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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE CAPACITORS ANTITRUST LITIGATION, THIS DOCUMENT RELATES TO: ALL DIRECT PURCHASER ACTIONS	Master File No. 3:17-md-02801-JD Case No. 3:14-cv-03264-JD **CISCO AND APTIV'S MOTION FOR AN ORDER APPROVING THEIR SECOND-ROUND SETTLEMENT CLAIMS** Hon. James Donato Date: March 21, 2019 Time: 10:00 a.m. Location: 450 Golden Gate Avenue Courtroom 11, 19th Floor San Francisco, California 94102

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on March 21, 2019, at 10:00 a.m. or as soon thereafter as this matter may be heard before the Honorable James Donato in Courtroom 11 on the 19th floor at 450 Golden Gate Avenue, San Francisco, California 94102, class members Cisco Systems, Inc. ("Cisco") and Aptiv Services US, LLC fka Delphi Automotive LLP ("Aptiv") (collectively, "Objecting Members") will and hereby do move this Court for an order approving their second-round settlement claims in the above-referenced action.

After over a month of conferring on various issues, which originally induced Objecting Members not to file the instant Motion, this Motion provides Objecting Members' positions on (i) the scope of second-round settlement releases; and (ii) whether those releases include foreign capacitor purchases incorporated into finished products sold in the United States. Objecting Members respectfully request an order directing that their second-round claims be approved. Cisco also requests an order directing that it be paid for assigned claims, since it "stands in the shoes" of the assignors that no longer have standing.

This Motion is based on this Notice, the accompanying Memorandum of Points and Authorities, the concurrently filed Declaration of Daniel A. Sasse, all files and records in this action, and any such further briefing, evidence, and argument as the Court may consider prior to or at the hearing on the Motion.

Dated: February 8, 2019

Respectfully submitted,
CROWELL & MORING LLP

/s/ Daniel A. Sasse
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Settlement class members Cisco Systems, Inc. ("Cisco") and Aptiv Services US, LLC fka Delphi Automotive LLP's ("Aptiv") (collectively, "Objecting Members") continue to object to Direct-Purchaser Plaintiffs' ("DPPs") motion seeking approval of second-round settlement distributions. Objecting Members respectfully request an order directing that their second-round claims, including supplemental commerce for Incorporated Capacitors,[1] be approved. Cisco also requests an order directing that it be paid for assigned claims, since it "stands in the shoes" of the assignors that no longer have standing. *Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Serv. Co.*, 191 Cal. App. 4th 1394, 1402 (2011).

During the December 13, 2018 hearing, the Court asked the parties to clarify their disputes and positions on the scope of the second-round Hitachi and Soshin settlement releases.[2] The Hitachi and Soshin settlements broadly release all claims that were or could have been asserted in the action—including all claims arising under the Sherman Act. In this action, such claims include Incorporated Capacitors because DPPs disputed what constitutes "import trade or commerce" under the Sherman Act and what "scope of nonimport trade or commerce [] satisfies the [FTAIA's] domestic effects exception." (Dkt. No. 1302 at 4:46–5:2.)[3]

The exception in the settlements for "claims based on purchases of Capacitors *excluded by the Foreign Trade Antitrust Improvement Act*" ("FTAIA") does not apply to Incorporated Capacitors. (Dkt. Nos. 1989-2 ¶ 12, 1989-3 ¶ 14 (emphasis added)). First, Incorporated

[1] Incorporated Capacitors are foreign capacitor purchases that are incorporated into finished products sold in the United States.

[2] *See* Transcript of Proceedings at 20:4–12, *In re Capacitors Antitrust Litigation*, MDL No. 17-md-02801 (Dec. 13, 2018). After over a month of conferring on issues and joint briefing, which originally induced Objecting Members not to file the instant Motion in time for a hearing on February 28, 2019, Class Counsel tried to impose last-minute unwarranted limitations on a possible joint brief. (Declaration of Daniel A. Sasse ("Sasse Decl.") Ex. A at 5, Ex. B at 2–3.) These tactics are consistent with the gamesmanship from Class Counsel on all issues related to this dispute, including last-minute changes in position that required Objecting Members to previously brief and file an opposition to the second-round distribution motion over the Thanksgiving holiday with only 24 hours' notice. (*See* MDL Dkt. No. 391 at 2–4.)

[3] All docket references are to Case No. 14-03264, unless the MDL docket is specified.

