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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE OPTICAL DISK DRIVE PRODUCTS ANTITRUST LITIGATION	No. 3:10-md-2143 RS
This Document Relates to: ALL INDIRECT PURCHASER ACTIONS	INDIRECT PURCHASER PLAINTIFFS' NOTICE OF UNOPPOSED MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENTS WITH PLDS AND PIONEER DEFENDANTS AND DISSEMINATION OF CLASS NOTICE Date: April 20, 2017 Time: 1:30 p.m. Dept: Courtroom 3, 17th Floor Judge: Hon. Richard Seeborg DATE ACTION FILED: Oct. 27, 2009

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on April 20, 2017 at 1:30 pm or as soon thereafter as the matter may be heard by the Honorable Judge Richard Seeborg of the United States District Court for the Northern District of California, San Francisco Division, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Indirect Purchaser Plaintiffs will and hereby do move the Court pursuant to Federal Rules of Civil Procedure 23 for an order:

1) preliminarily approving proposed class action settlements with the Koninklijke Philips N.V., Lite-On IT Corporation, Philips & Lite-On Digital Solutions Corporation, and Philips & Lite-On Digital Solutions U.S.A., Inc. defendants (collectively, PLDS) and with the Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., and Pioneer High Fidelity Taiwan Co., Ltd. defendants (collectively Pioneer);

2) certifying the settlement classes;

3) appointing Hagens Berman Sobol Shapiro LLP as Class Counsel; and

4) approving the manner and form of notice and proposed plan of allocation to class members.

This Motion is based on this Notice of Motion and Unopposed Motion for Preliminary Approval of Class Action Settlements with PLDS and Pioneer Defendants and Dissemination of Class Notice, the following memorandum of points and authorities, the accompanying settlement agreements, the pleadings and the papers on file in this action and such other matters as the Court may consider.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL RULES

SECONDARY AUTHORITIES

I. INTRODUCTION

Indirect Purchaser Plaintiffs (IPPs) seek preliminary approval under Federal Rule of Civil Procedure 23 for its proposed settlements with the PLDS and Pioneer defendant families.[1] The PLDS settlement is for $40 million – approximately 21 percent of the single damages attributable to this defendant family. The Pioneer settlement is for $10.5 million – approximately 16 percent of the single damages attributable to this defendant family.

This brings the total settlements in the IPP case to $175 million with defendants representing an average of 23 percent recovery for the market share attributable to all settling defendants – with approximately 25 percent of the market remaining.

The settlements are an exceptional result for the class. The PLDS defendant family played a unique role in this litigation, as the cooperating entities under the Antitrust Criminal Penalty and Enhancement Reform Act (ACPERA).[2] Had IPPs continued to go to trial against PLDS, they certainly would have argued that their liability was limited to single (rather than treble) antitrust damages, and that it was not subject to joint and several liability with the other defendants. The potential success of this argument would significantly limit the potential liability of the PLDS defendants.

The liability of the Pioneer defendant family was also potentially limited by the relatively minor role they played in the overall conspiracy. The Pioneer defendant family was not subject to any indictments, and has not been directly named in any of the governmental investigations into the ODD price fixing conspiracy.

The proposed settlements require certification by this Court of two settlement classes. The proposed settlement classes are identical to the class defined in the IPPs' revised motion for class

[1] "PLDS" refers to Koninklijke Philips N.V., Lite-On IT Corporation, Philips & Lite-On Digital Solutions Corporation, and Philips & Lite-On Digital Solutions U.S.A., Inc. defendants. *See* Declaration of Jeff D. Friedman in Support of Unopposed Motion for Preliminary Approval of Settlements with PLDS and Pioneer Defendants and Dissemination of Class Notice ("Friedman Decl."), Ex. A, concurrently filed herewith. "Pioneer" refers to the Pioneer Corporation, Pioneer North America, Inc., Pioneer Electronics (USA) Inc., and Pioneer High Fidelity Taiwan Co., Ltd. defendants. *See* Friedman Decl., Ex. B.

[2] *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 (2004).

certification – purchasers of computers and stand-alone ODDs in 24 jurisdictions. The proposed structure of these settlement classes, including its procedural administration, is identical to the four settlement classes that this Court previously approved for the IPPs settlements with the Panasonic, NEC, Sony and HLDS defendant families.[3]

The proposed settlements were reached with the assistance of Magistrate Judge Corley, after extensive negotiations between experienced and informed counsel, and easily meet the standards for preliminary approval.

IPPs propose a comprehensive notice program designed by an experienced notice administrator – Gilardi & Co. LLC. Direct notice will be sent to class members wherever possible – IPPs have collected approximately 25 million email addresses, with more yet to be produced by third parties. Supplementing a direct notice campaign, IPPs propose a robust online publication campaign that will ensure over 70 percent of class members receive notice. The proposed class notice provides class members with notice both of the certification of the class and the proposed settlement.

