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12
13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 IN RE OPTICAL DISK DRIVE PRODUCTS
ANTITRUST LITIGATION

No. 3:10-md-2143 RS

17
18 INDIRECT PURCHASER PLAINTIFFS'
NOTICE OF UNOPPOSED MOTION
19 AND MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
20 SETTLEMENT WITH TEAC
DEFENDANTS AND DISSEMINATION
OF CLASS NOTICE

21
22 Date: April 20, 2017
Time: 1:30 p.m.
23 Dept: Courtroom 3, 17th Floor
Judge: Hon. Richard Seeborg

24
25 DATE ACTION FILED: Oct. 27, 2009

26 This Document Relates to:
27 ALL INDIRECT PURCHASER ACTIONS
28

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 Defendants TEAC America, Inc.; TEAC Corporation (collectively “Teac”);
- 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 Settlement with the Teac Defendants and Dissemination of Class Notice, the following memorandum of points and authorities, the accompanying settlement agreement, the pleadings and the papers on file in this action and such other matters as the Court may consider.

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FEDERAL RULES

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11 Federal Rule of Civil Procedure 23 *passim*

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I. INTRODUCTION

1
2 Indirect Purchaser Plaintiffs (IPPs) seek preliminary approval under Federal Rule of Civil
3 Procedure 23 for their proposed settlement with the Teac defendant family.¹ The Teac settlement is
4 for \$5 million – approximately 19 percent of the single damages attributable to this defendant family.
5 This brings the total settlements in the IPP case to \$180 million, representing an average of 22
6 percent recovery for the market share attributable to all settling defendants – with approximately 25
7 percent of the market remaining.

8 The settlement is an exceptional result for the class, given the limited role Teac played in the
9 conspiracy and the small market share of this defendant family (2.5 percent). The Teac defendants
10 were neither subject to any indictments nor, to the IPPs’ knowledge, any government investigations.
11 During the settlement negotiations, overseen by Magistrate Judge Corley, Teac made substantial
12 showings that it is experiencing severe capital constraints – bordering on insolvency. As such,
13 plaintiffs believe defendant Teac would likely be unable to satisfy a judgment that was obtained
14 against them for the total damages in this case or any significantly higher negotiated settlement.²
15 Thus, directing its limited resources toward recovery for the class – rather than continued litigation
16 costs – is very beneficial to all parties.

17 The proposed settlement requires certification by this Court of a settlement class. The
18 proposed settlement class is identical to the class defined in the IPPs’ revised motion for class
19 certification – purchasers of computers and stand-alone ODDs in 24 jurisdictions. The proposed
20 structure of this settlement class, including its procedural administration, is identical to the four
21 settlement classes that this Court previously approved for the IPPs settlements with the Panasonic,
22 NEC, Sony and HLDS defendant families.³

24 ¹ “Teac” refers to TEAC America, Inc. and TEAC Corporation. *See* Declaration of Jeff D.
25 Friedman in Support of Unopposed Motion for Preliminary Approval of Settlement with TEAC
26 Defendants and Dissemination of Class Notice (“Friedman Decl.”), Ex. A, concurrently filed
27 herewith.

26 ² Friedman Decl., ¶ 2.

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

1 **III. SUMMARY OF SETTLEMENT TERMS**

2 **A. The Settlement Class**

3 The proposed settlement class mirrors the class certified by this Court. That class is as
4 follows:

5 All persons and entities who, as residents of Arizona, California,
6 District of Columbia, Florida, Hawaii, Kansas, Maine, Massachusetts,
7 Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New
8 Hampshire, New Mexico, New York, North Carolina, Oregon,
9 Tennessee, Utah, Vermont, West Virginia and Wisconsin and during
10 the period April 2003 to December 2008, purchased new for their own
11 use and not for resale: (i) a computer with an internal ODD; (ii) a
12 stand-alone ODD designed for internal use in computers; or (iii) an
13 ODD designed to be attached externally to a computer. ODD refers to
14 a DVD-RW, DVD-ROM, or COMBO drive manufactured by one or
15 more Defendants or their coconspirators. Excluded from the class are
16 any purchases of Panasonic-branded computers.⁷

17 **B. The Settlement Consideration**

18 Settlement with Teac totals \$5 million for the indirect purchaser class. This fund is non-
19 reversionary to the defendants, and IPPs intend to distribute as much of the funds to the IPP class as
20 is economically feasible. The settlement also provides for cooperation from the Teac defendants as
21 IPPs prepare for trial against the remaining defendants – this includes assisting in issues regarding
22 authenticity and admissibility of documents, and using reasonable efforts to make up to five
23 witnesses available for testimony at trial.⁸

24 **C. Release of Claims**

25 If the settlement becomes final, the plaintiffs and class members will release all federal and
26 state-law claims against the Teac defendants relating to the conduct alleged in plaintiffs’ complaint,
27 including “claims under foreign or federal antitrust or competition laws . . . that relate to or arise out
28 of the sale of any of the ODDs or any of the products containing ODDs”⁹ that are the subject of the
complaint. The releases do not preclude plaintiffs from pursuing their claims against the remaining

26 ⁷ Friedman Decl., Ex. A, ¶ A(1).