Capacitors are likely to be considered import commerce under the Sherman Act, and thus the FTAIA would not apply. (*See* MDL Dkt. No. 329 at 7:9-9:17.) Second, if the FTAIA permits claims for Incorporated Capacitors, then such claims are not *excluded* by the FTAIA. The Ninth Circuit held that claims for foreign sales of products "that were incorporated into finished consumer products ultimately sold in the United States" can trigger the FTAIA's domestic effects exception. *United States v. Hsiung*, 778 F.3d 738, 758 (9th Cir. 2015). Because Incorporated Capacitors can trigger the FTAIA's domestic effects exception, they are not excluded by the FTAIA and, thus, are released by the settlements.

Objecting Members should be permitted to recover for Incorporated Capacitors that are released by the settlements, and they request an order approving their second-round claims: $191,759,460.10 for Cisco and $198,910,686.94 for Aptiv. (*See infra* Section III.C.) Alternatively, if the Court holds that Defendants' settlements do not release Incorporated Capacitors, Objecting Members request an order clarifying this point and that the opt-out and related deadlines never applied to this type of commerce, with Objecting Members' full pro-rata shares being held in trust pending all appeals.

II. RELEVANT FACTS

A. Objecting Members conferred in good faith with Class Counsel.

After the December 13 hearing, Objecting Members timely produced documents on December 21 as ordered by the Court and, over the next month, tried to meet and confer with Class Counsel to try to narrow the matters at issue. (Sasse Decl. Ex. C.) The parties also exchanged multiple letters on their anticipated positions for the Court's requested briefing. (*Id.* Exs. D–F.)

Objecting Members indicated that they intended to file a regularly noticed motion for a February 28 hearing date (*id.* Ex. E at 2), but Class Counsel objected to that proposal, pushing for joint briefing with a hearing on February 7 or 21. (*Id.* Ex. F at 2.) On January 11, Objecting Members stated they were "amenable to a February 21 hearing if [the parties] can agree on" a specific briefing proposal with the parties working together to attempt to submit joint briefs, if possible. (Sasse Decl. Ex. G at 8–9.) On January 15, Class Counsel responded that they "agree

to ask for a [February] 21, 2019 hearing" and that they were "drafting a proposed joint submission with a[n] agreed upon statement of facts and separate sections for [the parties'] arguments. We hope to send that to you shortly." (*Id.* Ex. A at 11–12.)

On January 23, after no further response from Class Counsel, Objecting Members clarified that they were amenable to "a single joint submission [if the parties] agre[ed] to exchange their respective sections in a manner that allows sufficient time to prepare counter-positions, and there is appropriate space to do so." (*Id.* at 10–11.) Objecting Members subsequently provided detailed responses to a number of questions posed by Class Counsel over the next week (*id.* at 3–10), despite Class Counsel's apparent refusal to indicate whether global purchase data existed (*id.*Ex. F at 2), refusal to provide the corresponding purchase volume for the percentages of claims assigned to Cisco (*id.* Ex. A at 7), and prior refusal to provide defendants' underlying data to analyze a purported duplication issue raised by Class Counsel for Aptiv's data (MDL Dkt. No. 327 at 7:14–21).

Then, for the first time on January 31—one week before the proposed joint filing date for a February 21 hearing with no joint submission having been proposed as promised—Class Counsel first indicated they sought to limit the parties to five pages each to address the myriad issues in dispute. (Sasse Decl. Ex. A at 5.) Ultimately, Objecting Members determined it was necessary to proceed with their intended Motion for the first hearing date available in their schedules to ensure their rights and full arguments were adequately protected.[4]

B. The parties reached certain agreements.

The parties' discussions over the last month led to certain agreements, which Class Counsel cannot now walk away from. Class Counsel agreed "that the data included in the spreadsheets that [Objecting Members] submitted are accurate" for their second-round claims. (Sasse Decl. Ex. F at 2 ¶ A.) The parties agreed that Cisco's increased claim is based only on data for Incorporated Capacitors. (*Id.* Ex. A at 3–5 ¶¶ 2.a.) After Aptiv changed its claim calculation to more closely align with Class Counsel's position, and despite Class Counsel's prior

[4] Objecting Members are mindful of the upcoming April 15, 2019 opt-out deadline.

agreement the data was accurate, Class Counsel later disputed only Aptiv's Nippon Chemi-Con ("NCC") data—claiming it should be excluded as duplicative of United Chemi-Con ("UCC") data despite the fact Aptiv's data distinguishes NCC purchases from its subsidiary, UCC. (*Id.* at 3 ¶ 2.b.; *but see* MDL Dkt. No. 391 at 7:20–25.) However, despite requests, Class Counsel did not specifically indicate the claim values to which they would agree for Objecting Members depending on the Court's rulings.