Although class members will be able to make claims on the settlement, IPPs propose that distribution of the $40 million from PLDS and $10.5 million from Pioneer be held pending further settlements. Four defendant families remain in the indirect purchaser case, including one of the largest defendants by market share – TSST.[4] Claims against these remaining defendants are not released by this settlement with the PLDS and Pioneer defendants. Given the expense associated with distribution, IPPs believe that it is in the best interests of the class to wait before distributing the funds until litigation has concluded against all remaining defendants.

Accordingly, IPPs respectfully request an order: (1) preliminarily approving the proposed class action settlements with the PLDS and Pioneer defendants; (2) certifying the settlement classes;

[3] Order Granting Final Approval of Indirect Purchaser Plaintiffs' Settlements with Panasonic, NEC, Sony and HLDS Defendant Families, Granting Motion for Attorneys' Fees, Expenses and Service Awards, and Overruling Objections, Dec. 19, 2016, ECF No. 2133.

[4] The remaining defendants in the IPP case are: BenQ Corporation, BenQ America Corp., Samsung Electronics Co., Ltd., Toshiba Corp., Toshiba Samsung Storage Technology Corp., Toshiba Samsung Storage Technology Corp. Korea, TEAC America Inc., TEAC Corporation, Quanta Storage America, Inc., and Quanta Storage Inc.,

(3) appointing Hagens Berman Sobol Shapiro LLP as Class Counsel; and (4) approving the manner and form of notice and proposed plan of allocation to class members.

II. PROCEDURAL HISTORY

IPPs reached these settlements with the PLDS and Pioneer defendants after years of litigation. IPPs reached agreement on the terms of the respective settlements with PLDS and Pioneer on January 9, 2017 and February 21, 2017, respectively – seven years after the original complaint was filed in this action against PLDS, and nearly four years after the first complaint was filed against Pioneer.

IPPs reached these settlements only after this Court certified a class and fact discovery closed.

This litigation has required the assistance of not one, but two Magistrate Judges – one to oversee discovery disputes (Chief Magistrate Judge Spero), and one to oversee settlement discussions (Magistrate Judge Corley). IPPs and PLDS reached agreement on the terms of the settlement on January 2, 2017 and the agreement itself was executed on January 24, 2017. The settlement agreement with Pioneer was executed on March 1, 2017. Each class representative has approved the terms of this settlement.[5]

III. SUMMARY OF SETTLEMENT TERMS

A. The Settlement Class

The proposed settlement classes mirror the class certified by this Court. That class is as follows:

> All persons and entities who, as residents of Arizona, California, District of Columbia, Florida, Hawaii, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oregon, Tennessee, Utah, Vermont, West Virginia and Wisconsin and during the period April 2003 to December 2008, purchased new for their own use and not for resale: (i) a computer with an internal ODD; (ii) a stand-alone ODD designed for internal use in computers; or (iii) an ODD designed to be attached externally to a computer. ODD refers to a DVD-RW, DVD-ROM, or COMBO drive manufactured by one or

[5] Friedman Decl., ¶ 8.

> more Defendants or their coconspirators. Excluded from the class are any purchases of Panasonic-branded computers.[6]

B. The Settlement Consideration

Settlements with PLDS and Pioneer total $50.5 million for the indirect purchaser class. This fund is non-reversionary to the defendants, and IPPs intend to distribute as much of the funds to the IPP class as is economically feasible.

The settlements also provide for cooperation from the PLDS and Pioneer defendants as IPPs prepare for trial against the remaining defendants – this includes assisting in issues regarding authenticity and admissibility of documents, and using reasonable efforts to make up to five witnesses available for testimony at trial.[7] These cooperation provisions are particularly valuable to the class given PLDS's key role in the conspiracy, and their position as the cooperating entity with the DOJ during its investigation into the ODD cartel.

C. Release of Claims

If the settlements become final, the plaintiffs and class members will release all federal and state-law claims against the PLDS and Pioneer defendants relating to the conduct alleged in plaintiffs' complaint, including "claims under foreign or federal antitrust or competition laws . . . that relate to or arise out of the sale of any of the ODDs or any of the products containing ODDs"[8] that are the subject of the complaint. The releases do not preclude plaintiffs from pursuing their claims against the remaining defendants.[9] The settlements release only those claims of class members who will recover under the terms of the settlement.

D. Notice and Implementation of the Settlement

IPPs submit proposed notices and a plan for the dissemination of notice.[10] IPPs have obtained approximately 25 million email addresses for potential class members. The direct notice campaign

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[6] Friedman Decl., Ex. A, ¶ A(1); Ex. B, ¶ A(1).

[7] *Id.*, Ex. A, ¶¶ G(25-26); Ex. B, ¶¶ F(23-24).