27 ⁸ *Id.*, Ex. A, ¶¶ F(23-24).

28 ⁹ *Id.*, Ex. A, ¶ 13.

1 defendants.¹⁰ The settlement releases only those claims of class members who will recover under the
 2 terms of the settlement.

3 **D. Notice and Implementation of the Settlement**

4 IPPs submit proposed notices and a plan for the dissemination of notice.¹¹ IPPs have obtained
 5 approximately 14.7 million email addresses for potential class members. The direct notice campaign
 6 will be supplemented with an online campaign and publication notice. The notice administrator,
 7 Gilardi & Co. LLC, estimates that over 70 percent of class members will receive notice.

8 **E. Plan of Distribution**

9 IPPs propose to distribute the funds *pro rata* to class members based on: (1) the number of
 10 ODDs purchased by the class member; and (2) the number of valid claims filed.¹² There will be no
 11 reversion of unclaimed funds to any defendant. To the extent that money is not able to be reasonably
 12 distributed to class members, IPPs propose that the money escheat to the federal or state
 13 governments.

14 **IV. ARGUMENT**

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

16 Federal Rule of Civil Procedure 23(e) requires judicial approval of any compromise or
 17 settlement of class action claims. Preliminary approval of a settlement and notice to the proposed
 18 class is appropriate if the proposed settlement: (1) appears to be the product of serious, informed,
 19 non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant
 20 preferential treatment to class representatives or segments of the class; and (4) falls with the range of
 21 possible approval.¹³

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 24 ¹⁰ *Id.*, Ex. A, ¶ 13.

25 ¹¹ See Revised Supplemental Declaration of Alan Vasquez Regarding Implementation of Class
 Notice Plan (Vasquez Rev. Suppl. Decl.), ¶¶ 1, 6, 11; Exs. 1-4, concurrently filed herewith.

26 ¹² Friedman Decl., ¶ 4.

27 ¹³ See *Zepeda v. Paypal, Inc.*, No: C 10-2500 SBA, 2015 U.S. Dist. LEXIS 150577, at *14 (N.D.
 28 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); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078,
 1079 (N.D. Cal. 2007) (same).

1 **1. The Settlement Is the Result of Arm’s-Length Negotiations**

2 This settlement is the product of extended, informed, arm’s-length negotiations between
3 counsel for the parties. The parties reached agreement after seven years of litigation, discovery and
4 investigation and multiple conferrals of counsel and the parties concerning settlement constructs and
5 amounts. In addition to these non-collusive negotiations between sophisticated counsel, the
6 negotiations between IPPs and Teac were assisted by Magistrate Judge Corley, a neutral mediator.¹⁴

7 The settlement bears none of the signs of collusion warned against by the Ninth Circuit,
8 including: (a) when class counsel receive a disproportionate distribution of the settlement; (b) when
9 the parties negotiate a “clear sailing” arrangement that provides for the payment of attorneys’ fees
10 separate and apart from class funds; or (c) when the parties arrange for fees not awarded to plaintiffs’
11 counsel to revert to the defendants rather than the class.¹⁵ The proposed settlement is a common
12 fund, all-in settlement with no possibility of reversion. The funds will be used to cover costs and fees
13 and compensate the class based on a *pro rata* formula. There is no ‘clear sailing’ provision, no
14 payment of fees separate and apart from the class funds, and no “kicker” provision which would
15 allow unawarded fees to revert to the defendants. The proposed class notice informs class members
16 that class counsel will make a request for attorneys’ fees up to 25 percent of the settlement fund.¹⁶ In
17 short, this settlement is entitled to a presumption of fairness and should be granted preliminary
18 approval just as this Court previously granted preliminary approval to four identically structured
19 settlements against other defendants in this MDL.

20 **2. The Settlement Has No Obvious Deficiencies When Considered in Relation to the**
21 **IPPs’ Case**

22 The proposed settlement easily satisfies the requirements for preliminary approval. This
23 Court is aware of the risk faced by the class of no recovery – this Court has already once denied a
24 motion for class certification. The settlement represents an outstanding recovery for the class –

25 _____
26 ¹⁴ See *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (finding
27 the presence of a neutral mediator “a factor weighing in favor of a finding of non-collusiveness”).

