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Lead Counsel for the Indirect Purchaser Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE CAPACITORS ANTITRUST LITIGATION	**MDL No. 3:17-md-02801-JD** **Case No. 3:14-cv-03264-JD**
THIS DOCUMENT RELATES TO: **ALL INDIRECT PURCHASER PLAINTIFF ACTIONS**	**INDIRECT PURCHASER PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH ELNA, MATSUO, NICHICON, AND PANASONIC; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: January 23, 2020 Time: 10:00 a.m. Place: Courtroom 11, 19th Floor Judge: Hon. James Donato

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the Honorable James Donato will hear this Motion at the United States District Court for the Northern District of California, 450 Golden Gate Avenue, Courtroom 11, 19th Floor, San Francisco, California, on January 23, 2020 at 10:00 a.m.

Pursuant to Federal Rule of Civil Procedure ("Rule") 23(e), the Indirect Purchaser Plaintiffs ("IPPs") seek entry of an order:

1. Granting final approval of the proposed settlements with Elna Corporation, Ltd. and Elna America, Inc. ("ELNA"), Matsuo Electric Corporation, Ltd. ("Matsuo"), Nichicon Corporation and Nichicon America Corporation ("Nichicon"), and Panasonic Corporation ("Panasonic") (collectively, "Settlements").

2. Dismissing with prejudice IPPs' claims against ELNA, Matsuo, Nichicon, and Panasonic from the IPP actions ("Action"); and

3. Granting final approval of IPPs' plan of allocation of the Settlements ("Plan of Allocation") among the certified settlement class members ("Class Members").

The Court should grant this motion because (a) the Settlements are fair, reasonable, and adequate and satisfy Rule 23(e); (b) the Settlements are the product of arm's-length negotiations; (c) the Court-approved notice program satisfies Due Process and Rule 23; and (d) the Plan of Allocation is fair, reasonable, and adequate.

This Motion is based on this Notice of Motion and Motion; the following Memorandum of Points and Authorities; the accompanying Declaration of Adam J. Zapala and the exhibits attached thereto; the accompanying Declaration of Eric Schachter and the exhibits attached thereto; the Settlements with ELNA, Matsuo, Nichicon, and Panasonic; the Court's August 12, 2019 Order Granting IPPs' Motion for Preliminary Approval of Settlements with Panasonic, Nichicon, Elna, and Matsuo Defendants and for Approval of the Plan of Allocation (ECF No. 835[1]); the Court's August 12, 2019 Order Granting IPPs' Motion for Approval of Class Notice Program (ECF No. 836); the

[1] All ECF references are to the MDL Docket, Case No. 3:17-md-02801, unless otherwise noted.

[Proposed] Order submitted herewith; argument by counsel at the hearing before this Court, any papers filed in reply, and all papers and records on file in the Action.

DATED: January 6, 2020

Respectfully submitted,

/s/ Adam J. Zapala

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STATEMENT OF ISSUE TO BE DECIDED

Whether this Court should grant final approval of the Settlements with ELNA, Matsuo, Nichicon, and Panasonic and the Plan of Allocation given that they are fair, reasonable, and adequate, satisfy all applicable requirements and, after proper notice to the certified settlement classes ("Settlement Classes") in accordance with Due Process and Rule 23, no Class Member has objected.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Rule 23(e) and the Court's orders granting settlement class certification, preliminary approval of the Settlements, and approval of the settlement class notice program to potential Class Members ("Notice Program), IPPs submit this memorandum in support of final approval of the Settlements with ELNA, Matsuo, Nichicon, and Panasonic (collectively, "Settling Defendants").

The Settlements are "fair, reasonable, and adequate," *In re Online DVD-Rental Antitrust Litig*., 779 F.3d 934, 945 (9th Cir. 2015), and represent an excellent recovery for the Settlement Classes given the Settling Defendants' commerce involved and the overall commerce at issue in the Action. The Settlements provide for a settlement fund of $30,950,000 ("Settlement Fund"). For the entire Action, in combination with the Rounds 1 and 2 Settlements (*see* fn. 1), IPPs have recovered $80,490,000. Each settlement also includes requirements for substantial cooperation that will assist (or has assisted) IPPs in the prosecution of their claims against the non-settling Defendants.[1] The Settlements provide considerable relief for the Settlement Classes, whose members would otherwise face uncertainty and additional delay in this Action. Despite the strength of IPPs' claims, the classes continue to face litigation risk in the form of class certification, motions for summary judgment, expert discovery, trial, and potential appeals.

