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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION	CASE NO. M:07-CV-1827-SI MDL No. 1827
This Document Relates to: ALL ACTIONS	**DIRECT ACTION PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION REGARDING TRIAL STRUCTURE AND DUPLICATIVE RECOVERY** Date: April 20, 2012 Time: 9:00 a.m. Courtroom: 10 Judge: Honorable Susan Illston

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Plaintiffs Motorola Mobility, Inc. ("Motorola"); AT&T Mobility, LLC, AT&T Corp., AT&T Services, Inc., BellSouth Telecommunications, Inc., Pacific Bell Telephone Company, AT&T Operations, Inc., AT&T DataComm, Inc., Southwestern Bell Telephone Company (collectively "AT&T"); Target Corporation; Sears, Roebuck and Co.; Kmart Corporation; Old Comp Inc.; Good Guys, Inc.; RadioShack Corporation; Newegg Inc.; ATS Claim LLC, Electrograph Systems, Inc. and Electrograph Technologies Corp.; MetroPCS Wireless, Inc.; Office Depot, Inc.; Interbond Corporation of America (BrandsMart); P.C. Richard & Son Long Island Corporation; MARTA Cooperative of America, Inc.; ABC Appliance, Inc.; Schultze Agency Services, LLC (Tweeter); and CompuCom Systems, Inc ("Electrograph"); Dell, Inc. and Dell Products L.P. ("Dell"); Nokia Corporation and Nokia Inc. ("Nokia"); T-Mobile; Eastman Kodak Company; Best Buy Co., Inc.; Best Buy Purchasing LLC; Best Buy Enterprise Services, Inc.; Best Buy Stores, L.P.; Best Buy.com, LLC; and Magnolia Hi-Fi, Inc.("Best Buy"); Tracfone; Alfred H. Siegel, as Trustee of the Circuit City Stores, Inc. Liquidating Trust ("Circuit City"); SB Litigation Trust (collectively "Direct Action Plaintiffs"); hereby oppose LG Display Co., Ltd. and LG Display America, Inc.'s, AU Optronics Corporation and AU Optronics Corporation America, Inc.'s, and Toshiba Corporation, Toshiba Mobile Display Technology Co., Ltd., Toshiba American Electronic Components, Inc., and Toshiba America Information Systems, Inc.'s (collectively "Defendants") Motion Regarding Trial Structure and for Relief to Avoid Duplicative Recovery ("Defendants' Motion") (Dkt. Entry No. 5258) as follows:

INTRODUCTION

Defendants deserve credit for boldness, if nothing else. They urge the Court to embark on an admittedly unprecedented restructuring of the trials in this MDL, without a single controlling case calling for such a restructuring. More specifically, Defendants request that the Direct Action Plaintiffs, in cases currently on different schedules, be brought back onto the earlier calendar with the class cases they have opted out of. On the eve of the class trials, and with the pretrial schedules for the different cases in place for well over two years, Defendants piece together a doomsday scenario under the mantle of a "threat" of "duplicative recovery" and request that this

Court issue a fiat across the different cases preemptively minimizing Defendants' total liability. With basic antitrust law and decades of civil antitrust practice against them, the Defendants instead rely on cases concerning interstate real property disputes and excessive punitive damages awards. These cases do not apply here, and well-established antitrust law and practice clearly allow any conflicts between remedies that may arise in these MDL cases to be resolved ***as they arise*** in the different cases, not preemptively before trial.

The Defendants blithely assert a "due process" right to be free from multiple liability for price-fixing. In doing so, Defendants ask this Court to ignore Supreme Court precedent that expressly permits direct purchasers to bring federal claims for 100% of the overcharges, trebled, *and* simultaneously allows indirect purchasers to bring actions pursuant to state law. *See California v. ARC America Corp.,* 490 U.S. 93, 101-02 (1989). According to the Supreme Court, such "multiple liability" does not violate *any* federal policy. *Id.*

As Courts within this Circuit have recognized, "[s]tates . . . which have repealed *Illinois Brick* and allowed indirect purchasers to sue for antitrust violations, have necessarily made the policy decision that duplicative recovery may permissibly occur . . . [d]uplicative recovery is, in many if not all cases alleging a nationwide conspiracy with both direct and indirect purchaser classes, a necessary consequence that flows from indirect purchaser recovery." *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1143, 1156 (quoting *DRAM I*, 516 F.Supp.2d at 1094.)