III. ARGUMENT

A. The Hitachi and Soshin settlements broadly release all United States purchases premised on any legal theory.

The approval order for the Hitachi and Soshin settlements defines the Settlement Class as "[a]ll persons in the United States that purchased Capacitors . . . from any of the Defendants . . . from January 1, 2002 through July 22, 2015," and this matches the definitions found in the respective settlements. (MDL Dkt. No. 249 ¶ 4; Dkt. Nos. 1989-2 ¶ bb, 1989-3 ¶ z.) These settlements release the same claims:

> [A]ny and all manner of claims . . . that [Settlement Class members], or any one of them, whether directly, representatively, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall or may have against [Defendants], whether known or unknown, relating in any way to any conduct by [Defendants] alleged in the in the Action . . . whether such claims are known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, . . . regardless of legal theory . . . , or claims that have been, could have been, or in the future might have in law or equity . . . arising out of, resulting from, or in any way related to any conduct regardless of where it occurred at any time prior to the Effective Date, concerning the purchase, pricing, selling, discounting, marketing, manufacturing, and/or distributing Capacitors in the United States and its territories or for delivery in the United States and its territories. **The Released Claims also include**, but are not limited to, **all claims asserted or which could have been asserted in the Action relating to or arising out of the facts . . . alleged in this Action including**, but not limited to, **claims arising under** federal or state antitrust, unfair competition, unfair practices, price discrimination, unitary pricing, trade practice, or civil conspiracy law, including without limitation **the Sherman Act, 15 U.S.C. § 1 *et seq.*, but excluding . . . (c) claims based on purchases of Capacitors excluded by the Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a**.

(Dkt. Nos. 1989-2 ¶ 12, 1989-3 ¶ 14 (emphasis added).) These releases in the second-round settlements are either identical to or substantively the same as releases in the first-round

settlements[5] and round-three settlements[6] (the "Settlements"). Notably, the Okaya settlement omits the FTAIA exception, so at least one settlement does not have the provision Class Counsel advocates for excluding Incorporated Capacitors from the scope of the releases. (Dkt. No. 1298-9 ¶ 12.)

In this action, Direct-Purchaser Plaintiffs ("DPPs"), like direct-action plaintiff Flextronics International USA, Inc. ("Flextronics"), made a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1. (Dtk. Nos. 799-4 ¶¶ 433–443, 1302 at 4:5–8.) DPPs have previously disputed what constitutes "'import trade or commerce,' and the scope of nonimport trade or commerce that satisfies the domestic effects exception." (Dkt. No. 1302 at 4:26–5:2) This puts at issue the Incorporated Capacitors that Objecting Members now seek to recover through these Settlements, since they fall within both categories. Specifically, DPPs argued that capacitors billed and shipped to a foreign entity meet the FTAIA's domestic effects exception, and Flextronics argued that Incorporated Capacitors meet that exception and are also import commerce. (Id. at 8–12.) Class Counsel disagreed with the Court's first FTAIA order regarding these foreign transactions and reserved the right to appeal the issue. (Dkt. No. 1421 at 1–2.)

Thus, the Settlements release Incorporated Capacitors because parties in this action actually asserted claims and issues related to this type of commerce. Class Counsel cannot prevent Objecting Members from recovering that portion of their claims that will be released by the settlements Class Counsel negotiated. Further, as a fiduciary to Objecting Members, Class Counsel have an obligation to ensure and fight for the inclusion of these claims—though they have thus far declined to do so.[7] Thus, based on the Court's orders and Class Counsel's own

[5] *See* Dkt. Nos. 1298-9 ¶ 12 (Okaya), 1298-3 ¶ 12 (NEC Tokin), 1298-8 ¶ 12 (Nitsuko), 1298-10 ¶ 12 (ROHM), and 1298-2 ¶ 9 (Fujitsu).

[6] *See* MDL Dkt. No. 414-1 at 23 ¶ 15 (Rubycon) and 57 ¶ 13 (Nichicon).

[7] Objecting Members submit that an intra-class conflict exists regarding Incorporated Capacitors. Recently, in *In re Cathode Ray Tube (CRT) Antitrust Litigation*, the district court concluded it "erred in approving [a] provision that required class members . . . to release their claims without compensation" and that it had "concerns about the adequacy of the counsel who negotiated that settlement or whether they may have faced a conflict of interest. Lead Counsel had an obligation to vigorously represent class members" despite lead counsel's belief the "claims were worthless." (Order Denying IPPs' Mot. Pursuant to Fed. R. Civ. Proc. 62.1 at 1, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 3:07-cv-05944-JST ("CRT") (N.D. (Continued...)

arguments, Objecting Members properly seek to recover Incorporated Capacitors in their claims.