In addition to the excellent recoveries these settlements represent, the reaction of the Settlement Classes has been overwhelmingly and uniformly positive. Despite the large size of the Classes, and a Notice Program that this Court has approved and found constitutionally sufficient, not a single Class Member objected. Furthermore, the combined purchases of the entities requesting to

[1] IPPs have not resolved with Shinyei Technology Co., Ltd., Shinyei Capacitor Co., Ltd., (together, "Shinyei") and Taitsu Corporation ("Taitsu").

IPPs have settled with NEC Tokin Corp. and NEC Tokin America Inc. (together, "NEC Tokin"), Nitsuko Electronics Corporation ("Nitsuko"), and Okaya Electric Industries Co, Ltd. ("Okaya") (collectively, "Round 1 Settlements"); Hitachi Chemical Co., Ltd., Hitachi AIC, Hitachi Chemical Co. America (together, "Hitachi"), Holy Stone Enterprise Co., Ltd., Holy Stone Holdings Co., Ltd., Holy Stone Polytech Co., Ltd., and Milestone Global Technology, Inc. (together, "Holy Stone"), Nippon Chemi-Con Corp. and United Chemi-Con Corp. (together, "NCC/UCC"), Rubycon Corp. and Rubycon America Inc. (together, "Rubycon"), and Soshin Electric Co., Ltd. ("Soshin") (collectively, "Round 2 Settlements"); and ELNA, Matsuo, Nichicon, and Panasonic ("Round 3 Settlements").

opt-out represents .01% of the total sales to IPPs as reflected in distributor data received by IPPs. *See* Declaration of Adam J. Zapala ¶ 29 ("Zapala Decl."). IPPs have received an extremely small number of opt-outs, another indication that the settlement is fair, reasonable, adequate, and warrants approval. *See* Declaration of Eric Schachter ¶ 18, Ex. F ("Schachter Decl.").

II. FACTUAL AND PROCEDURAL HISTORY

A. Factual History

For a complete factual history regarding this Action, IPPs refer to the Court to the Declaration of Adam J. Zapala in Support of IPPs' Motion for Attorneys' Fees, Expenses, and Service Awards (ECF No. 1011) ¶¶ 5-87 (detailing IPPs' efforts in this Action), which IPPs submitted in connection with these final approval proceedings. This Action arises from alleged conspiracies by Defendants to fix, raise, maintain, and/or stabilize the price of capacitors sold in the United States. All parties have heavily litigated this Action, including through motions to dismiss, motions for summary judgment, and many discovery challenges. Despite the complexity and length of the case thus far—evidenced by the thousands of docket entries—IPPs still have much work to complete to hold the non-settling Defendants accountable for their illegal price-fixing conspiracy. These preliminarily approved Settlements are therefore the result of a fair evaluation of the merits of the Action after over five years of extensive litigation and discovery.

To achieve the Settlements, Class Counsel[2] and Settling Defendants' counsel engaged in extensive arm's-length negotiations. *See* Zapala Decl. ¶ 2. This Court entered orders preliminarily approving the Settlements (ECF No. 835) and the Notice Program (ECF No. 836). In these orders, the Court also certified Settlement Classes (ECF No. 835) and set a deadline by which class members could opt-out or object (ECF No. 836).

IPPs have complied with the Court order approving the Notice Program, including dissemination of notice in various forms. *See* Schachter Decl. ¶¶ 3-16. Despite the breadth of the Notice Program, only an extremely limited number of Class Members have opted out. *Id*. at Ex. F, and no Class Member has objected.

[2] "Class Counsel" collectively refers to CPM and the law firms and attorneys that assisted CPM in the prosecution of this Action.

B. The Settlement Agreements

The terms of the Settlements are described in detail in IPPs' preliminary approval motion and the Court's order granting preliminary approval, which are incorporated herein by reference (ECF Nos. 698, 835). In exchange for $2,250,000 from ELNA, $2,500,000 from Matsuo, $21,500,000 from Nichicon, and $4,700,000 from Panasonic (for a total of $30,950,000), and substantial cooperation from all Settling Defendants in further prosecution of the Action against the non-settling Defendants, the Settlements release claims for alleged price-fixing of capacitors sold to IPPs through distributors. *See* Zapala Decl. ¶¶ 9-10, 13-14, 17-18, 21-22, Exs. A-D. In preliminarily approving the Settlements with the Settling Defendants and approving the Notice Program, the Court certified the Settlement Classes and directed IPPs to implement the Notice Program (ECF Nos. 835, 836).