[8] *Id.*, Ex. A, ¶ 13; Ex. B. ¶ 12.

[9] *Id.*, Ex. A, ¶ 13; Ex. B. ¶ 12.

[10] *See* Supplemental Declaration of Alan Vasquez Regarding Implementation of Class Notice Plan (Vasquez Suppl. Decl.), ¶ 5; Exs. 1-4, concurrently filed herewith.

will be supplemented with an online campaign and publication notice. The notice administrator, Gilardi & Co. LLC, estimates that over 70 percent of class members will receive notice.

E. Plan of Distribution

IPPs propose to distribute the funds *pro rata* to class members based on: (1) the number of ODDs purchased by the class member; and (2) the number of valid claims filed.[11] There will be no reversion of unclaimed funds to any defendant. To the extent that money is not able to be reasonably distributed to class members, IPPs propose that the money escheat to the federal or state governments.

IV. ARGUMENT

A. The Court's Role in Approving a Class Action Settlement

Federal Rule of Civil Procedure 23(e) requires judicial approval of any compromise or settlement of class action claims. Approval of a settlement is a multi-step process, beginning with preliminary approval, which then allows notice to be given to the class and objections to be filed, after which there is a motion for final approval and fairness hearing.[12] Preliminary approval is thus not a dispositive assessment of the fairness of the proposed settlement, but rather determines whether it falls within the "range of possible approval."[13] Preliminary approval establishes an "initial presumption" of fairness,[14] such that notice may be given to the class and the class may have a "full and fair opportunity to consider the proposed [settlement] and develop a response."[15]

Preliminary approval of a settlement and notice to the proposed class is appropriate if the proposed settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class

[11] Friedman Decl., ¶ 4.

[12] *See* Manual for Complex Litigation (Fourth) § 21.632, 320-21 (2004). All internal citations and quotations omitted and all emphasis added, unless otherwise indicated.

[13] *Id.*; *see also Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 301-302 (E.D. Cal. 2011).

[14] *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

[15] *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).

representatives or segments of the class; and (4) falls with the range of possible approval.[16] The "initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge."[17]

1. The Settlements Are the Result of Arm's-Length Negotiations

These settlements are the product of extended, informed, arm's-length negotiations between counsel for the parties. The parties reached agreement after seven years of litigation, discovery and investigation and multiple conferrals of counsel and the parties concerning settlement constructs and amounts. In addition to these non-collusive negotiations between sophisticated counsel, the negotiations between IPPs, Pioneer and PLDS were assisted by Magistrate Judge Corley, a neutral mediator.[18]

The settlements bear no signs of collusion or conflict. In its opinion in *In re Bluetooth*, the Ninth Circuit admonished that courts must, at the final approval stage, ensure that the settlement, taken as a whole, is free of collusion or any indication that the pursuit of the interests of the class counsel or the named plaintiffs "infected" the negotiations.[19] The Ninth Circuit has pointed to three factors as troubling signs of a potential disregard for the class's interests during the course of negotiation: (a) when class counsel receive a disproportionate distribution of the settlement; (b) when the parties negotiate a "clear sailing" arrangement that provides for the payment of attorneys' fees separate and apart from class funds; or (c) when the parties arrange for fees not awarded to plaintiffs' counsel to revert to the defendants rather than the class.[20]

None of these warning signs are present here. The proposed settlements are common fund, all-in settlements with no possibility of reversion. The funds will be used to cover costs and fees and compensate the class based on a *pro rata* formula. For both settlements, there is no 'clear sailing'

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[16] *See Zepeda v. Paypal, Inc.*, No: C 10-2500 SBA, 2015 U.S. Dist. LEXIS 150577, at *14 (N.D. Cal. Nov. 5, 2015); *Fraley v. Facebook, Inc*., No. C 11-1726 RS, 2012 U.S. Dist. LEXIS 116526, at *4 n.1 (N.D. Cal. Aug. 17, 2012) (same); *Tableware*, 484 F. Supp. 2d at 1079 (same).

[17] *Officers for Justice v. San Fran. Civ. Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982).

[18] *See In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (finding the presence of a neutral mediator "a factor weighing in favor of a finding of non-collusiveness").

[19] *Id*. at 946-48.

[20] *Id*. at 947.

provision, no payment of fees separate and apart from the class funds, and no "kicker" provision like the one in *In re Bluetooth* which would allow unawarded fees to revert to the defendants. The proposed class notice informs class members that class counsel will make a request for attorneys' fees up to 25 percent of the settlement fund.[21] In short, these settlements are entitled to a presumption of fairness and should be granted preliminary approval just as this Court previously granted preliminary approval to four identically structured settlements against other defendants in this MDL.

