Blake L. Harrop (*pro hac vice*)
Senior Assistant Attorney General
Antitrust Bureau
Office of the Illinois Attorney General
100 W. Randolph Street
Chicago, Illinois 60601
(312) 814-1004 (phone)
(312) 814-4209 (fax)
bharrop@atg.state.il.us

Counsel for Intervener, the State of Illinois
(See signature page for complete list of represented parties)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In Re TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	No.: M-07-1827 SI MDL No. 1827
This document relates to: Indirect Purchaser Actions	**Illinois and Washington's Objection to the IPPs' Motion for Preliminary Approval of Proposed Settlements and Proposed Notice** Date: January 20, 2012 Time: 9 a.m. Dept.: Courtroom 10, 19th Floor Judge: Honorable Susan Illston

Table of Contents

Table of Authorities

Federal Cases

State Cases

Federal Rules

Other Authority

Statement of Issues

This Court should reject the IPPs' proposed settlements because they violate the due-process rights of Illinois and Washington class members in at least four ways. The first three involve the IPPs' inadequate representation and the fourth involves their inadequate proposed notice.

(1) **Jeopardizing State-Law Monetary-Relief Claims.** Due Process requires absent class members to receive adequate representation from the named plaintiffs. The IPPs, the named plaintiffs here, have jeopardized the recovery of monetary relief by Illinois and Washington class members through claim preclusion, covenants not to sue, and "no other recovery" provisions. Have the IPPs violated those class members' due-process rights?

(2) **Releasing State-Law Injunctive Relief.** Named plaintiffs cannot provide adequate representation for claims they lack authority to bring. The IPPs lack authority to represent Illinois or Washington indirect purchasers for claims under their state antitrust laws. The IPPs intend to release all state-law injunctive-relief claims of Illinois and Washington class members. Have the IPPs violated those class members' due-process rights?

(3) **Receiving No Consideration from Epson.** The IPPs have agreed to release Illinois and Washington class members' injunctive claims against Epson without any consideration. Have the IPPs violated those class members' due-process rights through inadequate representation?

(4) **Providing Inadequate Notice.** Due Process requires that class members are given notice about the action, their rights, and any opportunity to participate that is clear and accurate. The IPPs' proposed notice may mislead Illinois and Washington class members to think they may recover monetary relief for the LCD conspiracy through this lawsuit and subsequent ones when they may not have rights to either. Does this notice violate Due Process?

Facts

This is the second time the IPPs have asked for settlement approval that would impair the interests of class members from Illinois and Washington.

In June 2010, the IPPs asked this Court for preliminary approval of their proposed settlement with Epson.[1] In that settlement, the IPPs purported to represent Illinois and Washington indirect purchasers and release their state-law claims—though the IPPs lack the authority to do so under state law. The States of Illinois and Washington ("the States") opposed preliminary approval, and after a year-and-half-long fight, the IPPs relinquished and withdrew their motion.[2]

For the last several months, the IPPs have been negotiating settlements with not only Epson but also several other defendants. When the States raised concerns that the IPPs again intended to represent their indirect purchasers, the IPPs' counsel promised this Court that "none of the three States [including Oregon] are in the settlements at all."[3] But their counsel refused to share with the States the specifics of the proposed settlements.[4]

The IPPs have now filed those proposed settlements and seek preliminary approval. The relevant settlements are between the IPP classes and Chimei, Epson, HannStar, Hitachi, Samsung, and Sharp.[5] With these Defendants, the IPPs intend to settle the injunctive claims of

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[1] IPPs' Mot. for Preliminary Approval of Class Settlement with Epson Imagining Devices Corp., June 21, 2010, ECF 1812.

[2] Notice of Withdrawal of motion for Preliminary Approval of Epson Imaging Devices Corp. Settlement, Nov. 9, 2011, ECF 4130.

[3] Hr'g Tr. 5, Oct. 14, 2011.

[4] Harrop Decl. ¶¶ 2-3, Jan. 6, 2011.