Defendants half-heartedly purport to explain why their motion is appropriate for consideration now. But, in fact, there is absolutely no justification for the timing of Defendants' motion other than to disrupt the order, and delay the sensible resolution, of these cases. The ostensible justification for the motion is that the Defendants face the "risk" of multiple liability and that, Defendants claim, is precluded either by due process or state statutes. However, if the mere potential for such liability is the basis for Defendants' motion, then it comes far too late. That potential has been present from the outset and Defendants should be deemed to have waived their arguments by delaying them, to the prejudice of all other parties. On the other hand, if—as we believe is the case—any due process or statutory duplication issue only will become ripe once such duplication is an actual as opposed to a theoretical issue, then Defendants' motion must be

dismissed as premature. In either event, the time for the motion is not now.

The Direct Action Plaintiffs' response consists of three primary points:

First, there is no duplicative recovery issue between direct purchaser plaintiffs suing under federal antitrust law and indirect purchaser plaintiffs suing under state law. Defendants cherry-pick sentences from *Hanover Shoe, Illinois Brick,* and *ARC America* to argue that the Court must "allocate damages" between federal and state law claimants to avoid "duplicative recovery," but Defendants' argument ignores the logic and holdings of each of those cases, as well as other cases that Defendants themselves cite. The claims brought by federal and state law plaintiffs stand separately, and each type of plaintiff is free to pursue its own claims without regard for the recovery that may be obtained by the other.

Second, any duplicative recovery or due process concerns raised by potentially conflicting verdicts or allegedly "excessive" recoveries should be dealt with as those issues actually arise in the trials to come, not in advance, in the abstract, when such concerns are at best purely speculative and may never be presented in the actual cases. Indeed, Defendants' proposed consolidation of all damage claims into one proceeding would not help the situation. It would only create a proceeding so complex as to be unmanageable. The juries in these cases will be taxed enough reaching verdicts in the separate cases; they would have to be super-human to be able to allocate damages across all the plaintiffs in this MDL in one giant damage proceeding, as Defendants request.

Third, a consolidated trial or consolidated damage proceeding would preclude the Direct Action Plaintiffs from the full exercise of their own due process rights. Canceling the separate tracks for different plaintiffs would effectively nullify the Direct Action Plaintiffs' constitutional right to opt out of the class actions. The Defendants are essentially requesting the Direct Action Plaintiffs be opted back in to the class actions against their will. No law supports such a result.

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I. THERE IS NO DUPLICATIVE RECOVERY ISSUE BETWEEN SHERMAN ACT DIRECT PURCHASER PLAINTIFFS AND STATE LAW INDIRECT PURCHASER PLAINTIFFS.

Under well-established federal law, there is no duplicative recovery issue between the federal and state law plaintiffs in this MDL. *Hanover Shoe* established that a federal antitrust plaintiff is entitled to 100% of any overcharge that it paid, regardless of whether some of that overcharge was passed on to indirect purchasers. The Supreme Court held that "Hanover proved injury and the amount of its damages for the purpose of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge," and did not allow a pass-on defense. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968). The Court stated that it was reaffirming earlier cases holding that any passing-on of an overcharge is "irrelevant in assessing damages." *Id.* at 490. While the Court indicated that there might be rare situations where the logic of the opinion would not control—for example when a plaintiff had a cost-plus contract—there is nothing in the opinion suggesting that the Court thought that a pass-on defense and allocation of damages across distribution levels was called for by federal law.

Next, in *Illinois Brick*, the Court reaffirmed its holding in *Hanover Shoe* that "in general a pass-on theory may not be used defensively by an antitrust violator against a direct purchaser plaintiff." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 726 (1977). The Court stated that this holding "rest[ed] on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers." *Id* at 735. The Court further held that indirect purchaser claims based on passed-on overcharges would not be recognized under the federal antitrust laws. *Id.* at 728-729.