2. The Settlements Have No Obvious Deficiencies When Considered in Relation to the IPPs' Case

The proposed settlements easily satisfy the requirements for preliminary approval. This Court is aware of the risk faced by the class of no recovery – this Court has already once denied a motion for class certification. These settlements represent an outstanding recovery for the class – ensuring an additional $50.5 million in recovery for the class, while preserving IPPs' claims against the remaining large defendants TSST, Toshiba and Samsung.

Recently, on February 1, 2017, IPPs served their Rule 26 report regarding damages caused by the defendants' cartel. Dr. Flamm estimates that indirect purchasers in the 24 jurisdictions certified by this Court's October 2014 order suffered damages in the amount of $1.074 billion for the period of April 2003 through December 2008.[22]

Looking at the damages attributable to these defendants by their market share, PLDS had approximately 18 percent market share during the class period – equaling approximately $193 million in damages attributable to this defendant family. This equates to a 21 percent recovery for the IPP class for the single damages attributable to the PLDS defendants.

Pioneer had approximately a six percent market share during the class period – equaling approximately $64 million in damages attributable to this defendant family. This equates to a 16 percent recovery for the IPP class for the single damages attributable to the Pioneer defendants.

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[21] Vasquez Suppl. Decl., Exs. 3 & 4.

[22] This number differs slightly from the damages figure proposed at class certification and proposed with the prior preliminary approval papers of $840 million. *See* Notice of Unopposed Motion and Motion for Preliminary Approval of Settlements with Panasonic, NEC, Sony and HLDS Defendant Families and Dissemination of Class Notice at 7, ECF No. 1898.

Compared against the prior settlements reached in the IPP action, these settlements are well within the appropriate range considering the respective roles of PLDS and Pioneer in this litigation:

TOTAL SETTLEMENTS TO DATE				
	Contribution to Settlement Fund	**Percent Share of ODD Market**	**Damages Attributed to Defendant Family**	**Percent Recovery for IPPs**
HLDS	$73,000,000.00	26%	$283,483,200.00	26%
PLDS	$40,000,000.00	18%	$193,284,000.00	21%
NEC/Sony (Joint Venture)	$35,000,000.00	10%	$107,380,000.00	33%
Panasonic	$16,500,000.00	12%	$128,856,000.00	13%
Pioneer	$10,500,000.00	6%	$64,428,000.00	16%
Total	**$175,000,000.00**	**72.4%**	**$777,431,200.00**	**23%**

In total, settlements to date represent recovery of 23 percent of the damages attributable to the settled defendants' market share, and 16 percent of the total damages ($1.074 billion) suffered by indirect purchasers with four defendant families remaining (BenQ, Samsung, Teac and TSST/Toshiba).

The settlement with the PLDS defendants must be viewed against the backdrop of the PLDS defendants' anticipated argument that they are only subject to single, rather than treble, antitrust damages because of their status as cooperators under ACPERA. Whether or not the PLDS defendants have provided the "satisfactory cooperation" that is the ACPERA requisite for single damages has not yet been decided by this Court but the potential eligibility of the PLDS defendants for this limitation on damages is further support for the fairness of this settlement.[23]

The settlement with the Pioneer defendants reflects that Pioneer was never the subject of any government indictments for its role in the ODD conspiracy. Indeed, the IPPs are unaware of any government investigations of Pioneer. Neither the European Commission nor the Taiwanese Fair Trade Commission named Pioneer during their investigations into price fixing in the ODD market.

[23] *See* Pub. L. No. 108-237, tit. II, 118 Stat. 661 (2004), at § 213 (stating that if an amnesty applicant renders "satisfactory cooperation," then "the damages . . . shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation").

Pioneer was also a relatively minor player within the industry according to market participants, who characterized Pioneer as "third tier" in the industry.

IPPs entered into these settlement agreements with a thorough understanding of the strengths and weaknesses of their case that was gained from seven years of extensive, hard-fought litigation. The parties conducted comprehensive discovery; defendants have collectively produced over 3.1 million documents in four different languages (English, Japanese, Korean and Chinese). The parties in the case have conducted 142 depositions – this includes depositions of 69 current and former employees of the defendants regarding their role in the conspiracy (the vast majority of which, IPPs have taken the lead), eight days of expert depositions (three days of Dr. Flamm, two days of defense expert Dr. Burtis, and three days of defense expert Dr. Ordover), 28 depositions of IPP class representatives, 11 depositions of third parties regarding pass-through issues, six depositions of telephone companies regarding the authenticity of phone records produced in this litigation, and 18 depositions of other plaintiffs in this MDL which IPPs attended and at timed questioned regarding issues of pass-through or FTAIA. Plaintiffs have served 58 written interrogatories, 33 requests for admission, deposed defendants' economists (Drs. Burtis and Ordover) twice each, and deposed 10 third parties. The parties have submitted two sets of expert declarations regarding class certification, including IPPs' fully developed multi-variate regression analysis to isolate the overcharge due to defendants' cartel, and IPPs' pass-through analysis of 278 million different transactions in the consumer market. On February 1, 2017, IPPs served their Rule 26 expert reports.[24] Weighing the developed stage of litigation against the risk that IPPs face in this litigation, there are no obvious deficiencies regarding these settlements.