[5] Chimei Settlement, Dec. 23, 2011, ECF 4424-2; Epson Settlement, ECF 4424-4; HannStar Settlement, Dec, 23, 2011, ECF 4424-5; Hitachi Settlement, Dec. 23, 2011, ECF 4424-6;

the "IPP Nationwide Injunctive Class," previously certified under Rule 23(b)(2). With few exceptions,[6] the class includes every indirect LCD purchaser in the United States:

> All persons and entities residing in the United States . . . who indirectly purchased in the United States between January 1, 1999 and the present TFT-LCD panels incorporated in televisions, monitors and/or notebook computers from one or more of the named defendants or Quanta Display Inc., for their own use and not for resale.[7]

Thus, Illinois and Washington indirect purchasers are part of the IPP Nationwide Injunctive Class whose claims the settlements would resolve. But Illinois and Washington class members have divergent interests—they have rights to recover monetary relief under state law that, unlike other class members' monetary claims, are not being pursued in this action.[8]

Argument

The IPPs' proposed settlements violate the due-process rights of Illinois and Washington class members. When evaluating a class-action settlement, a court must do a "rigorous analysis" to determine if it complies with Rule 23's requirements.[9] Rule 23's requirements are "designed to protect absentees by blocking unwarranted or overbroad class definitions in the settlement context."[10]

Samsung Settlement, Dec. 23, 2011, ECF 4424-7; Sharp Settlement, Dec. 23, 2011, ECF 4424-8. The States take no position on the IPPs' settlement with Chunghwa.

[6] Order Granting IPPs' Mot. for Class Certification 35-36, Mar. 28, 2010, ECF 1642 (carving out from the class the defendants, government entities, and jurors).

[7] *Id.*

[8] Washington's action was previously before this Court on a motion to remand. This Court granted that motion, and that decision was affirmed by the Ninth Circuit.

[9] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

[10] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

One of those Rule 23 requirements is adequate class representation.[11] By agreeing to the proposed settlements, the IPPs have failed to adequately represent the interests of Illinois and Washington class members in three ways. The IPPs are jeopardizing their state-law monetary-relief claims (section I *infra*), releasing their state-law injunctive claims without any authority (section II *infra*), and agreeing to release their injunctive claims against Epson without anything in return (section III *infra*). This inadequate representation violates Due Process.[12]

Another Rule 23 requirement is adequate notice. The IPPs propose a notice that fails to adequately inform Illinois and Washington class members about their rights—either in the proposed settlements or in any trial going forward (section IV *infra*).

There is a remedy for these due-process violations: excluding Illinois and Washington citizens from the injunctive class.

I. The IPPs are inadequately representing Illinois and Washington class members by jeopardizing their state-law monetary-relief claims.

The IPPs are not adequately representing Illinois or Washington class members by forsaking their state-law monetary-relief claims. Class representation is inadequate if the named plaintiffs have an insurmountable conflict of interest with other class members.[13] There must be both an absence of antagonism and a sharing of interests between named parties and absent class

[11] *Id.* at 625; Fed. R. Civ. P. 23(a)(4).

[12] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members."); *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009) ("An absence of material conflicts of interest between the named plaintiffs and their counsel with other class members is central to adequacy and, in turn, to due process for absent members of the class.").

[13] *Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010).

members.[14] "[U]ncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry."[15] Here, the IPPs have no interest in—and, indeed, are risking—the state-law monetary-relief claims of Illinois and Washington class members. The IPPs' settlements threaten recovery of monetary relief through (a) claim preclusion, (b) covenants not to sue, and (c) provisions that permit "no other recovery."

A. The IPPs are splitting the claims of Illinois and Washington class members, endangering their recovery of state-law monetary relief to claim preclusion.

The IPPs intend to settle the injunctive-relief claims of Illinois and Washington class members. But, because the IPPs lack authority, they are not pursuing monetary relief for these class members under their state antitrust laws. This claim-splitting—seeking some types of relief but not others—puts that state-law monetary relief at risk of claim preclusion. For these class members, the IPPs are inadequate representatives.

Under federal law,[16] "[f]or claim preclusion to apply, there must be (1) an identity of claims in the two actions; (2) a final judgment on the merits in the first action; and (3) identity or privity between the parties in the two actions."[17] This doctrine generally prohibits plaintiffs from claim-splitting—that is, reserving some legal theories or types of relief for a second lawsuit.[18] Plaintiffs may not pursue in a second lawsuit claims that could have been brought in the first lawsuit and

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[14] *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011).

[15] *Rodriguez*, 563 F.3d at 959.

[16] The IPPs sued under the Sherman Act, which gives this Court federal-question jurisdiction. For judgments from courts with federal-question jurisdiction, the claim-preclusion effect is determined by federal law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).

[17] *Frank v. United Airlines, Inc.*, 216 F.3d 845, 850 (9th Cir. 2000).