B. The Court's orders indicate that United States purchases may include Incorporated Capacitors for which Objecting Members should be appropriately compensated.

The Court's first order on the FTAIA explicitly did not bar foreign or Incorporated Capacitors, and the second order found there was sufficient evidence that Flextronics[8] could include Incorporated Capacitors as part of its lawsuit. Thus, Objecting Members properly seek compensation for their Incorporated Capacitors, which are within the Settlements' releases because they may be import commerce under the Sherman Act and may also fall within the FTAIA's domestic effects exception.

The Court and parties recognized early that the FTAIA would have a "pivotal" impact on all plaintiffs' claims in this action, since its limitations "go to the merits of a Sherman Act claim." (Dkt No. 1302 at 1:26–27, 4:15–16.) The Court, defense counsel, and Class Counsel shared the goal of resolving disagreements early for efficiency and to "spur settlement talks." (*Id.* at 3:2–4.) So the Court and parties agreed on a two-phase resolution of their disputes: the Court's order on the first phase resolves legal determinations, and the order on the second phase applies those legal determinations to the facts at issue. (*Id.* at 3:8–18.)

The Court's First FTAIA Order held that DPPs' claims for foreign capacitors were "not barred as a matter of law"—only that a global pricing theory was insufficient. (*Id.* at 11:1–5.) The Court noted that DPPs were "certainly free to proffer facts in Phase II showing that they can"

Cal. Nov. 8, 2018) (No. 5362).) Class Counsel in the instant matter now seek to be appointed as separate counsel in *CRT*, arguing "[w]here there are actual or potential intra-class conflicts . . . structural protections should be put in place, such as sub-classing and appointing separate counsel. *Amchem Prods. v. Windsor*, 521 U.S. 591, 627 (1997)." (Not. of Mot. and Mot. to Intervene at 1–2, *CRT* (N.D. Cal. Jan. 11, 2019) (No. 5368).)

The instant dispute demonstrates an intra-class conflict like *CRT* because Class Counsel inadequately represents Objecting Members and similarly situated class members. For example, during the recent meet and confer efforts, Objecting Members asked Class Counsel whether their data is limited to sales that were "billed to" or "shipped to" the US. (Sasse Decl. Ex. E at 2 ¶ B.) Class Counsel deemed the inquiry "irrelevant" and would not disclose whether they had global data that could be used to supplement Objecting Members' claims (*id.* Ex. F at 2 ¶ B)—an indication that actual conflicts exist that prevent Class Counsel from adequately representing Objecting Members' interests.

[8] Flextronics is one of a small number of contract manufacturers that ordered capacitors at Cisco's direction for incorporation into Cisco products.

establish actionable facts. (*Id.*) The court further held that "the ultimate legal disposition of [Incorporated Capacitors] will depend on the facts, which are far from undisputed here. The Court leaves this category for further development and resolution in Phase II or later stages of the case." (*Id.*)

The Court's Second FTAIA Order "applies to all constituent cases," "answers an additional question about the territorial reach of the state law claims . . . , and applies the Court's FTAIA rulings to several categories of transactions[, including] . . . overseas affiliates." (MDL Dkt. No. 329 at 1:15-18, 22.) It concludes that Incorporated Capacitors "may be subject to the Sherman Act as 'import trade or commerce' . . . [and] might also come within the FTAIA's domestic effects exception." (*Id*. at 7:9-9:17.)

These orders comport with the Ninth Circuit's analysis in *United States v. Hsiung*, 778 F.3d 738, 748–58 (9th Cir. 2015), and that of five district courts within the Circuit.[9] Together, they indicate that foreign and Incorporated Capacitors were asserted in the action, remain in the action, and fall within the Settlements' releases because they may be either import commerce or may fall within the FTAIA's domestic effects exception.