III. ARGUMENT

A. Legal Standard for Final Approval of Class Action Settlements

A class action may not be dismissed, compromised, or settled without approval of the Court. Fed. R. Civ. P. 23(e). The settlement approval procedure includes three steps: (1) certification of a settlement class and preliminary approval of the proposed settlement; (2) dissemination of notice to affected class members; and (3) a formal fairness or final approval hearing, at which class members may be heard regarding the settlement, and at which counsel may present argument concerning the fairness, adequacy, and reasonableness of the settlements. *Vasquez v. Coast Valley Roofing*, 670 F. Supp. 2d 1114, 1124–25 (E.D. Cal. 2009); *see also* Manual for Complex Litigation, Fourth (Fed. Judicial Center 2004) § 23.63. This procedure safeguards class members' Due Process rights and enables the Court to fulfill its role as the guardian of class interests. *See* William B. Rubenstein, Albert Conte & Herbert Newberg, 4 Newberg on Class Actions §§ 13:39–40 (5th ed. 2014).

The Court completed the first two steps when it granted preliminary approval of the Settlements, certified the Settlement Classes, and approved the Notice Program (ECF Nos. 835, 836). IPPs' notice provider, A.B. Data, designed the Notice Program, which was extensive and thorough. Class Counsel worked with A.B. Data to provide the "best notice that [was] practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see also* Schachter Decl. ¶¶ 21-23. In particular, the Notice Program mailed notice to Class Members using addresses made available to Class Counsel

through third-party distributor data, posted notice online, published notice in various printed media and digital media, emailed notice, and provided notice through web banners. *Id*. ¶¶ 3-16. The Notice Program succeeded, reaching over 400,000 people or entities via direct mail and over 90,000 people via e-mail blast and recording over 30 million views of the online "banner" ads. *Id*. ¶¶ 7, 11, 13. As expected, the Notice Program fully complied with Rule 23 and Due Process. Schachter Decl. ¶ 23.

B. The Class Settlements Are Fair, Reasonable, and Adequate, and Should be Approved

Rule 23(e) requires the district court to determine whether a proposed settlement is "fair, reasonable, and adequate." *Online DVD*, 779 F.3d at 944 (citation omitted). To determine whether a settlement agreement meets these standards, a district court must balance a number of factors, including:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of future litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class members to the proposed settlement.

Id. at 944 (quoting *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). These factors militate in favor of granting final approval of the Settlements as set forth, *infra*.

The law favors compromises and settlements of class action suits. *See, e.g.*, *Churchill Vill*, 361 F.3d at 576; *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). "[T]he decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is 'exposed to the litigants and their strategies, positions and proof.'" *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1026 (9th Cir. 1988) (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982)). "Where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair." *M. Berenson Co. v. Faneuil Hall Marketplace, Inc*., 671 F. Supp. 819, 822 (D. Mass. 1987). The Court should find that the Settlements are fair, adequate, and reasonable within the meaning of Rule 23(e).

1. The Settlements Reflect the Strength of IPPs' Case at the Time Reached

The Settlements reflect the strength of IPPs' case as well as Defendants' positions at the time the parties entered the agreements. Courts have noted that legal uncertainty supports approval of a settlement. *See, e.g.*, *Browning v. Yahoo! Inc.*, No. 04-CV-01463-HRL, 2007 WL 4105971, at *10 (N.D. Cal. Nov. 16, 2007) ("[L]egal uncertainties at the time of settlement—particularly those which go to fundamental legal issues—favor approval"). Here, IPPs settled with ELNA, Matsuo, Nichicon, and Panasonic during the pendency of IPPs' motion for class certification and many other pretrial proceedings. Zapala Decl. ¶¶ 11, 15, 19, 23. The Court should find that the judicial policy favoring compromise and settlement of class action suits is applicable. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008).