Finally, in *ARC America,* the Court held that federal antitrust law did not pre-empt state law causes of action by indirect purchaser plaintiffs. *ARC America*, 490 U.S. at 101. The *Illinois Brick* rule does not preclude state law indirect purchaser claims because "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." *Id.* at 102. The Supreme Court rejected the argument that any "express federal policy condemning multiple

liability" compelled a different result. *Id.* at 105. As the Court held, there is no "federal policy against States imposing liability in addition to that imposed by federal law." *Id.*

This holding raises precisely the possibility that Defendants' brief focuses on: that a defendant could be held liable for one hundred percent of the overcharge damages, trebled, to the direct purchaser under federal law and also be liable to the indirect purchaser under state law. But that possibility of dual liability did not trouble the Court in the least. The Court did not say that federal and state law trials should be consolidated to coordinate remedies, or that damages would somehow have to be allocated between direct purchaser federal plaintiffs and indirect purchaser state plaintiffs. The Court in fact said just the opposite: "[T]hese state statutes cannot and do not purport to affect remedies available under federal law." *Id.* at 103. Federal and state law plaintiffs can pursue their different claims without coordination and without allocation between each other, because under the federal antitrust laws there is no "policy against States imposing liability in addition to that imposed by federal law." *Id.* at 105.[1]

The California Supreme Court came to a similar conclusion in *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15 (1984), a case cited by Defendants. There the defendants argued that California direct purchasers who were pursuing federal claims in a separate case should be brought into a pending Cartwright Act state case brought by indirect purchasers, because the federal claims supposedly created a risk of multiple liability. *Id.* at 22. The Court rejected that argument, finding that there is no substantial risk of multiple liability arising from the fact that the defendants "may be held liable in a federal suit under a federal statute to a person or class wholly different from the person or class to whom they are sought to be held liable in a California action under a California statute for the same tortious conduct." *Id.* at 22-23. The Court noted that pass-on issues were "irrelevant to" the federal direct purchaser case because federal law "allows

[1] *See also People of State of California v. Zook*, 336 U.S. 725, 738 (1949) ("[T]he State may punish as it has in the present case for the safety and welfare of its inhabitants; the nation may punish for the safety and welfare of interstate commerce. There is no conflict."); *Heath v. Alabama*, 474 U.S. 82, 89 (1985) (quoting *Westfall v. United States*, 274 U.S. 256, 258 (1927)) ("[T]he proposition that the State and Federal Governments may punish the same conduct 'is too plain to need more than statement.'").

recovery by the direct purchaser regardless of whether the overcharge was passed on." *Id.* at 23. Thus, there was no need to join the actions of the federal direct purchasers, who were pursuing full federal law recovery in their case, to the actions of the California indirect purchasers, who were pursuing their full state law recovery under the Cartwright Act.

The fact that antitrust defendants may be dually liable to the direct purchaser under federal law and to indirect purchasers under state law for the same overcharge is a "necessary consequence" of the Supreme Court's decision in *Arc America* and of the *Illinois Brick* repealer statutes enacted by state legislatures:

> States . . . which have repealed *Illinois Brick* and allowed indirect purchasers to sue for antitrust violations, have necessarily made the policy decision that duplicative recovery may permissibly occur. Duplicative recovery is, in many if not all cases alleging a nationwide conspiracy with both direct and indirect purchaser classes, a necessary consequence that flows from indirect purchaser recovery.

In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1143, 1156 (quoting *DRAM I*, 516 F.Supp.2d at 1094.) In short, there is not even the conceptual possibility of a duplicative recovery problem between federal law plaintiffs and state law plaintiffs. Defendants' argument, in effect, asks this Court to find that *Arc America* was wrongly decided and that every state statute that provides for indirect purchaser liability in antitrust cases is unconstitutional.

II. DEFENDANTS' STATUTORY AND DUE PROCESS ARGUMENTS ARE PREMATURE AND SPECULATIVE, AND PROVIDE NO BASIS FOR CONSOLIDATING TRIALS.