[18] *Haphey v. Linn County*, 924 F.2d 1512, 1517 (9th Cir. 1991), *rev'd en banc in part on other grounds*, 953 F.2d 549 (9th Cir. 1992); *In re Conseco Life Ins. Co. Lifetrend Ins. Sales & Mkt. Litig.*, 270 F.R.D. 521, 531 (N.D. Cal. 2010) (Illston, J.).

that are based on the same nucleus of facts.[19] All legal theories and remedies arising from the same facts generally must be brought in one action.[20]

In class actions, a court must protect absent class members from claim preclusion by preventing named plaintiffs from splitting claims. For example, in *Sanchez v. Wal-Mart Stores, Inc.*, the court refused to certify a class in a lawsuit alleging that a stroller was defectively made because the named plaintiff limited the class's claims to economic recovery, forgoing any personal-injury claims.[21] The court explained that "[t]his strategic claim-splitting decision creates a conflict between Plaintiff's interests and those of the putative class, and renders Plaintiff an inadequate class representative."[22] Further, this Court itself recognized that "'class certification should be denied on the basis that class representatives are inadequate when they opt to pursue certain claims on a class-wide basis while jeopardizing the class members' ability to subsequently pursue other claims.'"[23]

Claim-splitting is a particular hazard in class-action settlements. Judge Schwarzer advises courts to consider "[w]hether the settlement will have significant effects on potential claims of class members for injury or loss arising out of the same or related occurrences but excluded from

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[19] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077-78 (9th Cir. 2003)

[20] *Haphey*, 924 F.2d at 1517 (saying that a plaintiff is compelled to "pursue in one action all the theories and remedies which might be appropriate to a grievance").

[21] *Sanchez v. Wal-Mart Stores, Inc.*, No. Civ. 2:06-CV-02573-JAM-KJM, 2009 WL 1514435 (E.D. Cal. May 28, 2009).

[22] *Id.* at *3.

[23] *In re Conseco Life*, 270 F.R.D. at 531 (Illston, J.) (quoting *In re Universal Serv. Fund Tel. Billing Practices Litig.,* 219 F.R.D. 661, 668 (D. Kan. 2004)).

the settlement."[24] Likewise, the Manual for Complex Litigation advises judges who are reviewing class-action settlements to avoid "splitting claims of class members for injuries or losses arising out of the same or related occurrences and excluding some claims from the settlement."[25] Splitting claims, the manual says, is a feature of a class-action settlement "that, if uncorrected, should bar approval."[26]

Here, the IPPs have split the claims of Illinois and Washington class members, so their monetary-relief claims would be at risk of claim preclusion. The IPPs intend to settle the injunctive-relief claims of Illinois and Washington class members and are not pursuing any recovery of monetary relief for them. The Defendants, therefore, may argue that the elements of claim preclusion are satisfied for Illinois and Washington state-law monetary relief. First, the claims are sufficiently similar because they arise from the same nucleus of facts: the LCD price-fixing conspiracy. Although the monetary-relief claims are under state law, a plaintiff cannot avoid claim preclusion by using a new legal label or alleging a new legal theory.[27] Second, court-approved settlement agreements like the ones at issue are final judgments on the merits for claim-preclusion purposes.[28] Third, it is undisputed that the Illinois and Washington indirect purchasers in this case are the same purchasers for whom the Illinois and Washington Attorneys

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[24] William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Cornell L.R. 837, 844 (1995).

[25] Manual for Complex Litigation (Fourth) § 22.923 (2004).

[26] *Id.*

[27] *Tahoe-Sierra Preservation Council*, 322 F.3d at 1077-78; *Gonzales v. Cal. Dep't Corr.*, 782 F. Supp. 2d 834, 838-39 (N.D. Cal. 2011).

[28] *Rein v. Providian Fin. Corp.*, 270 F.3d 895, 903 (9th Cir. 2001); *accord Cell Therapeutics Inc. v. Lash Group Inc.*, No. 08-35619, 2010 WL 22686, at *8 (9th Cir. Jan. 6, 2010); *see also Arizona v. California*, 530 U.S. 392, 414 (2000) (recognizing that "consent judgments ordinarily support claim preclusion" (quoting 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4443, at 384-85 (1981))).

General are pursuing monetary-relief claims in other cases. Therefore, the Defendants likely will argue that the proposed settlements preclude state-law monetary-relief claims.

