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IN RE TFT-LCD (FLAT PANEL)  
ANTITRUST LITIGATION

) Case No. 3:07-MD-1827 SI  
) MDL No. 1827  
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This Document Relates to:  
All Indirect-Purchaser Actions;  
*State of Missouri, et al. v. AU Optronics Corporation, et al.*, Case No. 10-cv-3619;  
*State of Florida v. AU Optronics Corporation, et al.*, Case No. 10-cv-3517; and  
*State of New York v. AU Optronics Corporation, et al.*, Case No. 11-cv-0711.

) **INDIRECT-PURCHASER PLAINTIFFS'**  
) **AND SETTLING STATES' JOINT**  
) **NOTICE OF MOTION AND MOTION**  
) **FOR PRELIMINARY APPROVAL OF**  
) **COMBINED CLASS, PARENS PATRIAE,**  
) **AND GOVERNMENTAL ENTITY**  
) **SETTLEMENTS; MEMORANDUM OF**  
) **POINTS AND AUTHORITIES**

) Hearing Date: January 20, 2012\*  
) Time: 9:00 a.m.  
) Courtroom: 10, 19th Floor

) The Honorable Susan Illston

) \* *subject to concurrently-filed motion to*  
) *advance hearing*

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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT, subject to the concurrently-filed motion to advance  
4 hearing, on January 20, 2012, at 9:00 a.m. or as soon thereafter as the matter may be heard, in the  
5 Courtroom of the Honorable Susan Illston, United States District Judge for the Northern District of  
6 California, located at 450 Golden Gate Avenue, San Francisco, California, the Indirect-Purchaser  
7 Plaintiffs will and hereby do move, under Rule 23 of the Federal Rules of Civil Procedure, for  
8 entry of an Order:

- 9 1. Granting preliminary approval to the combined class, *parens patriae*, and  
10 governmental entity settlements (“Proposed Settlements”) with the Chimei,  
11 Chunghwa, Epson, HannStar, Hitachi, Samsung, and Sharp Defendants;  
12 2. Certifying, for settlement purposes only, a class of Arkansas indirect purchasers  
13 defined in an identical fashion to the 24 previously-certified statewide monetary  
14 relief classes, and appointing the proposed representative and counsel for this class;  
15 3. Approving the proposed notice plan and forms of notice to inform class members  
16 of: (i) the pendency of the litigation classes previously certified by the Court, and  
17 the opportunity to be excluded; (ii) the Proposed Settlements, and the opportunity to  
18 object; and (iii) the pendency of the litigation of *parens patriae* claims against the  
19 non-settling defendants, and the deadline for any consumers to be excluded from  
20 the Attorneys Generals’ actions; and  
21 4. Setting a schedule for final approval of the Proposed Settlements.

22 Joining the motion are the Attorneys General of Arkansas, California, Florida, Michigan,  
23 Missouri, New York, West Virginia, and Wisconsin. Additionally, the States of Arkansas and  
24 California seek preliminary approval of the Proposed Settlements and the notice plan and forms of  
25 notice under applicable state law.

26 The grounds for this motion are that the Proposed Settlements meet the preliminary  
27 approval standard of being within the range of reasonableness for final approval, and are the result  
28 of extensive arm’s-length negotiations conducted by experienced counsel. The motion is based

1 upon this Notice; the following Memorandum of Points and Authorities; the accompanying  
2 Declarations of Francis O. Scarpulla, Anne Schneider, Adam Miller, and Katherine Kinsella; the  
3 arguments of counsel; and all records on file in this matter.  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Indirect-Purchaser Plaintiffs (“IPPs”) seek preliminary approval, under Rule 23 of the  
4 Federal Rules of Civil Procedure, of settlements with the Chimei, Chunghwa, Epson, HannStar,  
5 Hitachi, Samsung, and Sharp Defendants.<sup>1</sup> Under the Proposed Settlements, the Settling  
6 Defendants will:

7 (1) pay a total of approximately \$539 million:

8 (a) Chimei \$110,273,318.

9 (b) Chunghwa<sup>2</sup> \$5,305,105.

10 (c) Epson<sup>3</sup> \$2,850,000.

11 (d) HannStar \$25,650,000.

12 (e) Hitachi \$38,977,224.

13 (f) Samsung \$240,000,000.

14 (g) Sharp \$115,500,000.

15 **TOTAL \$538,555,647.**

16 (2) implement antitrust compliance programs, including agreements not to engage in  
17 conduct violative of the antitrust laws at issue in these actions, and instituting (or  
18 maintaining) educational programs for employees, and verifying such compliance  
19 for up to five years; and

20 (3) provide ongoing cooperation in the preparation and trial of the actions against the  
21 non-settling defendants (AUO, LG Display, and Toshiba Defendants).

22  
23 <sup>1</sup> The settlement agreements are attached as exhibits A to G to the accompanying declaration  
24 of Francis O. Scarpulla. The Chimei, Chunghwa, Epson, HannStar, Hitachi, Samsung, and Sharp  
Defendants – as identified in the Proposed Settlements, and inclusive of related entities identified  
in the Proposed Settlements – are collectively referred to as the “Settling Defendants.”

25 <sup>2</sup> The IPPs previously moved for preliminary approval of a class settlement with Chunghwa,  
26 which was granted by the Court in May 2010. *See* Dkt. # 1728. By this motion, the IPPs and  
Chunghwa seek preliminary approval of an amended settlement agreement that supersedes the one  
previously presented to the Court.

27 <sup>3</sup> The IPPs previously moved for preliminary approval of a class settlement with Epson in  
28 June 2010. *See* Dkt. # 1812. The IPPs subsequently withdrew that preliminary approval motion  
before it was ruled upon by the Court. *See* Dkt. # 4130.

1 In exchange, the IPPs will release, as against the Settling Defendants only, all claims  
2 asserted in the IPP action (or arising in any way from the sale of LCD panels contained in TVs,  
3 notebook computers, and monitors) for monetary relief held by members of the 24 previously-  
4 certified statewide monetary relief classes and a proposed Arkansas statewide settlement-only  
5 class. The IPPs will also release, as against the Settling Defendants only, all LCD panel-related  
6 claims for injunctive relief held by members of the previously-certified nationwide federal  
7 Sherman Act injunctive relief class. The Proposed Settlements do not settle any claims for  
8 monetary relief by consumers or businesses in any state not previously certified (except Arkansas).  
9 Thus, there is no release of monetary claims by consumers or businesses in, for example, Illinois,  
10 Oregon, and Washington. The releases in the Proposed Settlements do not affect contract,  
11 warranty, or product defect claims arising in the ordinary course of business unrelated to the  
12 conduct alleged in the action. Additionally, the releases do not release any claims that any non-  
13 participating State may have for injunctive relief, proprietary claims, or *parens patriae* claims.  
14 Moreover, the Settling Defendants' amounts of commerce remain in the IPP case against the non-  
15 settling defendants for purposes of joint-and-several liability.

16 In addition to resolving the IPPs' claims against the Settling Defendants, the Proposed  
17 Settlements also resolve the *parens patriae* and/or governmental entity claims<sup>4</sup> asserted against the  
18 Settling Defendants by the States of Arkansas, California, Florida, Michigan, Missouri, New York,  
19 West Virginia, and Wisconsin in separate lawsuits.<sup>5</sup> The Settling States will receive an agreed-  
20 upon portion of the total amount paid under the Proposed Settlements (with the exception of the  
21 Chunghwa Proposed Settlement) to settle the governmental entity claims. The formula for  
22 computing the Settling States' portion for governmental entity claims is described below, and will  
23 be less than 5% of the payments under the Proposed Settlements after deduction of any Court-  
24 approved fees and costs.

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25 <sup>4</sup> The Chunghwa Proposed Settlement does not address the Settling States' claims on behalf  
26 of governmental entities because those claims are the subject of earlier settlements that did not  
require the Court's approval.