1. Incorporated Capacitors are import commerce under the Sherman Act.

The Settlements release "all claims asserted or which could have been asserted in the Action . . . including . . . claims arising under . . . the Sherman Act, 15 U.S.C. § 1 *et seq.*" (*See, e.g.*, Dkt. No. 1989-2 ¶ 12.) Objecting Members' claims for Incorporated Capacitors are within the scope of the releases because such capacitors are, or at least could, be deemed import

[9] *See CRT*, MDL No. 1917, 3:07-cv-05944-JST, 2016 WL 5725008 (N.D. Cal. Sept. 30, 2016); *In re Lithium Ion Batteries Antitrust Litig.*, No. 4:13-md-02420-YGR, 2017 WL 2021361 at *6–8, (N.D. Cal. May 12, 2017) ("Batteries"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-CV-1827, 2012 WL 3276932, at *3 (N.D. Cal. Aug. 9, 2012) ("Motorola III"); *see also Costco Wholesale Corp. v. AU Optronics Corp.*, No. C13-1207RAJ, 2014 WL 4718358 at *4–5 (W.D. Wash. Sept. 22, 2014) ("Costco") (conduct involves import trade where the price-fixed product is incorporated into manufactured goods ultimately shipped to the United States); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-md-01819 CW, 2010 WL 5477313 (N.D. Cal. Dec. 31, 2010) (permitting evidence of SRAM products that were "incorporated into a product in turn specifically designed for the United States market, and actually sold in the United States").

commerce under the Sherman Act.

The Court's Second FTAIA Order observes that the Ninth Circuit's *Hsiung* decision provides good reason to conclude that import commerce may extend beyond situations where a defendant directly brings goods into the United States. *Id.*, at *5. Like Flextronics, import trade may include commerce where a defendant negotiated with United States companies in the United States or where the defendants were targeting customers located in the United States. *Id*. At least one other court also concluded that import trade can include commerce where the conspirator did not physically import the price-fixed good directly into the United States. *CRT*, 2016 WL 5725008 at *4 (N.D. Cal. Sept. 30, 2016) ("It is sufficient that a conspiring defendant negotiated to set the price of a good that was imported into the United States, even if that good was sold by another conspirator or imported by someone else").

Objecting Members claim Incorporated Capacitors under a substantially similar fact pattern argued by Flextronics that led to the Court's Second FTAIA Order. Like Flextronics, Objecting Members make claims for capacitors that were incorporated abroad into finished goods that were then sold into the United States, where Defendants knew a substantial portion of the capacitors purchased on behalf of the Objecting Members were intended to be and were incorporated into finished products sold in the United States. Defendants' knowledge and intent is clear from the fact the prices and other terms of sale under which capacitors were sold were negotiated between Cisco and the defendants, without the involvement of Flextronics or the other contract manufacturers. (MDL Dkt. No. 391-9 at 4–5, ¶¶ 9–13.)

Incorporated Capacitors should be treated identically to how the Court has treated Flextronics' claims. Without even reaching FTAIA issues, Incor porated Capacitors are within the scope of the releases because they relate to the same factual circumstances and are premised on claims under the Sherman Act.

2. Incorporated Capacitors fall under the FTAIA's domestic effects exception.

As this Court recognized, Incorporated Capacitors can also fall under the FTAIA's domestic effects exception. *In re Capacitors Antitrust Litigation, MDL No. 17-md-02801 JD*,

2018 WL 4558265, at *5 (N.D. Cal. Sept. 20, 2018) ("The Court cannot definitively exclude [those capacitors], all the more so because they might also come within the FTAIA's domestic effects exception."). Under the domestic effects exception to the FTAIA, products that would otherwise be barred by the FTAIA can still be pursued under the Sherman Act if defendants' conduct had a direct, substantial, and reasonably foreseeable effect on United States commerce. *Hsiung*, 778 F.3d at 756. The Ninth Circuit held that foreign sales of products "that were incorporated into finished consumer products ultimately sold in the United States" can trigger the domestic effects exception. *Id.* at 758. For Class Counsel's position to be accepted, Incorporated Capacitors would need to be excluded from the action by the FTAIA—meaning no exception applies to them. (Dkt. Nos. 1989-2 ¶ 12, 1989-3 ¶ 14 (releases exclude "claims based on purchases of Capacitors *excluded by the [FTAIA]*" (emphasis added)).)

Again, Objecting Members only claim Incorporated Capacitors under a substantially similar fact pattern that was argued by Flextronics that led to the Court's Second FTAIA Order. Objecting Members negotiated capacitor prices directly with Defendants. Aptiv then purchased capacitors and Cisco directed its contract manufacturers to purchase capacitors according to the prices negotiated with those specific Defendants. Defendants knew that a substantial share of these capacitors was going to be incorporated into finished products to be sold in the United States. (MDL Dkt. No. 391-9 at 4–5, ¶¶ 9–13.) Since Defendants knew the capacitors were destined for the United States, it was reasonably foreseeable that US commerce would be affected.