Further, the IPPs have agreed to settlement terms that would buttress the Defendants' arguments for claim preclusion. First, the settlements themselves say that they are intended to have preclusive effects. Consider, for example, the Chimei Settlement. Paragraph 24(f) says, "Nothing herein is intended to limit or narrow the preclusive effect of the dismissal with prejudice of the Actions against Chimei."[29] Further, paragraph 38 says:

> This Agreement shall be construed and interpreted to effectuate the intent of the parties, which is to provide, through this Agreement, for a complete resolution of the relevant claims with respect to each Chimei Releasee as provided in this Agreement.[30]

The use of "relevant claims"—rather than "Released Claims"—creates the wiggle room that Defendants need to argue that the parties intended to preclude these state-law monetary-relief claims. Further still, in paragraph 18(g), the parties agree to seek an order "enjoining [class members] from . . . maintaining any Released Claim . . . against [Chimei] *or any other claim precluded by the dismissal of the Actions* against Chimei with prejudice."[31] The IPPs' settlements appear designed to preserve for the Defendants a claim-preclusion argument that the Illinois and Washington class members may not recover state-law monetary relief.

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[29] Chimei Settlement ¶ 24(f), ECF 4424-2; *accord* Epson Settlement ¶ 12(f), ECF 4424-4; HannStar Settlement ¶ 25(f), ECF 4424-5; Hitachi Settlement ¶ 25(f), ECF 4424-6; Samsung Settlement ¶ 12(f), ECF 4424-7; Sharp Settlement ¶ 21(f), ECF 4424-8.

[30] Chimei Settlement ¶ 38, ECF 4424-2; *accord* HannStar Settlement ¶ 39, ECF 4424-5; Hitachi Settlement ¶ 39, ECF 4424-6; Sharp Settlement ¶ 34, ECF 4424-8; *see also* Epson Settlement ¶ 27, ECF 4424-4 (using "Settling Plaintiffs' claims" instead of "relevant claims"); Samsung Settlement ¶ 26, ECF 4424-7 (same).

[31] Chimei Settlement ¶ 18(g) (emphasis added), ECF 4424-2; *accord* HannStar Settlement ¶ 19(h), ECF 4424-5; Hitachi Settlement ¶ 19(g), ECF 4424-6; Sharp Settlement ¶ 15(g), ECF 4424-8.

At first blush, two provisions in the settlements may mislead a reader to think that they preserve Illinois and Washington state-law monetary-relief claims. Although the settlements say that "the IPP Nationwide Injunctive Class Released Claims do not include any claims for monetary relief,"[32] that statement refers only to "Released Claims"; it does nothing to alleviate the preclusive effect of a final judgment. Similarly, although the settlements say that "nothing in this Agreement shall release any enforcement, proprietary or injunctive claims against [the Defendants] of any state which is not a Settling State"[33] this provision omits—and therefore does not preserve—the States' *parens patriae* claims to recover monetary relief for their indirect purchasers. Although claim preclusion might not apply if Defendants so stipulate,[34] nothing in the proposed settlements suggest the Defendants have done so.

Short of excluding Illinois and Washington indirect purchasers from the class, there is nothing this Court can do to assure that another court does not bar their monetary-relief claims under claim preclusion. "After all," the Supreme Court recently said,

> a court does not usually "get to dictate to other courts the preclusion consequences of its own judgment." 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §4405, p. 82 (2d ed. 2002) (hereinafter Wright & Miller). Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court . . . .[35]

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[32] Chimei Settlement ¶ 24(c), ECF 4424-2; Epson Settlement ¶ 12(c), ECF 4424-4; HannStar Settlement ¶25(c), ECF 4424-5; Hitachi Settlement ¶ 25(c), ECF 4424-6; Samsung Settlement ¶ 12(c), ECF 4424-7; Sharp Settlement ¶ 21(c), ECF 4424-8.

[33] Chimei Settlement ¶ 24(g), ECF 4424-2; Epson Settlement ¶ 12(g), ECF 4424-4; HannStar Settlement ¶25(g), ECF 4424-5; Hitachi Settlement ¶ 25(g), ECF 4424-6; Samsung Settlement ¶ 12(g), ECF 4424-7; Sharp Settlement ¶ 21(g), ECF 4424-8.

[34] *See* Restatement (Second) of Judgments § 26(1)(a) (1982) (recognizing that claim preclusion does not apply if "[t]he parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein").

[35] *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375 (2011).