27 <sup>5</sup> The States of Arkansas, California, Florida, Michigan, Missouri, New York, West Virginia,  
28 and Wisconsin are collectively referred to as the "Settling States." California's case was  
previously remanded. *See* Dkt. # 2456. As a party to the Proposed Settlements, California has  
consented to the Court's jurisdiction solely for purposes of effectuating the Proposed Settlements.

1 In exchange, the Settling States will release, as against the Settling Defendants, all claims  
2 that were asserted, or that could have been asserted and arise in any way from the sale of LCD  
3 panels contained in TVs, notebook computers, and monitors, in the Settling States' actions. The  
4 Settling States will also receive the Settling Defendants' ongoing cooperation, and participate in  
5 the verification of the Settling Defendants' antitrust compliance programs. Again, the releases do  
6 not affect contract, warranty, or product defect claims arising in the ordinary course of business  
7 unrelated to the conduct alleged in the action, held by the Settling States. The Settling  
8 Defendants' amounts of commerce remain in the Settling States' actions against the non-settling  
9 defendants for purposes of joint-and-several liability. The Settling States, through separate  
10 agreements, have also resolved their claims for civil penalties under their respective state laws.

11 Resolution of some of the Settling States' *parens patriae* claims is subject to certain court  
12 approval and notice requirements that are satisfied by the proposed notice plan and forms of notice  
13 that meet the requirements of Rule 23.<sup>6</sup>

14 In summary, the Court should grant preliminary approval under Rule 23 to the Proposed  
15 Settlements because they meet the preliminary approval standard of being within the range of  
16 possible final approval, and are the product of arm's-length negotiations conducted by experienced  
17 counsel. The Court should also certify, for settlement purposes only, a class of Arkansas indirect  
18 purchasers defined in an identical fashion to the 24 previously-certified statewide monetary relief  
19 classes, and appoint the proposed representative and counsel for this class. Additionally, the Court  
20 should preliminarily approve the Proposed Settlements under the applicable state laws governing  
21 *parens patriae* actions. Further, the Court should authorize the notice plan and forms of notice  
22 under Rule 23 and the applicable state laws governing *parens patriae* actions. Finally, the Court  
23 should set a schedule for final approval.

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25  
26 <sup>6</sup> Resolution of the Settling States' governmental entity claims under the Proposed  
27 Settlements does not require Court approval. Separately, the Settling States have also entered into  
28 agreements with the Settling Defendants to resolve the Settling States' claims for civil penalties  
asserted against the Settling Defendants. These agreements do not require Court approval, but are  
identified here for purposes of Rule 23(e)(3).

## II. BACKGROUND

### A. Overview of the Case

#### 1. Indirect-Purchaser Plaintiff Class Action

The IPPs allege that Defendants engaged in a worldwide, multi-year, conspiracy to fix prices and restrain competition relating to the thin-film transistor liquid crystal display panels (“LCD panels”) contained in TVs, notebook computers, and monitors. *See* IPPs’ Third Consol. Am. Class Action Cmpl. (Dkt. No. 2694). Based on their purchases of TVs, notebook computers, and monitors, the IPPs assert certified class claims for monetary relief under the antitrust, consumer protection, and unfair competition laws of 24 states (including the District of Columbia), and a certified injunctive relief class claim under federal antitrust law. The Settling Defendants dispute the allegations and have asserted defenses to the IPPs’ claims.

The first indirect-purchaser complaints were filed in December 2006. In April 2007, the Judicial Panel on Multidistrict Litigation ordered the transfer of all related actions to this Court for pretrial proceedings. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 483 F. Supp. 2d 1353 (Jud. Pan. Mult. Lit. 2007). Full merits discovery commenced in January 2009, with the partial lifting of a stay requested by the Antitrust Division of United States Department of Justice. *See* Order re Stay of Discovery (Dkt. # 631, filed May 27, 2008). In response to discovery requests, the IPPs received more than 7.8 million documents, totaling more than 40 million pages, many of which are not in English. Scarpulla Decl. ¶ 3. More than 100 depositions were taken by the IPPs, including many depositions in Korea, Japan, and Taiwan. *Id.* Throughout this period, the parties litigated numerous discovery disputes.

The Court granted the IPPs’ motion for class certification in March 2010.<sup>7</sup> *See* Dkt. # 1642. The Ninth Circuit denied Defendants’ petition for review of the class certification order in June 2010. *See* Dkt. # 1805. Fact discovery ended in May 2011. The parties exchanged expert damages reports from May through August 2011. *See* Order Extending Time and Modifying Pretrial Schedule (Dkt. # 2948). The Court denied Defendants’ dispositive motion under the

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<sup>7</sup> The Court subsequently certified a Missouri indirect-purchaser statewide class in an identical fashion to the 23 previously-certified statewide monetary relief classes (*see* Dkt. # 3198), bringing the total number of certified statewide monetary relief classes to 24.

1 Foreign Trade Antitrust Improvements Act in October 2011 (Dkt. # 3833), and declined to certify  
2 the ruling for immediate appellate review in December 2011 (Dkt. # 4346). The Court has also  
3 denied summary judgment motions filed by Defendants. *See, e.g.*, Dkt. # 4301 (denying summary  
4 judgment motion based on “AGC” standing); # 4123 (denying summary judgment motion based on  
5 “sole-sourced” LCD panels); # 4107 (denying Toshiba’s summary judgment motion).

6 Trial is set for April 23, 2012. *See* Pretrial Preparation Order (Dkt. # 4106).

## 7 **2. Settling States’ Actions**

8 After lengthy pre-complaint investigations, the Settling States filed complaints in various  
9 federal and state courts beginning in 2010. Schneider Decl. ¶ 4. The actions assert claims and  
10 seek various forms of relief against Defendants arising from indirect purchases made by  
11 governmental entities, and/or by consumers of such panels under each Settling State’s *parens*  
12 *patriae* authority, proprietary claims, and enforcement authority pursuant to both federal and state  
13 law. *Id.* at ¶ 8. The Settling Defendants dispute the allegations and have asserted defenses to the  
14 Settling States’ claims.

## 15 **B. Settlement Discussions**

16 The Proposed Settlements are the result of negotiations that generally took place in two  
17 phases. The first phase consisted of the settlements with Chunghwa and Epson, and were  
18 negotiated before 2011. Earlier versions of these two agreements have been the subject of prior  
19 Court proceedings. These agreements were then re-negotiated to conform to the certified litigation  
20 classes and other settlements. The second phase consisted of the balance of the Proposed  
21 Settlements, and were negotiated during 2011.

22 Through numerous in-person meetings and telephonic conversations, the terms of the  
23 Proposed Settlements were negotiated among counsel who are experienced in antitrust class  
24 actions. These sessions included the exchange of liability and merits positions and detailed  
25 economic analysis. The individual negotiations are summarized below.

1                                   **1.       “First Phase” Settlements**

2                                   **i.       Chunghwa**

3                                   Informal settlement discussions between the IPPs and counsel for Chunghwa began in May  
4 2008. *See* Scarpulla Decl. ¶ 4. The IPPs initially agreed to settle with Chunghwa in October 2008,  
5 for the payment of \$10 million and full cooperation. *Id.* The early cooperation from Chunghwa  
6 assisted the IPPs in amending their operative complaint to add more factual detail regarding the  
7 conspiracy. *Id.* The IPPs moved for preliminary approval of the previous Chunghwa settlement  
8 agreement in April 2010. *See* Dkt. # 1662. The preliminary approval motion was unopposed, and  
9 was granted by the Court in May 2010. *See* Dkt. # 1728.