Objecting Members' large purchase volumes further show how substantial the effects were in the United States. While the Court has not yet ruled that the cartel's effects were direct enough to satisfy the domestic effects exception, there is significant evidence that the effects are substantial: the guilty pleas alone establish that the cartel affected hundreds of millions of dollars of US commerce. Thus, even if the Incorporated Capacitors are not found to be import commerce, the cartel's actions relating to Incorporated Capacitors had a direct, reasonably foreseeable, and substantial effect on US Commerce. This means that Incorporated Capacitors likely fall under the FTAIA's domestic effects exception and are within the scope of the releases.

3. DPPs negotiated to release Incorporated Capacitors under the settlements.

The plain terms of the Settlements' releases support a clear intent to resolve all actual and prospective claims "regardless of legal theory" and "in any way related to any conduct regardless of where it occurred." (*See, e.g.*, Dkt. Nos. 1989-2 ¶ 12, 1989-3 ¶ 14.) The Court's FTAIA Orders indicating that Incorporated Capacitors may be import commerce or may fall within the FTAIA's domestic effect exception make it clear that DPPs asserted claims touching on Incorporated Capacitors in this litigation—even preserving the issue for appeal. (*See, e.g.*, Dkt. No. 1421 at 1–2.) The fact that Defendants sought summary judgement on foreign capacitors under the FTAIA also supports that the claims were asserted by DPPs in the action.

Under the "identical factual predicate" doctrine, a class settlement precludes a party from bringing a related claim in the future "where the released claim is based on the identical factual predicate as that underlying the claims in the settled class action." *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010). Courts have held that the "identical factual predicate" doctrine is satisfied when both the alleged conduct and the harm are the same. *Howard*, 208 F.3d at 747; *Reyn's Pasta Bella v. Visa USA, Inc.*, 442 F.3d 741, 749 (9th Cir. 2006). Here, Defendants' conduct and the resulting harm to Objecting Members with respect to Incorporated Capacitors would be identical to those for capacitors billed and shipped to the US. In any manner analyzed, the scope of the releases necessarily includes Incorporated Capacitors. And like *CRT*, Objecting Members' substantial, valid claims must receive value for the release. (*See supra*, fn.7.)

C. Objecting Members request that the Court approve their full claims.

For the instant dispute, Class Counsel had agreed "that the data included in the spreadsheets that [Objecting Members] submitted are accurate." (Sasse Decl. Ex. F at 2 ¶ A.) If Class Counsel now still disputes Objecting Members' data, Objecting Members believe they provided more than adequate verification of their data and rely upon their facts and arguments explained in their opposition to DPPs' second-round distribution motion. (*See* MDL Dkt. No. 391 at 6:12–28, 7:4–6, 7:20–8:20, 11:8–15:1.) Thus, if the Court agrees that Incorporated Capacitors are within the scope of the Settlements' releases, Objecting Members' claims should

be approved in the full amounts provided below. Cisco should also be paid the agreed percentages of existing claims assigned to Cisco by its contract manufacturers.

1. Cisco's claim includes supplemental commerce for Incorporated Capacitors, to which assigned claims should also be added.

Cisco individually claims a total of $191,759,460.10[10] in aluminum, film, and tantalum capacitor purchases. (MDL Dkt. No. 391-9 at 2; Sasse Decl. Exs. H–I (amended claim), Ex. J (claim calculations).) The first $37,709,130.70 of Cisco's claim is from pre-populated data on its claim forms ("billed" or "shipped" to the US). (Sasse Decl. Ex. I at 26–29.) The remainder of Cisco's second-round claim is for Incorporated Capacitors. But Cisco's contract manufacturers also have existing second-round claims for capacitors "billed" and "shipped" to the US that they assigned to Cisco, for which payment should be made directly to Cisco.

(a) Contract Manufacturers assigned Cisco <u>all</u> capacitors purchased for Cisco's products.

Cisco's principal contract manufacturers—Celestica, Foxconn, Jabil,[11] and Flextronics ("Manufacturers")—assigned Cisco <u>all</u> claims arising from capacitors purchased for incorporation

[10] Cisco's October 24, 2018 audit response claimed roughly $199 million, but correcting an error from transcribing pre-populated claim data and conservatively excluding US purchases that may already be included in Cisco's assigned claims results in this slightly reduced amount.