The mere risk of claim preclusion creates a due-process problem—a problem that must be resolved by the first court.

The IPPs caused the due-process problem by claim-splitting and then acquiescing to claim-preclusion language in the proposed settlements. For Illinois and Washington class members, the IPPs have provided inadequate representation.

B. In the proposed settlements, the IPPs agree to covenants not to sue that further jeopardize Illinois and Washington class members' recovery of state-law monetary relief.

The IPPs have agreed to covenants not to sue that give the Defendants a second argument that Illinois and Washington class members may not recover state-law monetary relief in other lawsuits. For example, the covenant not to sue in the Chimei Settlement says:

> The members of the IPP Nationwide Injunctive Class shall not, after the date of this Agreement, seek to establish liability for injunctive relief against Chimei Releasees based, in whole or in part, upon any of the IPP Nationwide Injunctive Class Released Claims or any conduct at issue in the IPP Nationwide Injunctive Class Released Claims.[36]

Although this provision could be interpreted as class members promising not to sue for injunctive relief, the parties could have drafted it to say that—that they shall not seek injunctive relief. But the settlements instead prohibit class members from "establish[ing] liability for injunctive relief." Therefore, a second interpretation is that class members may not try to establish the liability that would be necessary for injunctive relief. Under this second interpretation, the class members would be prohibited from proving the LCD conspiracy, which they may need to do to recover state-law monetary relief. There is also a third possible interpretation: Arguably, the covenant not to sue reaches not just injunctive relief but also "any

[36] Chimei Settlement ¶ 21(b), ECF 4424-2; *accord* Epson Settlement ¶ 9(b), ECF 4424-4; HannStar Settlement ¶ 22(b), ECF 4424-5; Hitachi Settlement ¶ 22(b), ECF 4424-6; Samsung Settlement ¶ 9(b), ECF 4424-7; Sharp Settlement ¶ 18(a), ECF 4424-8.

conduct at issue." The provision could be interpreted to mean that the class members may not "seek to establish liability for . . . any conduct at issue in the IPP Nationwide Injunctive Class Released Claims." Broad covenants not to sue, as this Court recognized elsewhere, are enforceable—even when the defendant's counsel says that such breadth was unintended.[37] In this case, the settlements' covenants not to sue, particularly because of their broad language, put at risk any state-law recovery of monetary relief by Illinois and Washington class members.

C. In the Epson and Samsung settlements, the IPPs have agreed to "no other recovery" provisions that jeopardize Illinois and Washington class members' recovery of state-law monetary relief.

The Epson and Samsung Settlements say that the Releasors, who include Illinois and Washington class members,[38] "shall have no other recovery of . . . damages, or other relief against [Epson or Samsung]."[39] Presumably, those provisions would bar Illinois and Washington class members from recovering state-law monetary relief claims in other lawsuits. The IPPs, by agreeing to these provisions, are further providing inadequate representation.

II. The IPPs—despite their lack of authority—are representing and releasing the state-law injunctive-relief claims of Illinois and Washington indirect purchasers.

The IPPs intend to release all injunctive-relief claims of Illinois and Washington class members under state law—even though they have no authority to do so. Further, the IPPs are

[37] *See Skilstaf, Inc. v. CVS Caremark Corp.*, No. C 09-02514 SI, 2010 WL 199717, at *3 (N.D. Cal. Jan. 13, 2010) (enforcing a court-approved covenant not to sue tweaked to prevent lawsuits not only against releasees but also any third parties).

[38] Epson Settlement §§ I.v and I.o, ECF 4424-4; Samsung Settlement §§ I.v and I.o, ECF 4424-7.

[39] Epson Settlement ¶ 16, ECF 4424-4; Samsung Settlement ¶ 15, ECF 4424-7. The other Defendants were not so bold. Although their settlements have a similar provision, that provision is qualified by the phrase "except as set forth in this Agreement," which thereby incorporates limitations on releases elsewhere.

asking this Court to thereafter enjoin the Illinois and Washington Attorneys General from pursuing injunctive relief under state law for their indirect purchasers—even though state law gives them that authority.