2. The Settlements Eliminate Risk to the Classes

The risks, expense, complexity, and likely duration of further litigation also support the Court's final approval of the Settlements. As stated above, at the time of the Settlements, IPPs' motion for class certification remained pending before the Court, and the parties had not yet conducted merits expert discovery or reached summary judgment proceedings on the merits. As a result of these Settlements with the last remaining electrolytic Defendants, IPPs eliminate the risk that the class may not be certified for litigation purposes, or that summary judgment could be granted on certain issues. Furthermore, these Settlements with the last electrolytic Defendants simplified summary judgment proceedings, allowing IPPs to focus their analyses on the film conspiracy and the remaining film Defendants.

While IPPs believe their case is strong, the Settlements eliminate the risks if the Action was to proceed against the Settling Defendants. Plaintiffs bear the burden of establishing liability, impact, and damages. *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) ("'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'" (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998)); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 282–283 (S.D.N.Y. 1999). The Settlements are in the best interest of the Settlement Classes because they eliminate risks of continued litigation against four

Defendants and resolve all IPPs' electrolytic claims, while at the same time creating a substantial cash recovery and requiring the Settling Defendants to cooperate with IPPs during the pendency of the ongoing litigation. The Settlements therefore both remove the potential for unfavorable verdicts against the Settling Defendants and increase the likelihood of favorable verdicts against non-settling Defendants.

Furthermore, if IPPs had not reached the Settlements, they would have had to prepare for a lengthy, costly, and complex trial against six Defendants instead of just two. The risks to both sides are magnified by the fact that the outcome at trial is uncertain. *See In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5159441, at *2 (N.D. Cal. Sept. 2, 2015). Any trial outcome would be subject to potential appeals, which, at a minimum, will substantially delay any recovery achieved for the classes. *Id.* These circumstances suggest that further litigation would have been costly, uncertain, and detrimentally delayed any potential relief for the classes. By contrast, the Settlements provide the Settlement Classes with timely, certain, and meaningful recovery.

3. The Settlements Provide Considerable Relief for the Classes

The cumulative settlement fund of $80,490,000 is substantial and provides considerable relief to the Settlement Classes. The four Settlements that are the subject of this motion provide for a cash payment of almost $31 million, a settlement value that compares favorably to settlements finally approved in other recent price-fixing cases in the Ninth Circuit. *See*, *e.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 941 (approving $27.25 million settlement).

Additionally, the Settlements accurately reflect the percentages of total sales of the Settling Defendants in the United States. *See* Zapala Decl., Exs. A-D. The Settlement with ELNA represents 69.23% of ELNA's *total* sales of capacitors to U.S. distributors and 734.65% of the estimated damages attributable to ELNA during the electrolytic class period; the Settlement with Matsuo represents 49.99% of Matsuo's sales of capacitors to U.S. distributors and 567.13% of the estimated damages attributable to Matsuo during the same period; the Settlement with Nichicon represents 9.95% of Nichicon's sales of capacitors to U.S. distributors and 106.72% of the estimated damages attributable to Nichicon during the same period; and the Settlement with Panasonic represents 4.4% of Panasonic's affected sales of capacitors to U.S. distributors and 47.13% of the estimated damages

against Panasonic during the class periods (ECF No. 1011 at 7). These percentages compare favorably with recent antitrust class settlements. *See, e.g.*, *Online DVD*, 779 F.3d at 941 (approving $27.25 million settlement); *Fisher Bros. v. Mueller Brass Co.*, 630 F. Supp. 493, 499 (E.D. Pa. 1985) (recoveries equal to 0.1%, 0.2%, 0.3%, 0.65%, 0.88%, 2%, and 2.4% of defendants' total sales).

Moreover, the Settlements call for the Settling Defendants to provide substantial cooperation. This is a valuable benefit because it will save time, reduce costs, and provide access to information, witnesses and documents regarding the conspiracy that might otherwise not be available to IPPs. *See In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1386 (D. Md. 1983) (finding such agreements "an appropriate factor for a court to consider in approving a settlement"). The provision of cooperation is a substantial benefit to the classes and strongly militates toward approval of a settlement agreement. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003). In addition, "[i]n complex litigation with a plaintiff class, 'partial settlements often play a vital role in resolving class actions.'" *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247 (7th Cir. 1992) (*quoting* Manual for Complex Litigation, Second, § 30.46 (1986)).