[11] Class Counsel will likely argue incorrectly, both factually and legally, that the Court should ignore the Jabil assignment, and possibly others, as untimely. Multiple communications from Cisco indicate that Class Counsel knew, or very well should have known given their close involvement in the claims process, that Jabil communicated with the claims administrator about the assignment under negotiation between Cisco and Jabil in early October 2018. Indeed, Class Counsel scheduled a joint call with Cisco and Jabil to discuss the assignment around the time of Cisco's October 24, 2018 audit response (which asserted the Jabil and other assignments, though Class Counsel never responded). (Sasse Decl. Exs. G at 5, O at 1–2, P at 1; MDL Dkt. No. 391-7 at 2.) Class Counsel's argument about the formal written agreement is inapposite because no particular form of assignment is required for there to be a valid assignment of rights. *Kelley v. British Commercial Ins. Co.*, 221 Cal. App. 2d 554, 564 (1963). The only requirement is that the assignor manifested an intent to transfer the right to the assignee. *See Fink v. Shemtov*, 210 Cal. App. 4th 599, 610 (2012). Thus, an assignment of a right does not need to be in writing and can be oral. *Hearn Pac. Corp. v. Second Generation Roofing, Inc.*, 247 Cal. App. 4th 117, 149 (2016). While it took time for Cisco and Jabil to iron out a formal written agreement, Class Counsel cannot dispute that Jabil manifested an intent to assign the relevant portion of its claim to Cisco as far back as June 2018, if not earlier. (*See* Sasse Decl. Ex. Q at 3–4, 14–15.) Of note, none of the Manufacturers have disputed that they assigned Cisco their claims, and DPPs are in no position to opine on the agreements entered into by Cisco and its Manufacturers.

into Cisco products. (*Id*. Exs. K–M.) **The effect of an assignment is that the assignee "stands in the shoes" of the assignor and the assignor loses his standing to sue on the claims**. *Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Serv. Co.*, 191 Cal. App. 4th 1394, 1402 (2011). Thus, Cisco stands in the shoes of its Manufacturers and, as the party with standing, is entitled to direct payment for Cisco purchases. There is no risk of duplicate payments because the Manufacturers agree on specific percentages of their existing claims that should be paid to Cisco.

(b) The Court should approve payment to Cisco for agreed percentages of Cisco's Manufacturers' existing claims for capacitors billed or shipped to the US.

Manufacturers' existing claims in the second round are for capacitors "billed to" or "shipped to" the United States and already include purchases made for Cisco products. Manufacturers' second-round claims do not include any Incorporated Capacitors.

Manufacturers agree that the following percentages of their existing, second-round claims constitute Cisco purchases they assigned: Jabil – [redacted] (Sasse Decl. Ex. M ¶ I.A.–C.); and Celestica – [redacted], (*id.* Ex. U). Flextronics opted out of the second-round settlement, and Cisco is still working with Foxconn to determine a percentage. Class Counsel did not disclose the corresponding purchase volumes for these percentages, so Cisco is unable to inform the Court the purchase volume that should be added to Cisco's claim or reduced from Manufacturers' claims. But, based on these agreements, Cisco is entitled to payment of the pro-rata share for the corresponding purchase volume even if Incorporated Capacitors are excluded.

(c) The Court should approve Cisco's $154,050,329.40 in supplemental commerce for Incorporated Capacitors, resulting in a total claim for $191,759,460.10 in qualifying purchases (excluding assigned claims).

The supplemental data that Cisco submitted for its claim is comprised primarily of Incorporated Capacitors assigned from Cisco's contract manufacturers. The data supports an additional $316,975,986.43 in foreign capacitor purchase volume. Cisco uses this full purchase volume for its claim calculations, instead of a percentage, because the data is comprised of actual purchases Manufacturers reported to Cisco (MDL Dkt. No. 391-9 at 2–3, ¶¶ 10–12) and because

Manufacturers' claims exclude foreign and Incorporated Capacitors.

Cisco submitted a declaration verifying the data and calculating that 48.6% of its finished products sold in the United States include Incorporated Capacitors. (MDL Dkt. No. 391-9 at 3–4, ¶¶ 4–8.) Thus, in addition to Cisco's purchases that were billed or shipped to locations within the United States, it is also reasonable to estimate that *at least* 48.6% of Cisco's capacitor purchases billed or shipped to locations outside of the United States qualify as Incorporated Capacitors because they are later incorporated into finished products sold in the United States. Adding Cisco's pre-populated capacitor purchases (roughly $38 million) to 48.6% of its supplemental data (roughly $154.5 million) results in total qualifying purchases of at least $191,759,460.10. (Sasse Decl. Ex. J.)