10                                   Subsequently, the IPPs and Chunghwa amended the previous Chunghwa settlement  
11 agreement to conform with the scope of releases negotiated during the “second phase” of  
12 settlement discussions, which included the participation of the Settling States. *See* Scarpulla Decl.  
13 ¶ 5; Schneider Decl. ¶¶ 5, 14. The scope of release in the Chunghwa Proposed Settlement is  
14 narrower than the scope of release in the previous Chunghwa settlement agreement, which  
15 contained a nationwide release of monetary relief claims. As a result of the narrowing of the scope  
16 of release, the amount of money paid has been reduced. The amended Chunghwa Proposed  
17 Settlement provides for the payment of approximately \$5.3 million; the implementation of an  
18 antitrust compliance program, to be verified annually for the next three years; and ongoing  
19 cooperation in the prosecution of these actions against the non-settling defendants. *See* Scarpulla  
20 Decl. Ex. B (Chunghwa Proposed Settlement) at p. 7, and ¶¶ 33 - 35. In a separate agreement with  
21 the Settling States, Chunghwa agreed to an injunction prohibiting conduct violative of the antitrust  
22 laws at issue in these actions. *See* Schneider Decl. ¶ 5.

23                                   **ii.     Epson**

24                                   Informal settlement discussions between the IPPs and counsel for Epson began in  
25 November 2009. *See* Scarpulla Decl. ¶ 6. The IPPs initially agreed to settle with Epson in May  
26 2010, for the payment of \$5 million. *Id.* The IPPs moved for preliminary approval of the previous  
27 Epson settlement in June 2010. *See* Dkt. # 1812. The Attorneys General for the States of Illinois,  
28 Oregon, and Washington moved to intervene and opposed preliminary approval.

1 Subsequently, the IPPs and Epson amended the previous Epson settlement agreement to  
2 conform with the scope of releases negotiated during the “second phase” of settlement discussions,  
3 including the participation of the Settling States. *See* Scarpulla Decl. ¶ 7; Schneider Decl. ¶ 14.  
4 The scope of release in the Epson Proposed Settlement is narrower than the scope of release in the  
5 previous Epson settlement agreement, which contained a nationwide release of monetary relief  
6 claims. As a result of the narrowing of the scope of release, the amount of money paid has been  
7 reduced. The amended Epson Proposed Settlement provides for the payment of \$2.85 million; a  
8 certification that Epson no longer manufactures or sells TFT-LCDs and that in the event it returns  
9 to this business it will implement an antitrust compliance program; and ongoing cooperation in the  
10 prosecution of these actions against the non-settling defendants. *See* Scarpulla Decl. Ex. C (Epson  
11 Proposed Settlement) at p. 7, and ¶¶ 30 - 32.

## 12 2. “Second Phase” Settlements

13 As ordered by the Court, the IPPs, the Settling States, and Defendants (other than  
14 Chunghwa and Epson, with whom settlements had already been reached) engaged in a preliminary  
15 joint mediation session with Professor Eric Green on January 13, 2011. The parties engaged in  
16 additional group mediation sessions on February 15 and 16, 2011. These “group” mediations did  
17 not result in any settlements. *See* Scarpulla Decl. ¶ 8; Schneider Decl. ¶ 6.

18 In the months that followed, the IPPs and the Settling States engaged in a series of  
19 mediations with individual Settling Defendants. *See* Scarpulla Decl. ¶ 9; Schneider Decl. ¶ 7. The  
20 parties were assisted in this process by Professor Green and Judge Daniel Weinstein (Ret.), who  
21 were effective in helping the parties come to fair and equitable resolutions.

### 22 i. Chimei

23 On or about June 10, 2011, the IPPs and the Settling States on the one hand, and counsel  
24 for Chimei on the other hand, reached an agreement in principle on monetary relief with the  
25 assistance of Professor Green. *See* Scarpulla Decl. ¶ 10; Schneider Decl. ¶ 10. Throughout the  
26 summer of 2011, the parties continued to negotiate the scope of release, injunctive relief, and  
27 cooperation, among other material terms. The parties formalized their settlement agreement on or  
28 about November 16, 2011. *See* Scarpulla Decl. ¶ 10; Schneider Decl. ¶ 10. The Chimei Proposed

1 Settlement provides for the payment of approximately \$110 million; an injunction prohibiting  
2 anticompetitive behavior; the implementation of an antitrust compliance program, to be verified  
3 annually for the next five years; and ongoing cooperation in the prosecution of these actions  
4 against the non-settling defendants. *See* Scarpulla Decl. Ex. A (Chimei Proposed Settlement) at ¶¶  
5 12, 43 - 45.

6 **ii. Hitachi**

7 In June 2011, the IPPs and the Settling States on the one hand, and counsel for Hitachi on  
8 the other hand, reached an agreement in principle on monetary relief, with the assistance of  
9 Professor Green. *See* Scarpulla Decl. ¶ 11; Schneider Decl. ¶ 9. Thereafter, the parties continued  
10 to negotiate the scope of release, injunctive relief, and cooperation, among other material terms.  
11 The parties formalized their settlement agreement on or about December 1, 2011. *See* Scarpulla  
12 Decl. ¶ 11; Schneider Decl. ¶ 9. The Hitachi Proposed Settlement provides for the payment of  
13 approximately \$38.9 million; an injunction prohibiting anticompetitive behavior; the  
14 implementation of an antitrust compliance program, to be verified annually for the next five years;  
15 and ongoing cooperation in the prosecution of these actions against the non-settling defendants.  
16 *See* Scarpulla Decl. Ex. E (Hitachi Proposed Settlement) at p. 7, and ¶¶ 44 - 45.

17 **iii. Sharp**

18 On or about November 11, 2011, the IPPs and the Settling States on the one hand, and  
19 counsel for Sharp on the other hand, reached an agreement in principle on monetary relief. *See*  
20 Scarpulla Decl. ¶ 12; Schneider Decl. ¶ 13. Thereafter, the parties continued to negotiate the scope  
21 of release, injunctive relief, and cooperation, among other material terms. The parties formalized  
22 their settlement agreement on or about November 22, 2011. *See* Scarpulla Decl. ¶ 12; Schneider  
23 Decl. ¶ 13. The Sharp Proposed Settlement provides for the payment of \$115.5 million; an  
24 injunction prohibiting anticompetitive behavior; the implementation of an antitrust compliance  
25 program, to be verified annually for the next five years; and ongoing cooperation in the  
26 prosecution of these actions against the non-settling defendants. *See* Scarpulla Decl. Ex. G (Sharp  
27 Proposed Settlement) at p. 6, and ¶¶ 39 - 41.

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1           **C. Key Terms of the Proposed Settlements**

2                   **1. Consideration**

3                           **i. Cash**

4           Under the Proposed Settlements, the Settling Defendants will pay a total of approximately  
5 \$539 million. A portion of this amount will be allocated to the Settling States to resolve their  
6 proprietary governmental entity claims against the Settling Defendants, according to a formula  
7 contained in the Proposed Settlements (except for the Chunghwa Proposed Settlement).<sup>8</sup> First, all  
8 Court-approved attorneys' fees and expenses will be deducted. Then, an amount equal to the eight  
9 Settling States' pro rata share (as compared to the gross domestic product of the 24 certified  
10 statewide classes) is applied to 7% of remaining amount, and is allocated to the Settling States for  
11 redress of their governmental entity claims. This amount will equal less than 5% of the remaining  
12 settlement funds. More than 95% of the remaining settlement funds will go to non-governmental  
13 consumers who comprise the members of the IPP statewide monetary relief classes and *parens*  
14 *patriae* group.

15                           **ii. Antitrust Injunction and Compliance**

16           Each Settling Defendant agrees, for a period of five years, that it will not engage in price  
17 fixing, market allocation, bid rigging, or other conduct that violates Section 1 of the Sherman Act,  
18 with respect to the sale of any LCD panels, or TVs, notebook computers, or monitors containing  
19 LCD panels, that are likely, through the reasonably anticipated stream of commerce, to be sold to  
20 end-user purchasers in the United States.<sup>9</sup> (Epson no longer manufactures or sells TFT-LCDs and  
21 therefore the injunction provisions are not applicable to it.)