Defendants also argue that the cases must be consolidated because Defendants are potentially at risk of duplicative recoveries by plaintiffs suing from different levels of the distribution chain. This risk, Defendants say, imperils their due process rights and contravenes various state statutes. However, as explained below, the state statutes that Defendants cite do not require the consolidation they seek. Meanwhile, Defendants' due process argument is entirely misconceived, and any potential due process issue is far more limited than Defendants suggest. To the extent that there is even a possibility of some issue of duplicative recovery or a due process issue arising in the future, that possibility is purely speculative at this point, and

consolidating cases for a full trial or a damage trial would make the efficient resolution of these cases impossible.

A. State law does not justify consolidation of these trials.

The state statutes discussed at pages 13-14 of Defendants' brief ("Def. Mem") provide only that (1) in some states, a defendant can assert a pass-on defense; (2) in some states, a court should exclude from a damage award any amount that has already been awarded for the same injury in a previous case; (3) in some states, courts are authorized to use their discretion to transfer or consolidate cases if necessary in order to manage duplicative recovery issues; and (4) in at least one state, the courts have wide discretion to permit duplicative recovery.[2]

Nothing in those statutes argues for consolidation in this case, because consolidation is not needed here to deal with any potential issues of duplicative recovery. Indeed, consolidation would make the damage issues in these cases virtually unmanageable. The upcoming class trial will determine the right to recovery for the direct purchaser class suing under federal law and the consumer class suing under certain state laws. Subsequent trials will determine the right to recovery for other parties who are not members of the classes. If Defendants believe that some damage award to class members in the first trial limits the amount that can be recovered by other plaintiffs in later trials under the state laws applicable to those claims, the sensible way to deal with that argument is in the context of a concrete issue. Once there has been an actual judgment and recovery in the prior case, the Court and the parties can know exactly what the duplicative recovery issue is, assuming one exists at all.

It is ***not*** sensible to consolidate all these plaintiffs into one large damage trial and ask the jury to sort out damages across all the plaintiffs in the MDL. Defendants spend a large portion of their brief emphasizing the variety and complexity of the many different distributions chains involved in these cases. That Defendants would then turn around and dump all of this complexity

[2] *See, e.g.,* Minn. Stat. Ann. § 325D.57 ("In any *subsequent action* arising from the same conduct, the court *may* take any steps necessary to avoid duplicative recovery against a defendant.") (emphasis added.) Thus, the Minnesota Legislature has plainly given courts wide discretion to permit a duplicative recovery based on specific circumstances in the case. *See* Minn. Stat. Ann. § 645.44 Subd. 15 and 16 (defining "may" as permissive and "shall" as mandatory).

into the lap of one jury—to have them do one master damage allocation covering every plaintiff in the MDL—is incredible.

For example, Defendants say that a recovery by a consumer plaintiff bringing indirect purchaser claims in the class trial might limit recoveries that could be awarded to direct purchaser plaintiffs or retailers who were upstream purchasers of the same panel that was ultimately sold to the consumer. Even assuming that Defendants are right about that, it makes no sense to drag the direct purchaser and the retailer plaintiffs into the same case as the consumer class plaintiffs and force the jurors to hear at least three different damage experts (one for the direct purchases, one for the retailers, one for the consumers) testify about the overcharge incurred at each level of the distribution chain and the amount of the overcharge that was then passed on downstream—and to do that not only for one set of direct purchaser/retailer/consumer plaintiffs, but for every party in every case in this MDL, taking into account the varying requirements of multiple state statutes. No real-world jury could be expected to deal with a damage proceeding of that complexity.[3]

B. Due process concerns do not call for consolidation of these trials.

In addition to being speculative and premature, Defendants' due process argument fundamentally misconceives the nature of the due process issue. Due process does not focus on the potential liability that a defendant theoretically faces, but rather on how much a particular defendant is actually ***obligated to pay***. Thus, until an individual defendant is in the position of actually having to pay an amount that raises a possible due process issue, there is no due process question that needs to, or ought to, be addressed. Defendants typically do not get a pre-trial