4. The Advanced Stage of the Proceedings Supports Final Approval

The extent of discovery completed and the stage of the proceedings support approval. The factual investigation, significant discovery, and legal analyses in the five-plus years of this litigation were substantial. Class settlements are more likely fair if negotiated and agreed to following extensive discovery. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 967 (9th Cir. 2009); *see also Jaffe v. Morgan Stanley & Co.*, No. C 06-3903 TEH, 2008 WL 346417, at *9 (N.D. Cal. Feb. 7, 2008). When parties have "a good grasp on the merits of [the] case before settlement talks beg[i]n," negotiations are more likely to achieve fair results. *Rodriguez*, 563 F.3d at 967.

As detailed in IPPs' Motion for Attorneys' Fees, Expenses, and Service Awards (ECF No. 1011), after multiple amendments to the complaint, a series of motions to dismiss, and two rounds of summary judgment regarding the Foreign Trade Antitrust Improvements Act, IPPs have received and processed over 500 gigabytes of discovery from Defendants, which included over 15 million documents, and taken depositions of 144 fact and 30(b)(6) witnesses from Defendants, nonparties, and experts, which provided Class Counsel with the information needed to reach fair and reasonable

settlements. *See* IPPs' IPPs' Motion for Attorneys' Fees, Expenses, and Service Awards at 3, 10 (ECF No. 1011); Declaration of Adam J. Zapala in Support thereof ¶¶ 21-51 (ECF No. 1011-2). The progress in the litigation and the exchange of voluminous information confirm IPPs and Defendants had a solid understanding of their respective cases to "make an informed decision about settlement." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000).

As the foregoing demonstrates, the status of the proceedings and the substantial discovery that occurred militate in favor of approving the Settlements. The Settlements were achieved well into discovery and, as a result, Class Counsel were well-informed about the liability evidence, affected commerce at issue, and the associated risks to the classes should litigation proceed. Class Counsel's well-informed approach and the stage of the litigation lead to reaching fair, adequate, and reasonable Settlements with Settling Defendants. *Rodriguez*, 563 F.3d at 967.

5. The Settlements Are the Product of Arm's Length Negotiations Between the Parties, and the Recommendation of Experienced Counsel Favors Approval

When evaluating class action settlements, "the district court must reach a reasoned judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion among, the negotiating parties. . . ." *City of Seattle*, 955 F.2d 1290 (internal quotation marks omitted). As noted, *supra*, the parties have vigorously litigated this Action. IPPs and Defendants have constantly disputed pleadings, motions, and discovery requests. IPPs applied that same zealous advocacy in reaching the Settlements with the Settling Defendants. Negotiations over the Settlements took place over many months and involved numerous exchanges of confidential information and settlement proposals, as well as meetings with several top executives and corporate counsel. *See* Zapala Decl. ¶¶ 11, 15, 19, 23. The long process IPPs and the Settling Defendants endured in reaching these agreements shows that they are the product of arms-length negotiations and not collusion. There is little doubt that the settlements were contested, fair, and conducted in utmost good faith. Because these Settlements are the products of arms-length negotiations conducted by experienced counsel who reached terms both sides find beneficial to their respective parties, the Court should find the Settlements to be fair, adequate, and reasonable. *See Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW EMC, 2010 WL 1687832, at *13 (N.D. Cal. Apr. 22, 2010).

Furthermore, Class Counsel's views weigh in favor of final approval. Counsel's judgment on the fairness of settlements is entitled to "great weight." *See Nat'l Rural Telecomms*., 221 F.R.D. at 528. The Court appointed competent and experienced counsel who have done extensive work in complex litigation, including extensive work in antitrust class actions around the country. *See* Order Appointing Interim Lead Class Counsel (Case No. 3:14-cv-03264, ECF No. 319). Class Counsel are therefore able to make informed and highly sophisticated assessments about the risks and possible recoveries in this Action. Class Counsel endorses the Settlements as fair, adequate, and reasonable. While IPPs believe they have meritorious claims, the Settling Defendants all assert that they have strong defenses that would eliminate their liability and/or damage exposure to the Settlement Classes. The parties entered the Settlements to eliminate the burden, expense and risks of further litigation.

6. There Are No Government Participants

Besides the Antitrust Division of the U.S. Department of Justice, which has been investigating the capacitor industry since 2014, there is no other government participant in this Action.