3. The Settlements Do Not Provide Preferential Treatment for Segments of the Class or the Class Representatives

The third factor to be considered by this Court in determining whether the settlement should be preliminarily approved is whether the settlement grants preferential treatment to class representatives or segments of the class.[25]

[24] Friedman Decl., ¶ 5.

[25] *Zepeda*, 2015 U.S. Dist. LEXIS 150577, at *14.

a. All Class Members Will Recover Their *Pro Rata* Share of the Settlements

A plan of distribution of class settlement funds is subject to the "fair, reasonable and adequate" standard that applies to approval of class settlements.[26] A plan of distribution that compensates class members based on the type and extent of their injuries (including on a *pro-rata* basis) is generally considered reasonable.[27]

IPPs propose to compensate members of the state classes according to a plan of distribution which provides for a *pro rata* share of the settlement fund based on: (1) the number of ODDs purchased by the class member; and (2) the number of valid claims filed.[28] There will be no reversion of unclaimed funds to any defendant.

In order to submit a claim, class members will identify the total number of products containing an ODD that they purchased between April 2003 through December 2008 (laptops, desktops or stand-alone ODDs). Class members do not need to submit a proof of purchase but they will be advised to retain all purchase documentation until the claim is closed. For large claims, proof of purchase may be required.[29] IPPs also believe, given the size of the settlement to date, that automatic distribution of money for those class members for whom receipts are directly available from vendors (such as Best Buy, HP and Dell), is appropriate. IPPs are working with the third parties and the claims administrator to understand the number of class members for whom automatic distribution will be possible. IPPs do not contemplate distributing funds from the settlements, however, at this time as it is most administratively feasible to wait until either the litigation has concluded against all of the defendants, or it appears that an interim distribution would be economical and efficient.

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[26] *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001).

[27] *Gaudin v. Saxon Mortg. Servs., Inc.*, No. 11-cv-01663-JST, 2015 U.S. Dist. LEXIS 159020, at *23 (N.D. Cal. Nov. 23, 2015) ("Such a plan 'fairly treats class members by awarding a pro rata share' to the class members based on the extent of their injuries.") (Internal citation omitted.); *Noll v. eBay, Inc.*, No. 5:11-cv-04585-EJD, 2015 U.S. Dist. LEXIS 123147, at *10, *50 (N.D. Cal. Sept. 15, 2015) (approving *pro-rata* distribution as fair and reasonable); *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 U.S. Dist. LEXIS 118051, at *29-*30 (N.D. Cal. Sept. 2, 2015) (approving *pro-rata* distribution of fractional share based upon class member's total base salary as fair and reasonable).

[28] Friedman Decl., ¶ 6.

[29] Vasquez Suppl. Decl., Ex. 2

b. The Service Awards for Class Representatives Reflect the Work They Have Undertaken on Behalf of the Class

The PLDS settlement sets forth a service award of $1,500 for each class representative.[30] This is in addition to the $4,500 this Court has already awarded in connection with the prior IPP settlements with the Sony, NEC, Panasonic and HLDS defendant families.[31] As the Ninth Circuit has recognized, service awards "that are intended to compensate class representatives for work undertaken on behalf of a class 'are fairly typical in class action cases.'"[32]

The representatives of the IPP classes have been actively involved in the litigation of this case. These representatives have been deposed, have responded to written discovery in detail, and have overseen and approved the terms of each of the various settlements. Most of these representatives have been involved in this litigation for nearly the entirety of this seven-year long litigation.[33] The class representatives have been actively involved in this litigation, receiving regular updates from class counsel. As recognition for this extraordinary service and perseverance, IPPs request the awards of $1,500 for each class representative from the PLDS defendants.

4. The Settlements Fall Within the Range of Possible Approval

To grant preliminary approval, this Court must decide that the settlements fall within the range of possible approval.[34] The amount of the recovery for the class ($50.5 million) certainly falls within a reasonable range given that the class may not be eligible for treble antitrust damages if the PLDS defendants qualify for amnesty under the ACPERA. Moreover, recovery of an estimated 21 percent of damages attributable to the PLDS defendant family and 16 percent of damages attributable to the Pioneer defendant family represent outstanding recoveries by any measurement.

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[30] Friedman Decl., Ex. A, ¶ 24.