22           Additionally, each Settling Defendant agrees to establish (or if applicable, maintain) an  
23 antitrust compliance program for the officers and employees responsible for the pricing or  
24

25 <sup>8</sup> See Scarpulla Decl. Ex. A (Chimei Proposed Settlement) at ¶ 30(e); Ex. C (Epson Proposed  
26 Settlement) at ¶ 19(e); Ex. D (HannStar Proposed Settlement) at ¶ 31(e); Ex. E (Hitachi Proposed  
Settlement) at ¶ 31(e); Ex. F (Samsung Proposed Settlement) at ¶ 18(e); Ex. G (Sharp Proposed  
Settlement) at ¶ 241(e).

27 <sup>9</sup> See Scarpulla Decl. Ex. A (Chimei Proposed Settlement) at ¶ 43; Ex. D (HannStar  
28 Proposed Settlement) at ¶ 44; Ex. E (Hitachi Proposed Settlement) at ¶ 44; Ex. F (Samsung  
Proposed Settlement) at ¶ 29; Ex. G (Sharp Proposed Settlement) at ¶ 39.

1 production capacity of LCD panels. Each Settling Defendant shall certify, through an annual  
2 written report for up to the next five years, that they are in compliance with this obligation.<sup>10</sup>

3 **iii. Cooperation**

4 Each Settling Defendant further agrees to provide ongoing cooperation to the IPPs and the  
5 Settling States, effective immediately, for purposes of prosecuting the respective actions against  
6 the non-settling defendants.<sup>11</sup> The cooperation includes authentication of documents, producing  
7 witnesses for interviews, depositions, and/or trial, and providing other assistance.

8 **2. Release**

9 **i. Indirect-Purchaser Plaintiff Release**

10 Upon final approval, the IPPs will dismiss the Settling Defendants with prejudice and  
11 release the claims under the terms of the Proposed Settlements. Specifically, the IPPs release, with  
12 respect to the claims asserted in the IPP action (or arising in any way from the sale of LCD panels  
13 contained in TVs, notebook computers, and monitors):

- 14 a) during the class period of January 1, 1999 through December 31, 2006, all  
15 claims for *monetary relief* held by indirect-purchaser end-user consumers  
16 (both natural persons and business entities) in the certified statewide  
17 monetary relief classes (including the proposed Arkansas statewide  
18 settlement class); and  
19 b) during the time period January 1, 1999 through the present, all claims for  
20 *injunctive relief* held by indirect-purchaser end-user consumers (both natural  
21 persons and business entities) in the previously-certified nationwide federal  
22 Sherman Act injunctive relief class.<sup>12</sup>

23 <sup>10</sup> See Scarpulla Decl. Ex. A (Chimei Proposed Settlement) at ¶ 44; Ex. B (Chunghwa  
24 Proposed Settlement) at ¶ 34; Ex. D (HannStar Proposed Settlement) at ¶ 44(d); Ex. E (Hitachi  
25 Proposed Settlement) at ¶ 44(b); Ex. F (Samsung Proposed Settlement) at ¶ 30(b); Ex. G (Sharp  
Proposed Settlement) at ¶ 40(b).

26 <sup>11</sup> See Scarpulla Decl. Ex. A (Chimei Proposed Settlement) at ¶ 45; Ex. B (Chunghwa  
27 Proposed Settlement) at ¶ 35; Ex. C (Epson Proposed Settlement) at ¶ 32; Ex. D (HannStar  
Proposed Settlement) at ¶ 45; Ex. E (Hitachi Proposed Settlement) at ¶ 45; Ex. F (Samsung  
Proposed Settlement) at ¶ 31; Ex. G (Sharp Proposed Settlement) at ¶ 41.

28 <sup>12</sup> See Scarpulla Decl. Ex. A (Chimei Proposed Settlement) at ¶ 21(a)-(b); Ex. B (Chunghwa  
Proposed Settlement) at ¶ 9 (a)-(b); Ex. C (Epson Proposed Settlement) at ¶ 9 (a)-(b); Ex. D

1 Thus, members of the statewide monetary relief classes (all of whom are also members of  
2 the previously-certified nationwide injunctive relief class), release *all* claims for monetary relief  
3 and injunctive relief relating to LCD panels. Members of the previously-certified nationwide  
4 injunctive relief class, who are not members of a statewide monetary relief class, release *only*  
5 injunctive relief claims relating to LCD panels – no monetary relief claims are released by  
6 indirect-purchaser end-user consumers who are only members of the nationwide injunctive relief  
7 class. Similarly, enforcement, proprietary, injunctive, or *parens patriae* claims held by any state  
8 other than the eight Settling States participating in the Proposed Settlements are not released. The  
9 releases in the Proposed Settlements do not affect contract, warranty, or product-defect claims  
10 arising in the ordinary course of business unrelated to the conduct alleged in the action.<sup>13</sup>

11 **ii. Settling States Release**

12 Upon final approval, the Settling States will dismiss the Settling Defendants with prejudice  
13 and release the claims they brought in their respective actions under the terms of the Proposed  
14 Settlements. Specifically, the Settling States release, during the time period January 1, 1999  
15 through December 31, 2006, all claims that were asserted and all claims that could have been  
16 asserted arising in any way from the sale of LCD panels in each Settling States' respective action,  
17 including claims based on governmental entity purchases and applicable *parens patriae* claims,  
18 based on the facts alleged.<sup>14</sup> The releases in the Proposed Settlements do not affect contract,  
19 warranty, or product-defect claims arising in the ordinary course of business unrelated to the  
20 conduct alleged in the action, held by the Settling States.<sup>15</sup>

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21 (HannStar Proposed Settlement) at ¶ 22 (a)-(b); Ex. E (Hitachi Proposed Settlement) at ¶ 22 (a)-  
22 (b); Ex. F (Samsung Proposed Settlement) at ¶ 9 (a)-(b); Ex. G (Sharp Proposed Settlement) at ¶  
18 (a)-(b).

23 <sup>13</sup> See Scarpulla Decl. Ex. A (Chimei Proposed Settlement) at ¶ 24; Ex. B (Chunghwa  
24 Proposed Settlement) at ¶ 12; Ex. C (Epson Proposed Settlement) at ¶ 12; Ex. D (HannStar  
25 Proposed Settlement) at ¶ 25; Ex. E (Hitachi Proposed Settlement) at ¶ 25; Ex. F (Samsung  
26 Proposed Settlement) at ¶ 12; Ex. G (Sharp Proposed Settlement) at ¶ 21.

27 <sup>14</sup> See Scarpulla Decl. Ex. A (Chimei Proposed Settlement) at ¶ 21(c)-(j); Ex. B (Chunghwa  
28 Proposed Settlement) at ¶ 9 (c)-(j); Ex. C (Epson Proposed Settlement) at ¶ 9 (c)-(j); Ex. D  
(HannStar Proposed Settlement) at ¶ 22 (c)-(j); Ex. E (Hitachi Proposed Settlement) at ¶ 22 (c)-(j);  
Ex. F (Samsung Proposed Settlement) at ¶ 9 (c)-(j); Ex. G (Sharp Proposed Settlement) at ¶ 18 (c)-  
(j).

<sup>15</sup> See Scarpulla Decl. Ex. A (Chimei Proposed Settlement) at ¶ 24; Ex. B (Chunghwa  
Proposed Settlement) at ¶ 12; Ex. C (Epson Proposed Settlement) at ¶ 12; Ex. D (HannStar

1                                   **3. Allocation and Distribution To IPP Class Members**

2           Money will not be distributed to class members until the completion of the case, so that all  
3 funds received in this case, whether through settlements or judgment following trial, can be  
4 distributed together and at one time.