First, the releases in the settlements are not limited to injunctive relief under the Sherman Act. They also include all state-law injunctive claims. Members of the IPP Nationwide Injunctive Class would

> completely release[], acquit[], and forever discharge[] [the settling defendants] from any and all claims, demands, judgments, actions, suits and causes of action for injunctive relief, whether class, individual or otherwise . . . that [class members], or each of them, ever had, now has, or hereafter can, shall, or may have on account of, arising out of, or relating to any act or omission of the [settling defendants] concerning price fixing, agreed output restrictions, or other forms of anticompetitive behavior with regard to TFT-LCD Panels during the period from January 1, 1999 through October 31, 2011 . . . .[40]

To make clear that the release includes all injunctive-relief claims, including those under state antitrust law, the settlements say:

> For the avoidance of doubt, the types of claims released . . . are released regardless of the type of cause of action, common law principle, or statute under which they are asserted, . . . [which includes claims under] state . . . antitrust . . . law or regulation of any jurisdiction within the United States.[41]

The IPPs' settlements, therefore, would also release all state-law injunctive-relief claims, including any that Illinois and Washington class members have.

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[40] Chimei Settlement ¶ 21(b), ECF 4424-2; Epson Settlement ¶ 9(b), ECF 4424-4; HannStar Settlement ¶ 22(b), ECF 4424-5; Hitachi Settlement ¶ 22(b), ECF 4424-6; Samsung Settlement ¶ 9(b), ECF4424-7; Sharp Settlement ¶ 18(a), ECF 4424-8.

[41] Chimei Settlement ¶ 22, ECF 4424-2; Epson Settlement ¶ 10, ECF 4424-4; HannStar Settlement ¶ 23, ECF 4424-5; Hitachi Settlement ¶ 23, ECF 4424-6; Samsung Settlement ¶ 10, ECF4424-7; Sharp Settlement ¶ 20, ECF 4424-8.

But the IPPs have no authority to represent or release those state-law claims. As explained in the States' previous filings,[42] neither Due Process nor Rule 23 is satisfied when a named plaintiff settles and releases the claims of absent parties whom the named plaintiff has no authority to represent.[43] The IPPs lack authority to represent Illinois or Washington indirect purchasers under their state antitrust laws since those laws grant that authority exclusively to each State's Attorney General. This Court has already said as much in the context of damages by denying the IPPs leave to add to their complaint a state-law damages class for Illinois indirect purchasers.[44] Illinois and Washington antitrust law treat injunctive relief no differently than monetary relief. Because the IPPs lack authority to release those state-law claims, they are by definition inadequate representatives, and the proposed settlements violate Due Process.[45]

Further, the IPPs ask this Court to enjoin the Illinois and Washington Attorneys General from pursing injunctive relief under state law for their indirect purchasers. The proposed order would enjoin each class member, "and any person purporting to act on their behalf, [from] commencing or prosecuting, either directly or indirectly, any action in any other court asserting any of the Released Claims," which include state-law injunctive relief. Arguably, the IPPs' proposed order would enjoin, for example, the Washington Attorney General from pursuing his current lawsuit against the Defendants because Washington seeks injunctive relief under its

[42] *See* State of Illinois' Objection to Special Master's Report and Recommendation 5-8, Sept. 6, 2011, ECF 3445; Opp'n of States of Washington and Illinois to IPPs' Mot. for Prelim. Approval of Class Settlement with Defendant Epson Imaging Devices 4-8, July 9, 2010, ECF 1848; States of Illinois and Washington's Motion to Modify the IPPs' Class for Injunctive Relief at 8-9, Nov. 4, 2011, ECF 4092.

[43] *See Dunlop v. Pan Am. World Airways, Inc.*, 672 F.2d 1044, 1051 (2d Cir. 1982); *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 18 (2d Cir. 1981).

[44] Order re IPPs' Mot. to File a 3d Am. Consol. Compl. at 2, Apr. 12, 2011, ECF No. 2641.

[45] *See Hesse v. Sprint Corp.*, 598 F.3d 581, 588-89 (9th Cir. 2010) (citing *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985)).

antitrust laws on behalf of Washington indirect purchasers. The Washington Attorney General should not be enjoined from seeking injunctive relief under Washington law since only he may do so.

The IPPs lack the authority to represent or release any state-law injunctive claims under Illinois or Washington antitrust law. And this Court should not enjoin the only parties who do—the Attorneys General.

III. The IPPs are releasing Epson from the injunctive-relief claims of Illinois and Washington class members without anything in return.

The IPPs' settlement with Epson gives Epson a broad release from Illinois and Washington class members with nothing in return. Paragraph 16 of the Epson Settlement says that "Releasors"—which include Illinois and Washington class members—get nothing except the proceeds in the Settlement Fund.