7. Class Members' Overwhelmingly Positive Reaction Favors Final Approval

In determining the fairness and adequacy of a proposed settlement, the Court also should consider "the reaction of the class members to the proposed settlement." *Churchill Vill*., 361 F.3d at 575; *Hanlon*, 150 F.3d at 1026. "It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 529 (C.D. Cal. 2004) (collecting cases); *see also In re Fleet/Norstar Sec. Litig*., 935 F. Supp. 99, 107 (D.R.I. 1996). Following the Notice Program, through which IPPs presented the Settlement Classes with the material terms of the Settlements, only 28 exclusion requests and no valid objections were received. Schachter Decl. ¶¶ 18-19. These Classes include large, sophisticated companies that purchase standalone capacitors. These entities can (and often do) assert objections in this type of litigation. Their approval of the Settlements demonstrates their value to the Classes.

The 28 exclusion requests submitted by 19 individuals and nine entities represent an extremely small fraction of the Settlement Classes as a whole, demonstrating the Classes' overall

positive reaction to the Settlements. One of the entities, Panasonic Automotive Systems Company of America, Division of Panasonic North America ("PASA"), submitted an exclusion request but is *already* excluded from the Settlement Classes as a subsidiary and/or affiliate of a Defendant in the Action (*see*, *e.g.*, ECF No. 835 at ¶ 4). The excluded parties' capacitor purchases constitute a miniscule fraction (.01%) of total sales made by distributors to the Settlement Classes. Zapala Decl. ¶ 29. Given the limited number of opt-outs, this Court should recognize the Classes' overwhelmingly favorable reaction to the Settlements.

One exclusion request submitted by Mr. Jacob Swary of San Diego, California, also purports to object to the Settlements (Case No. 3:14-cv-03264-JD, *see* ECF No. 2487). As a procedural matter, his objection fails because he cannot *both* exclude himself from the Settlements *and* object to them. *See In re Wachovia Corp. "Pick-A-Payment" Mortg. Mktg. & Sales Practices Litig.*, No. 5:09-MD-02015-JF, 2011 WL 1877630, at *4 (N.D. Cal. May 17, 2011) (class members who opt out lack standing to object to a settlement); *Zamora v. Ryder Integrated Logistics, Inc.*, No. 13CV2679-CAB BGS, 2014 WL 9872803, at *1 (S.D. Cal. Dec. 23, 2014) (an opt-out is no longer a class member and therefore lacks standing to object to the class settlement); *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 28–29 (D.C. Cir. 2000) (opt-out plaintiffs were not entitled to intervene to oppose class settlement). In addition to the long-standing and well-settled case law holding that an opt out lacks standing to assert an objection to final approval of a settlement, the Long Form Notice clearly informs Class Members of this fact. The Court-approved Long Form Notice explicitly provides, "You can object to or comment on one or more Settlements only if you do not exclude yourself from that Settlement Class" (ECF Nos. 836 (Order Granting IPPs' Motion for Approval of Class Notice Program); 836-2 at ¶ 18 (Long Form Notice)).[3] The Notice further states, "If you exclude yourself from any of the Classes, you are telling the Court that you do not want to participate in the Settlement(s). Therefore, you will not be eligible to receive any benefits from the Settlement(s), and you will not be able to object to the Settlement(s)" (ECF No. 836-2 at ¶ 19). Mr. Swary's letter states, in part, "I want to be excluded from the Capacitors Antitrust Litigation class action settlement with

[3] *See also* Long Form Notice at ¶ 18, *In re Capacitors Antitrust Litig*. (*Indirect Purchaser Actions*), https://www.capacitorsindirectcase.com/documents/Notice%20Docs/Capacitors%20-%20Long%20Form%20Notice.pdf.

[listing all Defendants with which IPPs have settled]" and "I understand that by so doing, I will not be able to get any money or benefits from the settlement with those Settling Defendants in this case." He has therefore incontrovertibly excluded himself from the Settlements, and Class Counsel is obligated to honor his opt-out request.

Notwithstanding the fact that Mr. Swary lacks standing to object, even if the Court were to consider the asserted objection, it should find that his purported "objection" is substantively meritless (Case No. 3:14-cv-03264-JD, ECF No. 2487). Mr. Swary argues that the Court should reject the Settlements because, in summary, he purchased capacitors to repair his TV and "at the time of this purchase [he] was fully aware that [he] was paying much more than [he] needed to pay for a few capacitors." *Id*. The fact that did not care about price-fixed capacitors is immaterial and misses the purpose of an antitrust class action and the theory on which injured parties recover in such cases.