5           At a later date, the IPPs and the Settling States will submit a plan of distribution for Court  
6 approval. The plan of distribution will explain how payments will be made on a *pro rata* basis,  
7 based upon the products purchased. The plan of distribution will also identify a minimum  
8 payment cut-off for class members (*i.e.*, the smallest check amount that will be distributed to a  
9 class member). The IPPs will seek to disburse all available proceeds to members of the statewide  
10 monetary relief classes, with any residual amount disposed of through supplemental distributions  
11 to class members and/or *cy pres* distributions, as approved by the Court.

12           Members of the nationwide injunctive relief class, who are not also members of any  
13 statewide monetary relief class, will not receive monetary compensation (but neither will they  
14 release monetary claims under the Proposed Settlements).

15                                   **4. Attorneys' Fees and Costs**

16           The Proposed Settlements provide that counsel for the IPPs and the Settling States may  
17 apply to the Court for an award of attorneys' fees (not to exceed one-third of the payments made  
18 under the Proposed Settlements) and payment of costs out of the payments made under the  
19 Proposed Settlements, and that the Settling Defendants will not oppose such an application.

20                                   **D. Notice Plan and Forms of Notice**

21           As explained in the attached declaration of Katherine Kinsella of Kinsella Media LLC, the  
22 IPPs and the Settling States propose to publish class (including the proposed Arkansas statewide  
23 settlement class) and *parens patriae* notice advising of:

- 24                                   (a)    the pendency of the litigation classes previously certified by the Court  
25    (including the certification of the proposed Arkansas statewide settlement  
26    class), and the deadline for any class member to be excluded;

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27 Proposed Settlement) at ¶ 25; Ex. E (Hitachi Proposed Settlement) at ¶ 25; Ex. F (Samsung  
28 Proposed Settlement) at ¶ 12; Ex. G (Sharp Proposed Settlement) at ¶ 21.

- 1 (b) the Proposed Settlements, and the dates associated with objection and final  
2 approval; and
- 3 (c) the pendency of the litigation of *parens patriae* claims against the non-  
4 settling defendants, and the deadline for any consumers to be excluded from  
5 the Attorney General actions.

6 Kinsella Media, a highly-experienced class action notice administrator, has formulated a  
7 notice-by-publication plan that satisfies due process standards and represents the best notice  
8 practicable under the circumstances. *See* Kinsella Decl. ¶ 26. Notice to the class members will be  
9 provide via print media, broadcast media, online media, and other media (including, *e.g.*, by text  
10 message). *Id.* ¶¶ 10 – 22. No claim forms will be provided at this time, so that there can be a  
11 single claims processing stage at the conclusion of the case. The IPPs and the Settling States  
12 intend to use Rust Consulting as the claims administrator.

13 Included with the Kinsella declaration is the proposed “short-form” notice (Kinsella Decl.  
14 Ex. 1-G) to be placed in publications, as well as the “long-form” notice (Kinsella Decl. Ex. 1-F)  
15 that will be available on the website [www.LCDclass.com](http://www.LCDclass.com). The proposed long-form notice  
16 explains that, with respect to IPP statewide monetary relief class members, the IPPs will seek  
17 Court approval for a plan of distribution (to be filed at a later time) that provides redress to all  
18 members of the statewide monetary relief classes in a uniform fashion. The website will also  
19 contain a link to the direct-purchaser class action website, whose settlement notice and  
20 administration also is being handled by Kinsella Media and Rust Consulting.

### 21 **III. ARGUMENT**

#### 22 **A. The Settlement of Complex Litigation Is Favored**

23 There is a “strong judicial policy that favors settlements, particularly where complex class  
24 action litigation is concerned.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008);  
25 *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (“It hardly seems necessary to  
26 point out that there is an overriding public interest in settling and quieting litigation. This is  
27 particularly true in class action suits . . .”). Moreover, “a district court’s certification of a  
28 settlement simply recognizes the parties’ deliberate decision to bind themselves according to

1 mutually agreed-upon terms without engaging in any substantive adjudication of the underlying  
2 causes of action.” *Sullivan v. DB Investments Inc.*, \_\_\_F.3d\_\_\_, No. 08-2784 *et seq.*, Slip Op. at p.  
3 70 (3rd Cir. Dec. 20, 2011) (en banc) (affirming certification of a nationwide indirect-purchaser  
4 settlement class).

5  
6 **B. The Proposed Settlements Should Be Granted Preliminary Approval Under  
Rule 23**

7 With the exception of the proposed Arkansas statewide settlement class, the Court has  
8 previously certified the IPP classes that are subject to the Proposed Settlements, and also  
9 appointed class representatives and class counsel. *See* Dkt. # 1642. In doing so, the Court found  
10 all elements of Rule 23(a), (b)(2), and (b)(3) to be satisfied (*id.*), though in the settlement context  
11 “manageability” is not an issue. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625 (1997);  
12 *Sullivan*, Slip Op. at pp. 48 – 52. Thus, with respect to these classes, there is no need to make  
13 additional certification findings or appointments for purposes of granting preliminary approval.<sup>16</sup>

14 **1. Procedure and Standards for Approval of Class Settlements**

15 Rule 23(e) provides that “[t]he claims, issues, or defenses of a certified class may be  
16 settled, voluntarily dismissed, or compromised only with the court’s approval.” Consistent with  
17 this Rule, class action jurisprudence has developed three distinct steps for the approval of a class  
18 settlement: a) preliminary approval of the proposed settlements; b) dissemination of notice of the  
19 proposed settlements to class members; and c) a fairness hearing (also referred to as a final  
20 approval hearing) where class members may be heard regarding the settlements, and counsel may  
21 introduce evidence and present arguments regarding the fairness, adequacy, and reasonableness of  
22 the settlements. *See* 4 Newberg on Class Actions, § 11.22 *et seq.* (4th ed. 2002) (“*Newberg*”). By  
23 this motion, the IPPs seek the Court’s preliminary approval of the Proposed Settlements, and  
24 approval of the proposed plan and forms of notice.

25 Preliminary approval requires a court simply to find that the proposed settlement fits  
26 “within the *range* of possible approval” and should be given further consideration. *Gautreaux v.*

27  
28 <sup>16</sup> As discussed below, the proposed Arkansas statewide settlement-only class should be  
certified in an identical fashion to the previously-certified statewide monetary relief classes.

1 *Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) (emphasis added). Preliminary approval of a  
2 proposed class action settlement is appropriate “if the preliminary evaluation of the proposed  
3 settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as  
4 unduly preferential treatment of class representatives or of segments of the class, or excessive  
5 compensation for attorneys and appears to fall within the range of possible approval.” *In re*  
6 *Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2001 U.S. Dist. LEXIS 25071, at \*30 (D.D.C. July  
7 25, 2001); *see also In re Nasdaq Market Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y.  
8 1997). Preliminary approval is intended to “ascertain whether there is any reason to notify class  
9 members of the proposed settlement and to proceed with a fairness hearing.” *Pierce*, 690 F.2d at  
10 621; *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1988). In contrast, the  
11 purpose of the final approval fairness hearing is to determine whether the settlement is fair,  
12 reasonable and adequate after notice has been given to the class.

13         The approval of a proposed settlement of a class action is a matter of discretion for the trial  
14 court. *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (9th Cir. 2004). In exercising that  
15 discretion, however, the Court should recognize that as a matter of sound policy, settlements of  
16 disputed claims are encouraged and a settlement approval hearing should “not be turned into a trial  
17 or rehearsal for trial on the merits.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625  
18 (9th Cir. 1982), *cert. denied sub nom. Byrd v. Civil Serv. Comm’n*, 459 U.S. 1217 (1983).  
19 Furthermore, courts must give “proper deference” to the settlement agreement, because “the  
20 court’s intrusion upon what is otherwise a private consensual agreement negotiated between the  
21 parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the  
22 agreement is not the product of fraud or overreaching by, or collusion between, the negotiating  
23 parties, and the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”  
24 *Hanlon*, 150 F.3d at 1027 (quotations omitted).