28 ¹⁵ *Id.* at 947.

¹⁶ Vasquez Rev. Suppl. Decl., Exs. 2 & 3.

1 ensuring an additional \$5 million in recovery for the class, while preserving IPPs' claims against the
2 remaining large defendants – TSST, Toshiba and Samsung.

3 According to IPPs' Rule 26 expert report, indirect purchaser class suffered damages in the
4 amount of \$1.074 billion for the period of April 2003 through December 2008.¹⁷ Looking at the
5 damages attributable to these defendants by their market share, Teac had approximately a 2.5 percent
6 market share during the class period – equaling approximately \$26.8 million in damages attributable
7 to this defendant family. This equates to a 19 percent recovery for the IPP class for the single
8 damages attributable to the Teac defendants.

9 Compared against the prior settlements reached in the IPP action, these settlements are well
10 within the appropriate range considering the role of Teac 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%
TEAC	\$5,000,000.00	2.5%	\$26,800,000.00	19%
Total	\$180,000,000.00	75%	\$804,231,200.00	22%

20 In total, settlements to date represent recovery of 22 percent of the damages attributable to the
21 settled defendants' market share, and 16 percent of the total damages (\$1.074 billion) suffered by
22 indirect purchasers with four defendant families remaining (BenQ, Quanta, TSST/Toshiba and
23 Samsung).

26 ¹⁷ This number differs slightly from the damages figure proposed at class certification and
27 proposed with the prior preliminary approval papers of \$840 million. *See* Notice of Unopposed
28 Motion and Motion for Preliminary Approval of Settlements with Panasonic, NEC, Sony and HLDS
Defendant Families and Dissemination of Class Notice at 7, June 28, 2016, ECF No. 1898.

1 The settlement with the Teac defendants reflects its small market share, and the minor role it
2 played in the overall conspiracy. Teac was never the subject of any government indictments for its
3 role in the ODD conspiracy. Indeed, the IPPs are unaware of any government investigations of Teac.
4 Teac was also a minor player within the industry. The HHI index compiled for the ODD industry did
5 not even include TEAC in its calculation of market concentration.¹⁸ Teac's overall market share was
6 in the low single digits throughout the conspiracy period. During negotiations supervised by Judge
7 Corley, Teac produced evidence that it is experiencing severe capital constraints that threaten it with
8 insolvency. Therefore, Teac would likely be unable to satisfy a judgment that was obtained against
9 them for the total damages in this case or any significantly higher negotiated settlement.¹⁹

10 IPP's entered the settlement with Teac with a thorough understanding of the strengths and
11 weaknesses of their case. Fact discovery is closed. Plaintiffs have, collectively, deposed 69 current
12 and former employees of the defendants. IPPs have reviewed millions of documents in four different
13 languages (English, Japanese, Korean and Chinese). Plaintiffs have served their opening Rule 26
14 expert reports.²⁰ Weighing the developed stage of litigation against the risk that IPPs face in this
15 litigation, there are no obvious deficiencies regarding this settlement.

16 **3. The Settlement Does Not Provide Preferential Treatment for Segments of the** 17 **Class or the Class Representatives**

18 The third factor to be considered by this Court in determining whether the settlement should
19 be preliminarily approved is whether the settlement grants preferential treatment to class
20 representatives or segments of the class.²¹ No such preferential treatment exists here. IPPs propose to
21 compensate members of the state classes according to a plan of distribution which provides for a *pro*
22 *rata* share of the settlement fund based on: (1) the number of ODDs purchased by the class member;

25 ¹⁸ [Corrected] Declaration of Dr. Kenneth Flamm in Support of Plaintiffs' Motion for Class
26 Certification at 14, Oct. 25, 2013, ECF No. 1049.

27 ¹⁹ Friedman Decl., ¶ 2.

28 ²⁰ *Id.*, ¶ 5.

²¹ *Zepeda*, 2015 U.S. Dist. LEXIS 150577, at *14.

1 and (2) the number of valid claims filed.²² There will be no reversion of unclaimed funds to any
2 defendant.

3 **4. The Settlement Falls Within the Range of Possible Approval**

4 To grant preliminary approval, this Court must decide that the settlement falls within the
5 range of possible approval.²³ The amount of the recovery for the class (\$5 million) certainly falls
6 within a reasonable range given Teac’s minor role in the conspiracy, its small market share
7 throughout the damages period, and its financial inability to satisfy a full judgment against it.
8 Moreover, recovery of an estimated 19 percent of damages attributable to the Teac defendant family
9 represents an outstanding recovery by any measurement.