Next, Mr. Swary objects to the "waste of resources towards antitrust and price-fixing litigation in general, as the cartelization of businesses is realistically only sustainable short term, and to the extent that it is not, it is resulting directly from bad legislation in the first place." *Id*. But, the Settlements will allow Class Members to receive payments resulting from the price-fixing conspiracies that they would not have received had IPPs not brought suit. These facts illustrate, contrary to Mr. Swary's statement, that the U.S. antitrust laws are in effect and serving justice on price-fixers. Mr. Swary's objection is therefore unsubstantiated and without merit. Given the thousands of individuals and entities that make up the Settlement Classes, the nearly unanimously favorable reaction of the Settlement Classes to the Settlements strongly militates in favor of approval.

C. The Class Notice Program Satisfied Due Process and Adequately Provided Notice to the Settlement Classes

Before final approval of a class action settlement, the Court must find class members were notified in a reasonable manner. Fed. R. Civ. P. 23(e)(1). When a settlement class is certified under Rule 23(b)(3), class members should receive "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(b)(3); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Notice must describe "the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Lane v. Facebook, Inc.*, 696

F.3d 811, 826 (9th Cir. 2012). The notice program must comport with Due Process requirements. *Rodriguez*, 563 F.3d at 963. Here, the Court-approved and IPP-implemented Notice Program comports with Due Process and is the best practicable under the circumstances. *See generally,* Schachter Decl.

The robust and multifaceted Notice Program provided both Long Form and Short Form Notices. *Id*. ¶ 3. The notices clearly describe who qualifies as members of the Settlement Classes and plainly provide class members with information about excluding themselves from or objecting to the Settlements. *Id*. ¶¶ 17, 19. The Program also provided notice by mail, e-mail, print publication, online publication, and online banner advertisements. *Id*. ¶¶ 4-13. IPPs additionally provided the Classes with a settlement website, www.capacitorsindirectcase.com, at which Class Members could learn more about the settlement terms, important dates, and even register as members of the Settlement Classes. *Id*. ¶ 15. As evidenced by the types of e-newsletters and websites targeted by the notice program, the program was specifically designed to reach persons making purchases from the electronics industry. *Id*. ¶¶ 10-13. The Court's Order approving the Notice Program found that the notice plan was the best notice practicable under the circumstances under Rule 23(c)(2)(B) and met all Due Process requirements (ECF No. 836).

In turn, IPPs implemented the Court-approved Notice Program. As to direct mail, A.B. Data mailed notice packets to 428,395 potential members of the Settlement Classes. Schachter Decl. ¶ 7. IPPs obtained substantial distributor sales data through Rule 45 subpoenas in connection with prior settlement rounds. *Id.* ¶ 5. The data included customer information, which IPPs provided to A.B. Data to disseminate direct notice for those potential Class Members where contact information was available. *Id*. A.B. Data mailed a notice packet consisting of the Long Form Notice and Proof of Claim Form, including their respective total capacitor purchases in a prepopulated field, to each of these potential Class Members. Schachter Decl. ¶ 7, Ex. A. A.B. Data also compared this data against the mailing list it had used to send notice of previous settlements in this Action and mailed notice packets to additional potential Class Members who were not in the distributor sales data. *Id*. ¶ 6.

As to the Short Form Notice, A.B. Data arranged for it to be published in *The Wall Street Journal*. *Id*. ¶ 9, Ex. B. Concerning email blasts, A.B. Data sent them to 63,000 subscribers of

Electronic Design, 50,000 subscribers to *Penton Publications*, and approximately 41,000 subscribers to *EE Times*. *Id*. ¶ 11. Regarding the banner ad campaign, A.B. Data arranged for banner ads to appear in *Nuts and Volts* and *Electronic Design TODAY* e-newsletters. *Id*. ¶ 12, Exs. C-1, C-2. A.B. Data also arranged for internet banner ads to appear on over 10 websites and Facebook, targeting business professionals in manufacturing industries and technically savvy electronics hobbyists and enthusiasts, which resulted in more than 30 million digital impressions. *Id*. ¶ 13, Ex. D. A.B. Data also issued a nationwide news release announcing the Settlements. *Id*. ¶ 14, Ex. E. Furthermore, A.B. Data also maintains the settlement website and the telephone helpline to provide the latest information to potential Class Members. *Id*. ¶¶ 15. IPPs and A.B. Data satisfied Due Process by providing the best notice practicable under the circumstances that is consistent with the requirements of Rule 23, Ninth Circuit precedent, and Due Process. *Id*. ¶¶ 21-23.