25         To grant preliminary approval of the Proposed Settlements, the Court need only find that  
26 the settlements fall within “the range of reasonableness.” *Newberg* § 11.25. The Manual for  
27 Complex Litigation (Fourth) § 21.632 (2004) (“*Manual*”) characterizes the preliminary approval  
28 stage as an “initial evaluation” of the fairness of the proposed settlement made by the court on the

1 basis of written submissions and informal presentation from the settling parties. *Manual* § 21.632.

2 The *Manual* summarizes the preliminary approval criteria as follows:

3 Fairness calls for a comparative analysis of the treatment of the  
4 class members *vis-à-vis* each other and *vis-à-vis* similar  
5 individuals with similar claims who are not in the class.  
6 Reasonableness depends on an analysis of the class allegations  
7 and claims and the responsiveness of the settlement to those  
8 claims. Adequacy of the settlement involves a comparison of the  
9 relief granted to what class members might have obtained  
10 without using the class action process.

11 *Manual* § 21.62.

12 A proposed settlement may be finally approved by the trial court if it is determined to be  
13 “fundamentally fair, adequate, and reasonable.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268,  
14 1276 (9th Cir. 1992). While consideration of the requirements for final approval is unnecessary at  
15 this stage, all of the relevant factors weigh in favor of the settlements proposed here. As shown  
16 below, the Proposed Settlements are fair, reasonable and adequate. Therefore, the Court should  
17 grant preliminary approval of the Proposed Settlements and authorize dissemination of notice.

18 **2. The Proposed Settlements Are Within the Range of Reasonableness and**  
19 **the Product of Arm’s-Length Negotiations**

20 All of the relevant factors heavily favor approval of the Proposed Settlements. In assessing  
21 whether a proposed settlement meets the standard for preliminary approval, the courts have  
22 identified the primary factors that should be considered: (1) whether the settlement is a result of  
23 arm’s-length negotiations; (2) the terms of the settlement in relation to the strength of plaintiff’s  
24 case; (3) whether sufficient discovery had been conducted at the time of settlement to evaluate the  
25 case; and (4) the opinion of experienced counsel. *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F.  
26 Supp. 1379, 1383-1384 (D.Md. 1983). Each of these factors weighs in favor of granting  
27 preliminary approval.

28 **i. Arm’s-Length Negotiations**

First, the settlements are entitled to “an initial presumption of fairness” because they are  
the result of arm’s-length negotiations among experienced counsel. *Newberg* § 11.41; *Hughes v.*  
*Microsoft Corp.*, No. C98-1646C, 2001 U.S. Dist. LEXIS 5976, at \*20 (W.D. Wash. Mar. 26,

1 2001). The basic terms of the Proposed Settlements resulted only after almost five years of  
2 litigation and extensive, arms-length negotiations. *See* Scarpulla Decl. ¶¶ 2, 15; *see also* Schneider  
3 Decl. ¶¶ 2, 3. All sides were represented by counsel with years of experience and success in  
4 litigating antitrust and class action claims. As stated above, the IPPs engaged in extensive  
5 discovery and analysis. Thus, these settlements were reached by counsel with extensive  
6 knowledge of the strengths and weaknesses of the case. Each of the negotiations occurred over the  
7 course of several months and involved numerous meetings. The parties engaged in mediation  
8 sessions with highly-respected and experienced mediators. The IPPs, the Settling States, and the  
9 Settling Defendants engaged in settlement talks for a protracted time and expended significant  
10 resources in intensive negotiations to reach these agreements.

11 **ii. Settlements In Relation To the IPPs' Case**

12 Second, the approximately \$539 million cash payment is substantial, and IPP counsel  
13 believe this represents the largest all-cash recovery for an indirect-purchaser antitrust case. *See*  
14 Scarpulla Decl. ¶ 15. The payment represents nearly 25% of the potential single damages as  
15 estimated by the IPPs' experts. *Id.* This compares favorably to settlements approved in other  
16 price-fixing cases. *See, e.g., In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 627 (E.D. Pa.  
17 2004); *Fisher Bros. v. Mueller Brass Co.*, 630 F. Supp. 493, 499 (E.D. Pa. 1985).

18 It should be noted that Defendants' experts, including those retained by the Settling  
19 Defendants, have argued that the IPPs suffered little or no damages as a result of Defendants'  
20 alleged anticompetitive activity. Defendants have also maintained throughout this litigation that  
21 the alleged conspiracy was ineffective and unsuccessful and the IPPs would be incapable of  
22 "linking" any agreed-upon price increases for LCD panels to increased prices of products  
23 containing such panels to end-user purchases of class members.

24 Moreover, the Proposed Settlements require the Settling Defendants to cooperate with the  
25 IPPs and the Settling States for trial. This is a valuable benefit because it will save time, reduce  
26 costs, and provide access to information and documents regarding the LCD conspiracy that might  
27 otherwise not be readily available to the IPPs and the Settling States. *See In re Mid-Atlantic*  
28 *Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1386 (D. Md. 1983) (a defendant's agreement to

1 cooperate with plaintiffs “is an appropriate factor for a court to consider in approving a  
2 settlement”).

### 3 **iii. Sufficiency of Discovery**

4 Third, the stage of the proceedings at which the Proposed Settlements were reached also  
5 favors preliminary approval. As described above, the IPPs and Settling States negotiated these  
6 settlements after extensive pre-filing investigation, full discovery, and dispositive-motion practice.  
7 Millions of pages of Defendants’ documents were reviewed and analyzed, over a hundred  
8 depositions were taken, and extensive economic analysis was conducted. *See* Scarpulla Decl. ¶ 3;  
9 *see also* Schneider Decl. ¶ 4. The IPPs and Settling States were able to negotiate the Proposed  
10 Settlements with detailed knowledge of the factual and legal issues underlying the claims and  
11 defenses in the action, and the strengths and weaknesses of the actions.

### 12 **iv. Opinion of Experienced Counsel**

13 Finally, class counsel – who are experienced in antitrust and consumer class actions – have  
14 determined that the Proposed Class Settlements are in the best interests of the class members. *See*  
15 Scarpulla Decl. ¶ 15. Experienced plaintiffs’ counsel’s judgment that settlements are fair and  
16 reasonable is entitled to great weight at the preliminary approval stage. *See Nat’l Rural Telecomm.*  
17 *Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (“Great weight’ is accorded to the  
18 recommendation of counsel, who are most closely acquainted with the facts of the underlying  
19 litigation.”). The participation in the Proposed Settlements by the Settling States should also be a  
20 factor in favor of the Court’s approval of the Proposed Settlements. *See In re Lorazepam &*  
21 *Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 380 (D.D.C. 2002) (quoting *In re Toys “R” Us*  
22 *Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) (“participation of the State Attorneys  
23 General furnishes extra assurance that consumers’ interests are protected”); *see, e.g., Dunk v. Ford*  
24 *Motor Co.*, 48 Cal. App. 4th 1794, 1801 (Cal. App. 4th Dist. 1996).

### 25 **C. The Arkansas Settlement-Only Statewide Monetary Relief Class Should Be** 26 **Certified**

27 For purposes of effectuating the Proposed Settlements, the IPPs, with the State of  
28 Arkansas’ consent and approval, seek certification of a settlement-only class of Arkansas indirect

1 purchasers, defined in an identical manner to the previously-certified 24 statewide IPP monetary  
2 relief classes. The Arkansas settlement-only class is defined as:

3  
4 All persons and entities in Arkansas who, from January 1, 1999 to  
5 December 31, 2006, as residents of Arkansas, purchased TFT-LCD  
6 Panels incorporated in televisions, monitors, and/or laptop computers in  
7 Arkansas indirectly from one or more of the named Defendants or  
8 Quanta Display, Inc., for their own use and not for resale. Specifically  
9 excluded from the Class are defendants; the officers, directors, or  
employees of any defendant; the parent companies and subsidiaries of  
any defendant; the legal representatives and heirs or assigns of any  
defendant; and the named affiliates and co-conspirators. Also excluded  
are any federal, state or local governmental entities, any judicial officer  
presiding over this action and the members of his/her immediate family  
and judicial staff, and any juror assigned to this Action.