> Releasors shall look solely to the Settlement Fund for settlement and satisfaction against the EID Releasees of all Released Claims, and shall have no other recovery of costs, fees, attorney's fees, damages, or other relief against EID or the EID Releasees . . . .[46]

But Illinois and Washington indirect purchasers, as class members only of the IPP Nationwide Injunctive Class, are not part of the damages classes and would not share in the Settlement Fund. For Illinois and Washington class members, the Epson Settlement has no consideration.

In their motion, the IPPs point to a certification Epson must make and to a cooperation provision.[47] Neither has any value. Epson promises to certify that it is no longer making TFT-LCD panels,[48] but that provides no benefit to the injunctive class. Similarly, Epson does not

[46] Epson Settlement ¶ 16, ECF 4424-4.

[47] IPPs' Mot. for Preliminary Approval of Settlements at 9, Dec. 23, 2011, ECF 4424.

[48] Epson Settlement ¶ 30, ECF 4424-4.

actually promise to cooperate. Instead, Epson agrees to "meet and confer" with the Plaintiffs' counsel about cooperation and only then if the cooperation "does not adversely affect [Epson's] position as a defendant in such related cases."[49] Agreeing to talk with counsel—and in limited circumstances at that—does not provide anything of value to Illinois and Washington class members.

By agreeing to forgo any consideration in the Epson Settlement for Illinois and Washington class members, the IPPs are inadequate representatives.

IV. The IPPs are proposing to give Illinois and Washington class members notice that is inadequate for the settlements or trial.

Compounding these due-process problems about inadequate representation is that the IPPs' proposed notice is likewise inadequate. Due Process requires that class members are given notice about the action, their rights, and any opportunity to participate.[50] Importantly, the notice must be clear and accurate.[51] Here, the proposed notice is neither. It relies on a faulty class definition; misstates the rights of Illinois and Washington class members about future lawsuits; and misleads them to think they might recover monetary relief in this lawsuit.

As explained in the States' motion to modify the class definition,[52] to comport with Due Process, the class definition should exclude Illinois and Washington indirect purchasers. The

[49] Epson Settlement ¶ 32. ECF 4424-4.

[50] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

[51] *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009) ("Settlement notices are supposed to present information about a proposed settlement neutrally, simply, and understandably . . . .").

[52] States of Illinois and Washington's Motion to Modify the IPPs' Class for Injunctive Relief at 5-7, ECF 4092.

Supreme Court held in *Wal-Mart Stores, Inc. v. Dukes*[53] that plaintiffs with rights to recover monetary relief may not be made part of a Rule 23(b)(2) class.[54] The Supreme Court explained that those plaintiffs "might be collaterally estopped from independently seeking [the] compensatory damages" they are entitled to.[55] In fact, the risk of collateral estoppel is very real in this case: In the Illinois Attorney General's *parens patriae* lawsuit, the court stayed the action because "certain rulings [by this Court] may have a collateral estoppel effect."[56] That risk of collateral estoppel against the unrepresented monetary-relief claims of Illinois and Washington indirect purchasers is exactly why under *Dukes* those class members may not be in the Rule 23(b)(2) injunctive class. The current class definition is defective. Since the proposed notice relies on that definition, the notice itself is also defective.

Second, the proposed notices are inaccurate. Both the long-form and short-form notices say that if a person resides outside of the 24 States and the District of Columbia, for which there are damages classes, the person "will retain any right [he or she] may have to sue the Defendants for monetary relief."[57] That might be untrue. The Defendants have negotiated language in their settlements that arguably foreclose under claim preclusion state-law monetary-relief claims for Illinois and Washington class members. But the notice does not warn class members that.

Third, the proposed long-form notice is misleading by suggesting that all class members will receive monetary compensation. The notice says: "It is anticipated that a minimum payment will

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[53] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

[54] *Id.* at 2559.

[55] *Id.*

[56] *Illinois v. AU Optronics Corp.*, No 10 CH 34472, slip op. at 5 (Ill. Cir. Ct. Nov. 29, 2011) (attached as Harrop Decl. Ex. 1).

[57] Long-Form Notice at 6, Dec. 23, 2011, ECF 4424-10 at 113; Short-Form Notice at 1, Dec. 23, 2011, ECF 4424-10 at 118.

be made to all Class Members who submit a valid claim."[58] The Settlement Fund, however, is reserved only for those Class Members who are in the "Statewide Damages Classes." Class Members who are only in the "Nationwide Class" will not be able to make a valid claim and will not be eligible for any payment. As the IPPs explained, they "will seek to disburse all available proceeds to members of the statewide monetary relief classes . . . ."[59]

The due-process problems embedded in the class definition already have infected the IPPs' settlements—though the IPPs knew about them and could have avoided them. The problem has spread to the proposed notices. And if not corrected, the problem will taint any future settlements and even trial.