D. The Plan of Allocation is Fair, Reasonable, and Adequate and 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). When allocating funds, "[i]t 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) (approving securities class action settlement allocation on a "per-share basis"); *Four in One Co. v. S.K. Foods, L.P*., 2:08-CV-3017 KJM EFC, 2014 WL 4078232, at * (E.D. Cal. Aug. 14, 2014) (approving "plan of allocation providing for a pro rata distribution of the net settlement fund based on verified claimants' volume of qualifying purchases" as "fair, adequate, and reasonable").

Courts, including this one, have frequently found *pro rata* distributions fair, adequate, and reasonable (ECF No. 628; Case 3:14-cv-03264-JD, ECF No. 1934) (approving Plan of Allocation in connection with prior settlements rounds). *See also In re Cathode Ray Tube* (*CRT*) *Antitrust Litig*., 2015 U.S. Dist. LEXIS 170525, at *198-200 (N.D. Cal. Dec. 17, 2015) (approving *pro rata* plan of allocation based on proportional value of price-fixed component in finished product); *In re Dynamic*

Random Access Memory (*DRAM*) *Antitrust Litig*., No. M-02-1486 PJH, Dkt. No. 2093, at *2 (Oct. 27, 2010) (Order Approving Pro Rata Distribution)l *In re Vitamins Antitrust Litig*., No. 99-197 TFH, 2000 U.S. Dist. LEXIS 8931, at *32 (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); *In re Lloyds' Am. Trust Fund Litig*., No. 96 Civ.1262 RWS, 2002 U.S. Dist. LEXIS 22663, at *54 (S.D.N.Y. Nov. 26, 2002) ("Pro rata allocations provided in the Stipulation are not only reasonable and rational, but appear to be the fairest method of allocating the settlement benefits."); *In re PaineWebber Ltd. P'ships Litig.,* 171 F.R.D. 104, 135 (S.D.N.Y. 1997), aff'd 117 F.3d 721 (2d Cir. 1997) ("[A] pro rata distribution of the Settlement on the basis of Recognized Loss will provide a straightforward and equitable nexus for allocation and will avoid a costly, speculative and bootless comparison of the merits of the Class Members' claims.").

Here, as with each of the previous settlement rounds that have been finally approved, allocation of the Settlement Fund will be on a *pro rata* basis based on the type and extent of injury suffered by each class member in those states which permit indirect purchaser claims. Specifically, all funds from the ELNA, Matsuo, and Nichicon Settlements will be allocated to the electrolytic settlement pot. Regarding the Panasonic settlement, $3,572,000 will be allocated to the electrolytic settlement pot, and $1,128,000 will be allocated to the film settlement pot. This allocation of the settlement proceeds is based on the proportion of Panasonic's sales to distributors of electrolytic capacitors versus sales to distributors of its film capacitors (ECF No. 698 at 4).

With respect to the *pro rata* distribution, the plan of allocation contemplates a *pro rata* distribution to each Settlement Class Member with damages claims from the indirect purchaser states based on the number of approved purchases of film or electrolytic capacitor purchases during the respective settlement class periods as against the respective settlement pots for either film or electrolytic capacitors. This is a reasonable and fair way to compensate the Classes. The recovery to an individual Settlement Class Member is therefore tied to the volume of their purchases, the number of other qualified class members making claims against the settlement fund, and the size of the overall

fund. This plan of allocation is thus "fair, adequate, and reasonable" and merits approval by the Court. *See Citric Acid*, 145 F. Supp. at 1154.

IV. CONCLUSION

For the foregoing reasons, the Court should grant final approval of the Settlements with ELNA, Matsuo, Nichicon, and Panasonic, enter final judgment dismissing IPPs' claims against these Defendants with prejudice, and approve IPPs' Plan of Allocation.

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Respectfully submitted,

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