[31] Order Granting Final Approval of Indirect Purchaser Plaintiffs' Settlements with Panasonic, NEC, Sony and HLDS Defendant Families, Granting Motion for Attorneys' Fees, Expenses and Service Awards, and Overruling Objections, Dec. 19, 2016, ECF No. 2133.

[32] *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015).

[33] Friedman Decl., ¶ 7.

[34] *See Zepeda*, 2015 U.S. Dist. LEXIS 150577, at *14; *Fraley*, 2012 U.S. Dist. LEXIS 116526, at *4 n.1; *Tableware*, 484 F. Supp. 2d at 1079.

B. The Proposed Settlement Classes Satisfies Rule 23

Certification is appropriate where the proposed class and the proposed class representatives meet the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation. In addition, certification of a class action for damages requires a showing that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

This Court has already found that four previous settlement classes with defendants in this action, identical in structure to the proposed class here, satisfied all of the elements of Rule 23(a).[35] IPPs' revised motion for class certification demonstrates that the proposed class satisfies all of the elements of Rule 23(b)(3). Plaintiffs review this evidence briefly.

1. Rule 23(a): Numerosity

The first requirement for maintaining a class action is that its members are so numerous that joinder would be "impracticable." Fed. R. Civ. P. 23(a)(1). Here, the class consists of millions of members nationwide. Numerosity is established.

2. Rule 23(a): The Case Involves Questions of Law or Fact Common to the Class

The second requirement of Rule 23 is the existence of common questions of law or fact. Fed. R. Civ. P. 23(a)(2). This requirement is to be "construed permissively,"[36] and a single issue has been held sufficient to satisfy the commonality requirement.[37] Here, issues of law and fact are common to the class. Some examples of these common questions of law and fact are as follows.

1. Whether defendants shared the common object of the conspiracy – to restrain the prices of ODDs. Evidence of this common object includes:

[35] Order Granting Indirect Purchaser Plaintiffs' Motion for Preliminary Approval of Class Action Settlements with Panasonic, NEC, Sony and HLDS Defendant Families and Dissemination of Class Notice, July 21, 2016, ECF No. 1916.

[36] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

[37] *Slaven v. BP America, Inc.*, 190 F.R.D. 649, 655 (C.D. Cal. 2000); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 647 (C.D. Cal. 1996).

a. Over 2,452 examples of collusive activity between the defendants, covering customers which comprise 71 percent of U.S. purchases of ODDs.[38]

b. Three separate government enforcement agencies have found the ODD cartel violated antitrust laws (including the U.S. Department of Justice, Taiwanese Fair Trade Commission, and the European Commission).[39]

c. Over 1,267 phone calls between competitors based on phone records.[40]

d. Recordings of conversations between competitors made during the DOJ's criminal investigation into the ODD cartel.[41]

2. Whether this conspiracy took place between April 2003 through December 2008;

3. Whether defendants' conduct resulted in an overcharge on ODDs;

4. Whether the overcharge was passed-through to indirect purchasers.

Similar common questions have been routinely found to satisfy the commonality requirement in other antitrust class actions.[42]

3. Rule 23(a): Plaintiffs' Claims Are Typical of the Claims of the Class

The "claims . . . of the representative parties [must be] typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical."[43] Typicality is easily satisfied in cases involving allegations of horizontal price-fixing 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

[38] Declaration of Jeff D. Friedman in Further Support of Indirect Purchaser Plaintiffs' Motion for Class Certification ("Friedman II"), Ex. 151, filed Under Seal, Feb. 18, 2014.

[39] Declaration of Jeff D. Friedman in Support of Indirect Purchaser Plaintiffs' Motion for Class Certification, May 29, 2013, ECF No. 884 ("Friedman I"), Exs. 2-6; Friedman II, Exs. 136-38; Declaration of Jeff D. Friedman in Support of Revised Motion for Class Certification on Behalf of Indirect Purchaser Class, filed Under Seal, May 20, 2015 ("Friedman III"), Ex. 236.

[40] Friedman II, Ex. 151.

[41] Friedman III, Exs. 247-249.

[42] *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at *3 (N.D. Cal. June 5, 2006) ("the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist").

[43] *Hanlon*, 150 F.3d at 1020.

will be typical of the absent class members."[44] In this case, the claims of the representative plaintiffs are typical of the claims of the class members because they all indirectly purchased – at inflated prices – ODDs or computers containing ODDs manufactured by the defendants.

4. Rule 23(a): Plaintiffs Will Fairly and Adequately Represent the Interests of the Class

The final requirement of Rule 23(a) is that the representative plaintiffs will fairly and adequately represent the interests of the class. This requires only that a class member does not have interests that are antagonistic to or in conflict with the interests of the class.[45] Here, class representatives have been actively involved in the litigation of this case. Each class representative has reviewed the terms of the settlements with PLDS and Pioneer and has given their approval to each.[46] The interests of all plaintiffs and class members are aligned because they all suffered similar injury in the form of higher ODD prices and the prices of computers containing ODDs due to the conspiracy, and all class members seek the same relief. By proving their own claims, plaintiffs will necessarily be proving the claims of their fellow class members.

