. Laws § 445.784(2) ("It is the intent of the legislature that in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes . . . ."). **Minnesota**: "As the purposes of Minnesota and federal antitrust law are the same, it is sensible to interpret them consistently." *Lorix v. Crompton,* 736 N.W.2d 619, 626 (Minn. 2007). **Nebraska**: *See* Neb. Rev. Stat. § 59-829 ("the courts of this state in construing such sections or chapter shall follow the construction given to the federal law by the federal courts."); *Health Consultants v. Precision Instruments,* 527 N.W.2d 596, 601-604 (Neb. 1995) (following federal law in delineating elements of antitrust claims under Nebraska statute). **New York**: "Under New York law, the state and federal antitrust statutes 'require identical basic elements of proof.'" *Reading Int'l v. Oaktree Capital Mgmt.,* 317 F. Supp. 2d 301, 332-33 (S.D.N.Y. 2003).

[7] It is also well-settled that manageability concerns are not applicable when seeking to certify a settlement class since the proposal is that there will be no trial to "manage." *See In re Hyundai and Kia Fuel Economy Litigation,* 926 F.3d 539, 556-57 (9th Cir. 2019). "Courts . . . regularly certify settlement classes that might not have been certifiable for trial purposes because of manageability concerns." *Id.* (*quoting* 2 William B. Rubenstein, Newberg on Class Actions § 4:63 (5th ed. 2018)). "For purposes of a settlement class, differences in state law do not necessarily, or even often, make a class unmanageable." *Jabbari v. Farmer,* 965 F.3d 1001, 1007 (9th Cir. 2020).

California, Florida, Michigan, Minnesota, and New York. *See Flat Panel*, 267 F.R.D. at 608-13.

District courts throughout the country have repeatedly certified indirect purchaser classes asserting claims under the state law of all six of these states in recent years. *See, e.g., In re Namenda Indirect Purchaser Antitrust Litig.,* No. 1:15-cv-6549 (CM) (RWL), 2021 WL 509988 at *39 (S.D.N.Y. Feb. 11, 2021) (certifying multistate antitrust indirect purchaser class including for claims asserted under state laws of California, Florida, Michigan, Minnesota, Nebraska, New York); *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.,* 335 F.R.D. 1, 40 (E.D.N.Y. 2020) (same); *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litig.,* Case No. 17-md-2785-DDC-TJJ, 2020 WL 1873989 at *50 n.52, *61 (D. Kan. Feb. 27, 2020) (same); *In re Loestrin 24 FE Antitrust Litig.,* 410 F.Supp.3d 352, 376, 407 (D.R.I. 2019) (same); *In re Polyurethane Foam Antitrust Litig.,* 314 F.R.D. 226, 232, 291-93 (W.D. Ohio 2014) (same); *In re Nexium (Esomeprazole) Antitrust Litig.,* 297 F.R.D. 168, 184 (D. Mass. 2013) (same). The claims are amenable to classwide treatment.

B. This Court Should Appoint Interim Class Counsel as Settlement Class Counsel

Under Rule 23(g)(1), when certifying a class, including for settlement purposes, the Court should appoint class counsel. Fed. R. Civ. P. 23(g)(1); *Bellinghausen*, 303 F.R.D. at 618. When appointing class counsel, the Court must consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). Cotchett, Pitre & McCarthy, LLP ("CPM") is recognized as one of the top litigation firms in the United States, and its antitrust team is recognized in the field. CPM is adequate class counsel, as this Court has repeatedly found.

C. The Proposed Plan of Allocation Should be Approved

"Approval of a plan for the allocation of a class settlement fund is governed by the same legal standards that are applicable to approval of the settlement; the distribution plan must be 'fair, reasonable and adequate.'" *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154

(N.D. Cal. 2001) (cleaned up). When allocating funds, "it is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits." *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1045-46 (N.D. Cal. 2008) (cleaned up) (approving securities class action settlement allocation on a "per-share basis").

Pro rata distribution has frequently been determined by courts to be fair, adequate, and reasonable. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2015 WL 9266493, at *8 (N.D. Cal. Dec. 17, 2015) (approving pro rata plan of allocation based upon proportional value of price-fixed component in finished product); *In re Vitamins Antitrust Litig.*, No. 99-197 TFH, 2000 WL 1737867, at *6 (D.D.C. Mar. 31, 2000) ("Settlement distributions, such as this one, that apportions funds according to the relative amount of damages suffered by class members have repeatedly been deemed fair and reasonable.") (citations omitted).

Allocation of this round of settlements will be on a *pro rata* basis to purchasers in the six states with qualifying purchases. The *pro rata* distribution to each class member with damages claims from the six indirect purchaser states that are included in the settlement class will be based upon the number of approved purchases of film capacitors during the settlement class period, a dynamic that ties recovery to each class member to the volume and type of its purchases. This distribution is a reasonable and fair way to compensate classes and this basic structure has been approved as to the other rounds of settlements in this Action. This plan of allocation is "fair, adequate, and reasonable" and merits approval by the Court. *Citric Acid*, 145 F. Supp. at 1154.

IV. CONCLUSION

For the foregoing reasons, IPPs respectfully request that this Court enter an order: (1) preliminarily approving the proposed settlements with the Settling Defendants, (2) appointing CPM as Settlement Class Counsel, (3) preliminarily approving the proposed plan of allocation, and (4) establishing a schedule for final approval of the settlements.

Dated: July 2, 2021

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