10 Under Federal Rule of Civil Procedure 23(c)(1)(C), a district court may alter or amend a  
11 class certification order before final judgment. “Even after a certification order is entered, the  
12 judge remains free to modify it in the light of subsequent developments in the litigation.” *Gen.*  
13 *Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982); *see also Armstrong v. Davis*, 275  
14 F.3d 849, 871 n.28 (9th Cir. 2001) (Rule 23 “provides district courts with broad discretion to  
15 determine whether a class should be certified, and to revisit that certification throughout the legal  
16 proceedings before the court.”). Orders amending a previous class certification need address only  
17 those aspects of the class certification decision to be modified, in recognition of the flexibility and  
18 discretion committed to the district court under Rule 23(c)(1)(C). *See In Re Pharmaceutical*  
19 *Indus. Avg. Wholesale Price Litig.*, 588 F.3d 24, 39 (1st Cir. 2009) (“The depth of explanation  
20 courts should provide in amended certification orders depends on the circumstances. Courts can  
21 amend certification orders to reflect major changes or minor adjustments to the class.”).

22 The Arkansas settlement-only statewide class operates in an identical manner to the 24  
23 other statewide litigation classes that the Court certified by means of an across-the-board Rule 23  
24 analysis, and on this basis should be certified. There are two statutory claims under Arkansas law  
25 that have been asserted in these cases. First, the Arkansas Attorney General has asserted a *parens*  
26 *patriae* claim on behalf of Arkansas consumers under the state’s *Illinois Brick* repealer statute.  
27 *See Ark. Code Ann. § 4-75-315(b)* (referring to the Arkansas Attorney General’s *parens patriae*  
28

1 authority to assert claims on behalf of consumers in connection with violations of the Arkansas  
2 Unfair Practices Act); Ark. Code Ann. § 4-75-309 (prohibiting price fixing). The Court denied  
3 Defendants’ motion for partial dismissal of this claim. *See* Order (Dkt. # 2632), at 8-10. Second,  
4 the IPPs and Arkansas Attorney General both asserted claims under the Arkansas Deceptive Trade  
5 Practices Act (ADTPA) Ark. Code Ann. § 4-88-101 *et seq.*, which makes unlawful “[d]eceptive  
6 and unconscionable trade practices”. *See* Ark. Code Ann. § 4-88-107.

7         Although the Court dismissed the ADTPA claims in both cases (Dkt. # 2632), the issue is  
8 not free from doubt and would be subject to appeal if this case proceeded without settlement.  
9 Arkansas courts construe the ADTPA liberally to further its remedial purpose. *State ex rel. Bryant*  
10 *v. R&A Investment Co.*, 985 S.W.2d 299, 302 (Ark. 1999) (holding that the ADTPA’s provision on  
11 unconscionable practices “illustrates that liberal construction” of the statute “is appropriate”). The  
12 Arkansas Supreme Court has adopted the expansive definition of the word “unconscionable”  
13 contained in *Black’s Law Dictionary*: “An ‘unconscionable’ act is an act that ‘affronts the sense of  
14 justice, decency, or reasonableness.’” *Baptist Health v. Murphy*, 226 S.W.3d 800, 811 & n.6 (Ark.  
15 2006) (holding that a hospital’s policy of denying privileges to physicians holding ownership  
16 interests in competing hospitals was properly determined by the trial court to be unconscionable  
17 under the ADTPA).

18         In this case, the IPPs and the Arkansas Attorney General contend that Defendants’ alleged  
19 conduct easily passes the test for unconscionability under *Baptist Health*. Moreover, at least eight  
20 federal decisions—three of them by judges of this district—have held that price fixing and similar  
21 antitrust conduct is actionable under the ADTPA. *See In re Dynamic Random Access Memory*  
22 *Antitrust Litig. (DRAM)*, 516 F. Supp. 2d 1072, 1108-09 (N.D. Cal. 2007); *Infineon*, 531 F. Supp.  
23 2d at 1143-44; *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1156-57 (N.D. Cal.  
24 2007); *see also Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*,  
25 737 F. Supp. 2d 380, 404-05 (E.D. Pa. 2010); *In re Chocolate Confectionary Antitrust Litig.*, 602  
26 F. Supp. 2d 538, 583 (M.D. Pa. 2009); *In re Aftermarket Filters Antitrust Litig.*, No. 08-C-4883,  
27 2009 WL 3754041, at \*8-\*9 (N.D. Ill. Nov. 5, 2009); *In re New Motor Vehicles Canadian Export*  
28 *Antitrust Litig. (NMV)*, 350 F. Supp. 2d 160, 178 (D. Me. 2004); *FTC v. Mylan Labs., Inc. (Mylan*

1 *II*), 99 F. Supp. 2d 1 (D.D.C. 1999).

2 Because the ADTPA is substantially similar to the other states' antitrust and consumer  
3 protection laws at issue in the IPPs' motion for class certification, the Court's uniform analysis of  
4 the statewide classes applies with equal force to the Arkansas settlement-only statewide class.  
5 Indeed, in the class certification order, the Court primarily focused on whether the IPPs have  
6 presented plausible methodologies for demonstrating classwide antitrust impact, analyses equally  
7 applicable to all class members and will be unchanged by the addition of the proposed Arkansas  
8 settlement-only class.

9 The IPPs propose that the class representative for the previously-dismissed Arkansas  
10 statewide monetary relief claims, Robert Harmon, be appointed as the class representative for the  
11 Arkansas settlement-only class. Mr. Harmon has responded to discovery requests, and was  
12 deposed by Defendants. The IPPs propose that class counsel for the Arkansas settlement-only  
13 class be Zelle Hofmann Voelbel & Mason LLP and the Alioto Law Firm.

14 **D. The Plan And Forms Of Notice Should Be Approved Under Rule 23**

15 Rule 23(e)(1) states that, "[t]he court must direct notice in a reasonable manner to all class  
16 members who would be bound by a proposed settlement, voluntary dismissal, or compromise."  
17 Notice of a proposed settlement must inform class members of the following: (1) the nature of the  
18 pending litigation; (2) the general terms of the proposed settlement; (3) that complete information  
19 is available from the court files; and (4) that any class member may appear and be heard at the  
20 fairness hearing. *See Newberg*, § 8.32. The notice must also disclose to the class members that  
21 they have an opportunity to opt-out, that the judgment will bind all class members who do not opt-  
22 out, and that any member who does not opt-out may appear through counsel. Fed. R. Civ. P.  
23 23(c)(2)(B).

24 The form of notice is "adequate if it may be understood by the average class member."  
25 *Newberg* § 11.53. Notice to the class must be "the best notice practicable under the circumstances,  
26 including individual notice to all members who can be identified through reasonable effort."  
27 *Amchem Prods.*, 521 U.S. at 617. Publication notice is an acceptable method of providing notice  
28

1 where the identity of specific class members is not reasonably available. *See In re Tableware*  
2 *Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (citing *Manual* § 21.311).