5. Rule 23(b)(3): Common Questions of Fact or Law Predominate

Predominance, under Rule 23(b)(3), "is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."[47] The weight of authority holds that in horizontal price-fixing cases like this one, the predominance requirement is readily met. The existence of a conspiracy is the overriding issue common to all plaintiffs, sufficient to satisfy the Rule 23(b)(3) predominance requirement.[48] The second element of plaintiffs' claims, proof of impact, similarly predominates. At this point, both sides agree that HP and Dell formed the baseline

[44] *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1035 (N.D. Miss. 1993); *In re Citric Acid Antitrust Litig.*, No. 95-1092, 1996 WL 655791, at *3 (N.D. Cal. Oct. 2, 1996).

[45] *Hanlon*, 150 F.3d at 1020.

[46] Friedman Decl., ¶ 8.

[47] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

[48] *See, e.g., In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 352 (N.D. Cal. 2005) ("[T]he great weight of authority suggests that the dominant issues in cases like this are whether the charged conspiracy existed and whether price-fixing occurred.").

of prices in the industry.[49] "Courts have long held that a plaintiff can demonstrate antitrust impact by showing that the conspiracy caused an increase to the standard market price of the product at issue."[50]

Documents in this case reflect a stable pricing structure for ODDs through the market. Distributors (those entities that functioned as intermediaries between the manufacturers of ODDs and end-retailers) testified to common prices across the industry.[51] Defendants' price lists to distributors confirm this pricing structure.[52] Retailers also confirmed they had price protections in place with their vendors which required vendors to provide the same prices for sales of ODDs (and computers) as to competitors – further standardizing prices across the industry.[53] And defendants' own documents confirm that they set prices for OEMs such as HP and Dell, and a fixed price for distributors (or "distys") over the OEM price.[54] IPPs presented multiple economic analyses (including multiple version of the Nobel-prize winning Granger causality analysis) to demonstrate that prices in this industry moved together.[55] And IPPs presented a multivariate regression analysis which demonstrated impact on both HP and Dell, and other customers.[56] This model measures by product and customer type, on a monthly basis, the overcharges experienced by the direct purchasers, and then traces the overcharge through to the indirect purchaser class taking into account differences

[49] Declaration of Dr. Kenneth Flamm in Support of Indirect Purchaser Plaintiffs' Revised Motion for Class Certification, ¶ 25, filed Under Seal May 20, 2015 ("Flamm III"); Declaration of Dr. Janusz Ordover in Support of Defendants' Opposition to Class Certification, ¶ 95, filed Under Seal Oct. 21, 2013.

[50] *See Kleen Prods. LLC v. Int'l Paper*, 306 F.R.D. 585, 595 (E.D. Ill. 2015). *See also In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014) ("The inference of class-wide impact is especially strong where, as here, there is evidence that the conspiracy artificially inflated the baseline for price negotiations."); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 383 (S.D.N.Y. 1996) ("[I]f a plaintiff proves that the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price suffered some injury.").

[51] Friedman III, Ex. 200 at 60.

[52] Friedman III, Exs. 201- 221 (examples of defendants' price lists for distributor Synnex).

[53] *See* Friedman III, Ex. 222 at 25-26; Ex. 223 at 175-176.

[54] *See, e.g.*, Friedman III, Exs. 224-227.

[55] Flamm III, ¶¶ 12-24; Declaration to Dr. Kenneth Flamm in Further Support of Revised Motion for Class Certification on Behalf of Indirect Purchaser Class ("Flamm IV"), ¶¶ 70-94, filed Under Seal, Sept. 18, 2015.

[56] Flamm III ,¶¶ 39-57.

in the pass-through level at different levels in the distribution chain.[57] IPPs measure damages to class members for the April 2003 through December 2008 period totaling $1.074 billion with a weighted average overcharge during the class period of 13.6 percent.[58] Issues common to the class predominates in this case.

C. The Court Should Reaffirm the Appointment of Class Counsel

At the outset of this case, Judge Walker appointed Hagens Berman Sobol Shapiro LLP (Hagens Berman) as Interim Lead Counsel for the indirect purchaser class.[59] Hagens Berman requests that this appointment be reaffirmed. Under Rule 23, the appointment of class counsel, to "fairly and adequately represent the interests of the class" is required.[60] In making this determination, the Court must consider counsels': (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation, and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4) resources committed to representing the class.[61] Here, Hagens Berman has spent an extraordinary amount of time pursuing discovery from PLDS, including a discovery dispute that reached the Ninth Circuit Court of Appeals.[62] Hagens Berman is recognized as one of the country's foremost experts in antitrust law and class action litigation. Hagens Berman has worked tirelessly on behalf of the class of indirect purchasers and will continue its quest in resolving this case and administering the settlement. Hagens Berman requests that it be allowed to continue representing the class.