10 **B. The Proposed Settlement Class Satisfies Rule 23**

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

17 This Court has already found that four previous settlement classes with defendants in this
18 action, identical in structure to the proposed class here, satisfied all of the elements of Rule 23(a).²⁴
19 IPPs’ revised motion for class certification demonstrates that the proposed class satisfies all of the
20 elements of Rule 23(b)(3).

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²² Friedman Decl., ¶ 6.

26 ²³ 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.

27 ²⁴ Order Granting Indirect Purchaser Plaintiffs’ Motion for Preliminary Approval of Class Action
28 Settlements with Panasonic, NEC, Sony and HLDS Defendant Families and Dissemination of Class Notice, July 21, 2016, ECF No. 1916.

1 **C. The Court Should Reaffirm the Appointment of Class Counsel**

2 Hagens Berman Sobol Shapiro LLP (Hagens Berman) has been appointed as Interim Lead
3 Counsel for the indirect purchaser class.²⁵ Hagens Berman requests that this appointment be
4 reaffirmed. Under Rule 23, the appointment of class counsel, to “fairly and adequately represent the
5 interests of the class” is required.²⁶ Hagens Berman has worked tirelessly on behalf of the class of
6 indirect purchasers and will continue its quest in resolving this case and administering the settlement.
7 Hagens Berman requests that it be allowed to continue representing the class.

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

9 Rule 23(e)(1) requires that a court approving a class action settlement must “direct notice in a
10 reasonable manner to all class members who would be bound by the proposal.” In addition, for Rule
11 23(b)(3) class, the Rule requires the court to “direct to class members the best notice that is
12 practicable under the circumstances, including individual notice to all members who can be
13 identified through reasonable effort.”²⁷

14 The proposed plan of notice is supported by an experienced notice and claims administrator –
15 Gilardi & Co. LLC – who has worked cooperatively with counsel to develop the proposed plan of
16 notice. Gilardi submits a declaration in support of the proposed notice plan attesting to its adequacy
17 and constitutionality.²⁸ The proposed forms of notice provides all information required by
18 Rule 23(c)(2)(B) to the settlement class, in language that is plain and easy to understand. IPPs have
19 followed, as closely as possible, the language for settlements recommended by this District’s
20 Procedural Guidance for Class Action Settlements.²⁹ With this motion, IPPs provide proposed forms
21 for publication notice, email notice, and online banner notices.³⁰

22 The proposed plan of notice includes several components. Direct notice will be provided to
23 the approximately 14.7 million class members for whom IPPs have collected direct contact

24 ²⁵ Order, June 4, 2010, ECF No. 96.

25 ²⁶ Fed. R. Civ. P. 23(g)(1)(A), (B).

26 ²⁷ Fed. R. Civ. P. 23(c)(2)(B).

27 ²⁸ See Vasquez Rev. Suppl. Decl., ¶¶ 7, 11.

28 ²⁹ See <http://www.cand.uscourts.gov/ClassActionSettlementGuidance> (last visited April 3, 2017).

³⁰ Vasquez Rev. Suppl. Decl., Exs. 2-4.

1 information.³¹ Direct notice will be supplemented with a publication notice program consisting of
 2 print publication, online publication (through search advertising, banner advertising, Facebook
 3 advertising, Twitter-promoted tweets) and a press release.³² In addition, IPPs have established a
 4 website, www.OpticalDiskDriveAntitrust.com, to place important case documents and contact
 5 information for both class counsel and the notice and claims administrator. Gilardi estimates that this
 6 notice campaign will reach in excess of 70 percent of class members.³³ These notice provisions meet
 7 the requirements of Rule 23 and will allow the class a full and fair opportunity to review and respond
 8 to the proposed settlement.

9 **E. Proposed Schedule for Dissemination of Notice and Final Approval**

10 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

18 **V. CONCLUSION**

19 With this settlement, the IPPs have guaranteed recovery of \$5 million for the indirect
 20 purchaser class, and brought the total recovery for the indirect purchaser class to \$180 million. The
 21 structure of the settlement with Teac, and the procedure for its administration, follows the prior
 22 settlement classes that this Court preliminarily approved. Respectfully, IPPs request that this Court
 23 enter an order: 1) preliminarily approving proposed class action settlement with the Teac defendant
 24 family; 2) certifying the settlement class; 3) appointing Hagens Berman Sobol Shapiro LLP as Class
 25

26 ³¹ Friedman Decl., ¶ 7.

27 ³² Declaration of Alan Vasquez Regarding Implementation of Class Notice Plan (Vasquez Decl.),
 ¶¶ 13, 17-28, Nov. 2, 2016, ECF No. 1994-12.

28 ³³ *Id.*, ¶ 28.

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

3 DATED: April 3, 2017

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