3 The IPPs and the Settling States propose disseminating a summary notice, to be published  
4 in print media, broadcast media, online media, and other media throughout the United States, along  
5 with a detailed website accessible to class members. This is similar to procedures approved in  
6 numerous class actions, and fulfills all the requirements of Federal Rule of Civil Procedure 23 and  
7 due process. *See, e.g., Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374-75 (9th Cir. 1993); *In*  
8 *re AOL Time Warner ERISA Litig.*, No. 02 Civ. 8853 SWK, 2006 U.S. Dist. LEXIS 70474, at \*30-  
9 31 (S.D.N.Y. Sept. 27, 2006). The IPPs respectfully request that the notice of the litigation  
10 classes be combined with the settlement class notice, thereby saving substantial out-of-pocket  
11 notice costs.

12  
13 **E. The Court Should Preliminarily Approve the Proposed Settlements Under the**  
14 **Arkansas and California *Parens Patriae* Statutes**

15 Arkansas and California law specifically require court approval of any settlement of those  
16 States' *parens patriae* claims, as well as the notification efforts made to affected residents of those  
17 States. *See* Ark. Code Ann. § 4-75-315 (c)(3) ("any consent decree. . . must be approved by the . .  
18 . federal district court"); Cal. Bus. & Prof. Code § 16760(c) (an "action. . . shall not be dismissed  
19 or compromised without the approval of the court"). Because Arkansas is a plaintiff in the MDL  
20 action, the Arkansas Attorney General needs the Court's approval of the *parens patriae* settlement  
21 under Ark. Code Ann. § 4-75-315 (c)(3). However, that provision contains no "fairness" or other  
22 standard, and there are no cases interpreting the statute. Therefore, it is reasonable to presume that  
23 a settlement that meets the standard under Rule 23 also deserves approval under Arkansas law.

24 In contrast to Arkansas and the other Settling States, California, along with specified  
25 California government entities, are plaintiffs only in Case No. CGC-10-504651, pending in San  
26 Francisco Superior Court (the "California State Court Action"). But this Court has ancillary  
27 jurisdiction over California's participation in the Proposed Settlements under "two separate,  
28 though sometimes related, purposes: (1) to permit disposition by a single court of claims that are,  
in varying respects and degrees, factually interdependent [citations omitted] and (2) to enable a

1 court to function successfully, that is, to manage its proceedings, vindicate its authority, and  
2 effectuate its decrees [citations omitted].” See *Kokkonen v. Guardian Life Ins. Co. of America*,  
3 511 U.S. 375, 379-80 (1994). Here, although California has maintained an independent action in  
4 state court, its *parens patriae* and government claims are factually interdependent with the claims  
5 at issue in the MDL, and it has consented to the Court’s jurisdiction solely for the purpose of  
6 effectuating the Proposed Settlements.

7 Under Cal. Bus. & Prof. Code § 16760(b)(1), the California Attorney General is required to  
8 provide notice of her action by publication, subject to direction by the court. Since California’s  
9 action is in San Francisco Superior Court, during a Case Management Conference on December  
10 19, 2011, San Francisco Superior Court Judge Richard Kramer instructed that the California  
11 Attorney General notify him when this Motion has been filed, and schedule a hearing in Judge  
12 Kramer’s department prior to the hearing on this Motion, for the purpose of obtaining an order  
13 from Judge Kramer that provides that the notice plan described in this Motion complies with the  
14 Cartwright Act, *i.e.*, Cal. Bus. & Prof. Code § 16760. See Miller Decl. ¶ 5.

15 In addition, under Cal. Bus. & Prof. Code § 16760(c), the superior court is also authorized  
16 to approve any dismissal or compromise of the California State Court Action. During the same  
17 Case Management Conference mentioned above, Judge Kramer also instructed that the parties  
18 before him request that he contact this Court in order to discuss and implement any joint  
19 coordination orders necessary to effectuate the Proposed Settlements. See Miller Decl. ¶¶ 6, 7.  
20 The California Attorney General and the Settling Defendants in the California State Court Action  
21 intend to comply with Judge Kramer’s instructions.

22  
23 **F. The Plan and Forms of Notice Satisfy Any *Parens Patriae* Notice Requirements**

24 The laws of the settling states of Florida, Michigan, Missouri and New York<sup>17</sup> do not  
25 contain formal notice requirements for those states’ *parens patriae* claims. The Arkansas and  
26 California statutes, in contrast, require that the attorneys general in those states give notice of their  
27 statutory *parens patriae* claims, (and any settlement of those claims) by publication, unless

28 <sup>17</sup> The Settling States of West Virginia and Wisconsin do not assert *parens patriae* claims.

1 otherwise directed by the court. Ark. Code Ann. § 4-75-315 (b)(2); Cal. Bus.& Prof. Code §  
2 16760(b)(1). Both codes also provide that their states’ consumers may exclude themselves from  
3 the case by filing an election with the court. Ark. Code Ann. § 4-75-315 (b)(3)(A); Cal. Bus. &  
4 Prof. Code § 16760(b)(2). This is because “the final judgment in the action shall be *res judicata*  
5 as to any claim. . .” Ark. Code Ann. § 4-75-315 (b)(3)(B); Cal. Bus. & Prof. Code § 16760(b)(3).

6 While the Arkansas and California *parens patriae* statutes are not the same as Rule 23,  
7 their independent notice requirements are satisfied in this case, for purposes of approving the  
8 Proposed Settlements, by the IPPs’ proposed notice plan under Rule 23. *Compare* Fed. R. Civ. P.  
9 Rule 23 (c)(2)(B), *with* Ark. Code Ann. § 4-75-315 (b)(2)-(3), *and* Cal. Bus. & Prof. Code §  
10 16760(b).; *see* *Washington v. Chimei Innolux Corp.*, 659 F. 3d 842, 850 n.4 (9th Cir. 2011)  
11 (California’s *parens patriae* statute does not contain Rule 23 class action requirements, such as  
12 typicality and adequacy of representation requirements, but does “contain other procedural  
13 requirements such as notice to the affected citizens, opt-out provisions, and court approval for any  
14 settlements”). In particular, the Arkansas and California Attorneys Generals’ obligations to give  
15 notice of their *parens patriae* actions are satisfied if the court-approved notice is given by  
16 publication and otherwise comports with due process. Ark. Code Ann. §§ 4-75 315 (b)(2), 4-75-  
17 315 (c)(4); Cal. Bus. & Prof. Code § 16760(b)(1). To the extent any additional court’s approval is  
18 required, as discussed above, the parties in the California State Court Action that are participating  
19 in the Proposed Settlements intend to request that Judge Kramer contact this Court to discuss and  
20 implement any joint coordination orders necessary to effectuate the Proposed Settlements.

21 **G. The Schedule for Final Approval Should Be Adopted**

22 The last step in the settlement approval process is the final approval hearing. At that  
23 hearing, proponents of the settlements may explain and describe its terms and conditions and offer  
24 argument in support of settlement approval, and members of the class, or their counsel, may be  
25 heard in support of or in opposition to the settlement. The proposed order concurrently filed with  
26 this motion sets forth proposed deadlines for disseminating notice, exclusions, objections, filing of  
27 an application for attorneys’ fees and costs, and sets a date for the final approval hearing. These  
28 deadlines comply with all requirements of Rule 23, the Class Action Fairness Act (28 U.S.C.

1 § 1332(c) *et seq.*), applicable state laws, and relevant case law (including, *inter alia*, *In re Mercury*  
2 *Interactive Sec. Litig.*, 618 F.3d 988, 995 (9th Cir. 2010) (regarding adequacy of time to review  
3 application for attorneys' fees before final approval hearing)).

4 **IV. CONCLUSION**

5 For the foregoing reasons, the IPPs and the Settling States respectfully request that the  
6 Court grant preliminary approval of the Proposed Settlements.

7  
8 Dated: December 23, 2011

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9  
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11 **ATTESTATION**

12 Pursuant to General Order No. 45, § X(B), regarding signatures, I attest that I have  
13 obtained the concurrence in the filing of this document from all signatories.

14 Dated: December 23, 2011

/s/ Francis O. Scarpulla  
Francis O. Scarpulla

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