D. The Proposed Class Notice and Plan for Dissemination Meets the Strictures of Rule 23

Rule 23(e)(1) requires that a court approving a class action settlement must "direct notice in a reasonable manner to all class members who would be bound by the proposal." In addition, for Rule 23(b)(3) class, the Rule requires the court to "direct to class members the best notice that is

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[57] *Id.*, Ex. 3.

[58] *Id.*

[59] Order, June 4, 2010, ECF No. 96.

[60] Fed. R. Civ. P. 23(g)(1)(A), (B).

[61] Fed. R. Civ. P. 23(g)(1)(A).

[62] Opinion (Denying John Doe's Motion to Quash Subpoena to DOJ), *In re Optical Disk Drive Antitrust Litig.*, No. 14-17502 (9th Cir. Sept. 10, 2015), ECF No. 58-1.

practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[63] A class action settlement notice "is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard."[64]

The proposed plan of notice is supported by an experienced notice and claims administrator – Gilardi & Co. LLC – who has worked cooperatively with counsel to develop the proposed plan of notice. Gilardi submits a declaration in support of the proposed notice plan attesting to its adequacy and constitutionality.[65] The proposed forms of notice provides all information required by Rule 23(c)(2)(B) to the settlement class, in language that is plain and easy to understand. IPPs have followed, as closely as possible, the language for settlements recommended by this District's Procedural Guidance for Class Action Settlements.[66] With this motion, IPPs provide proposed forms for publication notice, email notice, postcard notice, and online banner notices.[67]

The proposed plan of notice includes several components. The direct notice component will include email notice to approximately 25 million potential class members for whom IPPs have collected direct contact information.[68] IPPs anticipate receiving further class contact information from additional third parties prior to the dissemination of notice. To supplement this direct notice campaign, Gilardi will also undertake a publication notice program consisting of print publication, online publication (through search advertising, banner advertising, Facebook advertising, Twitter-promoted tweets) and a press release.[69] In addition, IPPs have established a website, www.OpticalDiskDriveAntitrust.com, where class members can find additional, detailed information, including "Frequently Asked Questions," important case documents and contact

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[63] Fed. R. Civ. P. 23(c)(2)(B).

[64] *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *see also* Fed. R. Civ. P. 23(c)(2)(B) (describing specific information to be included in the notice).

[65] *See* Declaration of Alan Vasquez Regarding Implementation of Class Notice Plan ("Vasquez Decl."), ¶¶ 2, 28, Nov. 02, 2016, ECF No. 1994-12.

[66] *See* http://www.cand.uscourts.gov/ClassActionSettlementGuidance (last visited Dec. 9, 2015).

[67] Vasquez Suppl. Decl., Exs. 1-4.

[68] Friedman Decl., ¶ 9.

[69] Vasquez Decl., ¶¶ 13, 17-28.

information for both class counsel and the notice and claims administrator. A toll-free telephone number will also be established to answer questions from class members.[70] Gilardi estimates that this notice campaign will reach in excess of 70 percent of class members.[71] These notice provisions meet the requirements of Rule 23 and will allow the class a full and fair opportunity to review and respond to the proposed settlement.

E. Proposed Schedule for Dissemination of Notice and Final Approval

IPPs propose the following schedule for the dissemination of class notice and final approval

Event	Proposed Deadline
Notice campaign to begin, including website, email, publication and Internet notice	30 days from preliminary approval order
Last day for motion for attorneys' fees, costs, expenses, and service awards	76 days from preliminary approval order
Last day for objections and requests for exclusion from the class	90 days from preliminary approval order
Last day for motion in support of final approval of settlement	14 days after objection deadline
Fairness Hearing	35 days from motion for final approval, unless otherwise ordered by the Court.
Close of Claims Period	August 1, 2017

V. CONCLUSION

With these settlements, the IPPs have guaranteed recovery of $50.5 million for the indirect purchaser class, and brought the total recovery for the indirect purchaser class to $175 million. The structure of the settlements with PLDS and Pioneer, and the procedure for their administration, both follow the prior settlement classes that this Court preliminarily approved. Respectfully, IPPs request that this Court enter an order: 1) preliminarily approving proposed class action settlements with the PLDS and Pioneer defendant families; 2) certifying the settlement classes; 3) appointing Hagens Berman Sobol Shapiro LLP as Class Counsel; and 4) approving the manner and form of notice and proposed plan of allocation to class members.

[70] *Id.*, ¶¶ 12-13, 22.

[71] *Id.*, ¶ 28.

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