Cisco should be paid directly for the claims Manufacturers assigned to Cisco. The Court should thus order Class Counsel and the claims administrator to approve the appropriate purchase volume for the assigned percentages in addition to $191,759,460.10 as Cisco's total second-round[12] purchase volume, with corresponding reductions in Manufacturers' claims.

2. Aptiv's claim for $198,910,686.94 includes $48,567,508.65 in supplemental commerce for Incorporated Capacitors.

Aptiv's amended second-round claim is for $198,910,686.94 in direct purchases of aluminum, tantalum, and film capacitors from Defendants. (*Id*. Exs. R (corrected claim calculations), S at 3 (amended claim).) Aptiv bases its claim on Defendants' US data[13] and Aptiv's own available, contemporaneously maintained data. When using Aptiv's data only where no pre-populated defendants' data exists, the data supports additional US purchases totaling $2,367,303.69 and foreign purchases totaling $146,111,638.53. (*See id.* Ex. R at 1.)

[12] Cisco believes this should be the baseline purchase volume for future claims, but reserves its right to provide supplemental data of capacitors billed or shipped to the US when preparing third- and future-round claims for the purchases assigned by Manufacturers, which Cisco had no opportunity to review before submission in the second round.

[13] Again, Class Counsel refused to disclose whether they had global data that could be used to supplement Objecting Members' claims.

Aptiv's 2014 Annual Report, a pre-existing and audited regulatory document, states that approximately 33.24% of the company's net sales occurred in the United States during calendar year 2014. (*Id.* Ex. S at 63.) Thus, in addition to purchases billed or shipped to locations within the United States, it is also reasonable to estimate that *at least* 33.24% of Aptiv's capacitor purchases billed or shipped to locations outside of the United States qualify because they are later incorporated into finished products sold in the United States. Incorporated Capacitors comprise $48,567,508.65 of the foreign purchase data. (*Id.*)

Aptiv combined the additional US purchases (roughly $2.3 million) with Incorporated Capacitors and added all pre-populated claim form data. This analysis results in total qualifying purchases of $198,910,686.94, which the Court should direct Class Counsel and the claims administrator to accept as Aptiv's qualifying purchase volume for the second and future rounds. (*Id.* Ex. R.)

D. If Defendants did not settle claims for Incorporated Capacitors, the Court should issue an order clarifying that Incorporated Capacitors are excluded from the class and that the opt-out deadline did not apply to this type of commerce.

To the extent the Court holds that Incorporated Capacitors were not released by the Settlements, Objecting Members request that the court issue an order clarifying this point so that it is binding on Defendants. Without a clear order holding that Incorporated Capacitors were not released, were never part of the Class, and were never subject to opt-out deadlines, Defendants will undoubtedly argue that Objecting Members are precluded from pursuing claims for Incorporated Capacitors. Either the claims were never released and may still be pursued, or the claims were released and must be compensated by the Settlements.

IV. CONCLUSION

For the reasons discussed above, however, Objecting Members maintain that Incorporated Capacitors were released in the Settlements and respectfully request:

1. that the Court issue an order approving second-round payment to Cisco for

$191,759,460.10 and Aptiv for $198,910,686.94 in respective purchase volume;[14] or

2. in the alternative, if these second-round payments are not approved, that Objecting Members' full pro-rata shares, including Cisco's assigned shares, be held in trust pending all appeals.

Dated: February 8, 2019

Respectfully submitted,
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Cisco Systems, Inc. and
Aptiv Services US, LLC fka Delphi Automotive LLP

[14] Objecting Members are the only two class members that raised an objection over Incorporated Capacitors, which may indicate other members waived their right to such compensation for the second round. However, Objecting Members realize the broader implication of including Incorporated Capacitors in the second and all future settlement rounds. To avoid prejudice, and actually provide substantial benefit to class members, the Court could direct that the claim deadline for the second round be reopened and merged with the upcoming third round for the sizeable Nichicon and Rubycon settlements. Though the claims administrator just mailed third-round notices in early February, updated information can be sent in a cost-effective manner like recent, atypical notices sent after the last December 13 hearing simply informing claimants they "will receive [their] payment within the next several weeks." (Sasse Decl. Ex. T.) Claimants can then be paid their full pro-rata shares from the second- and third-round settlements at one time, ensuring no claimant is deprived the benefit of the Court's ruling.

CERTIFICATE OF SERVICE

I, Daniel A. Sasse, certify that on February 8, 2019, I electronically filed the foregoing with the Clerk of the United States District Court for the Northern District of California, by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Daniel A. Sasse
Daniel A. Sasse