Conclusion

Every settlement the IPPs propose is a due-process-violation minefield. The IPPs have failed to adequately represent the interests of Illinois and Washington class members. The IPPs have imperiled their recovery of monetary relief, have settled their state injunctive claims despite lacking the requisite authority, and have released claims without compensation. That type of representation is inadequate. Even in *Sullivan v. DB Investments, Inc.*, which the IPPs cite as approving a nationwide class settlement, the court recognized that a settlement must comply with the requirement of adequate representation. [60] Although, as the dissent hypothesized, adequacy of representation might have been a problem because of differences in state laws, the "the parties

[58] Long-Form Notice at 6, ECF 4424-10 at 113.

[59] IPPs' Mot. for Preliminary Approval of Settlements 15, Dec. 23, 2011, ECF 4424; *accord* Notice Pursuant to 28 U.S.C. § 1715 of Proposed Class Action Settlement with IPPs and Settling States at 8, Dec. 30, 2011, ECF 4464-1 (saying that "indirect purchaser end-user consumers . . . will not receive a monetary share of the Proposed Settlement").

[60] *Sullivan v. DB Invs., Inc.*, No. 08-2784, 2011 WL 6367740, at *10 (3d Cir. Dec. 20, 2011).

[did] not particularly press the issue in their briefs."[61] But here the inadequate-representation problem is before the Court, and the IPPs intend to exacerbate it with inadequate notice.

But this conundrum can be solved—by narrowing the injunctive class definition to exclude Illinois and Washington indirect purchasers. When a class definition is overly broad, absent class members receive inadequate representation. Whether it is caused by claim-splitting or otherwise, a court must decertify the class or modify its definition.[62] The Manual on Complex Litigation anticipates this problem and the States' proposed solution:

> Review of the terms of the settlement or objections might reveal a need to redefine the class or to create subclasses based on the revelation of conflicts among class members.[63]

For example, in *CRTs*, after a special master sustained the same objections the States make here,[64] the court approved the settlement with a new class definition that explicitly excluded Illinois and Washington indirect purchasers.[65] Here, before approving any of the IPP's proposed settlements, this Court should likewise modify the IPPs' injunctive class definition by adding to the exclusion clause the following eight words: "any citizens of the States of Illinois or Washington."

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[61] *Id.* at *47 n.4.

[62] *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) (decertifying a class in part because of inadequate representation where the named parties sought approval of a settlement favoring class members with current asbestos-related injuries over those with future injuries).

[63] Manual for Complex Litigation (Fourth) § 21.62 (2004).

[64] *In re Cathode Ray Tube (CRT) Antirust Litig.*, No. 07-5944 SC, slip op. at 2-4 (N.D. Cal. July 25, 2011), ECF 970 (Report & Recommendation Regarding Proposed Settlement with Chunghwa) (sustaining Illinois and Washington's objection to named plaintiffs settling their residents' state-law monetary-relief claims and recommending they be carved out of the settlement) (attached as Harrop Decl. Ex. 2).

[65] *In re Cathode Ray Tube (CRT) Antirust Litig.*, No. 07-5944 SC, slip op. at 1 (N.D. Cal. Aug. 10, 2011), ECF 993 (granting preliminary approval of class action settlement with Defendant Chunghwa Picture Tubes, Ltd.) (attached as Harrop Decl. Ex. 3).

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Respectfully submitted,

The State of Illinois,
by Lisa Madigan,
Attorney General of Illinois

By: /s/ Blake L. Harrop

Blake L. Harrop
Senior Assistant Attorney General
Antitrust Bureau
Office of the Illinois Attorney General
100 W. Randolph Street
Chicago, Illinois 60601
(312) 814-1004

The State of Washington,
by Robert M. McKenna,
Attorney General of Washington

By: /s/ Brady R. Johnson

Brady R. Johnson
Senior Counsel
Jonathan A. Mark,
Assistant Attorney General
Antitrust Division
Office of the Washington Attorney General
800 Fifth Avenue, Ste. 2000
Seattle, WA 98104
(206) 389-2848