[3] In addition to relying on various state statutes, Defendants assert that the California Supreme Court in *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758 (2010) "held" that a pass-on defense must be allowed where the possibility of duplicative recovery exists. *See* Def. Mem. at 2, 14. In fact, the statement that Defendants quote was *dicta*. The question before the court was whether to allow a pass-on defense in Cartwright Act cases—a proposition that the court rejected. 49 Cal. 4th at 764,766. In any event, it is unnecessary to deal with any potential duplicative recovery issues now because the Court can resolve any actual issues after the class trials and Direct Action Plaintiff trials have concluded without creating the unmanageable mega-trial proposed by Defendants here. Indeed, the court in *Clayworth* noted with approval the approach adopted by Hart-Scott-Rodino "of [limiting] duplicative recoveries . . . by allowing damages already paid to be offset against subsequent damages claims." *Id.* at 777 (citing 15 U.S.C. §15c(a)(1)); *see also Union Carbide Corp.*, 36 Cal. 3d at 22-23, discussed at page 4 above.

ruling about the due process limits on a jury's award. Rather, juries make an award and then the court can, if asked, review the award to see if there is a potential due process issue. Nothing about this case is any different.

Defendants' due process argument is further misconceived because it focuses on the collective amount that various plaintiffs might recover, rather than on each defendant's joint and several liability for participating in an unlawful conspiracy. The implicit premise of Defendants' argument is that due process is violated if the Defendants collectively face the possibility of multiple liability to different levels of purchasers in the distribution chain. However, that is fundamentally incorrect. Due process is a right individual to a particular defendant and it protects that defendant only against being punished excessively by having to pay more than a constitutionally permissible amount. *See State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408, 409 (2003) ("the Due Process Clause . . . prohibits the *imposition* of grossly excessive or arbitrary punishments *on a tortfeasor*") (emphasis added). Thus, the due process right asserted by Defendants is not a limitation on what a group of plaintiffs can collect or on what a group of defendants can be required to pay in the aggregate. It is, at most, the right of a particular defendant not to be "excessively" punished for the conduct it has engaged in. That is not the argument advanced in Defendants' motion and the difference is fatal to their motion.

A member of an illegal price-fixing conspiracy is liable jointly and severally for the full amount of harm caused to the plaintiff by the conspiracy of which a defendant is a member. A plaintiff who takes multiple defendants to trial and obtains a judgment against them is free to enforce its judgment in full against all, or any one of them, in such proportions as it chooses. Moreover, under the Supreme Court's decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), a defendant found liable for violating the antitrust laws along with other parties has no right of indemnity or contribution from other members of the conspiracy. Thus, if a jury assesses damages jointly and severally against five defendants in the amount of $10 million, any individual defendant could end up being required to pay the entire $10 million—although the plaintiff, of course, can only collect the amount of its judgment once. It necessarily follows that any participant in an antitrust conspiracy can, at a minimum, be required to pay three

times the amount of the total damages caused by a conspiracy without any possible claim that its due process rights thereby have been violated. This principle is critical here because it undermines the essential premise of Defendants' due process argument.

Defendants' motion asserts that there is a due process issue because of the "risk" of damage awards in the various LCD cases that, in the aggregate, exceed three times the harm caused by the conspiracy. According to Defendants, the "threat of [such] duplicative recovery" violates their constitutional rights. But, as we have explained, that argument misses the point. Due process—to the extent it applies here at all—necessarily relates only to a limit on the amount of punishment that may actually be imposed on a particular defendant. It has nothing to do with the amount that plaintiffs could theoretically collect from the defendants in the aggregate.[4]

[4] Defendants cite various punitive damages cases in which the Supreme Court has limited the amount of punishment that can be imposed on a defendant. However, Defendants refer to no case in which a group of defendants have asserted (let alone successfully asserted) a "collective" due process limit on the amount that they, as a group, can be required to pay in damages.

The cited punitive damages cases are inapposite. Defendants argue that the "guideposts" adopted by the Supreme Court in *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408, 417 (2003) for the post-judgment review of punitive damage awards should be applied prospectively by this Court to prevent potentially inconsistent awards of compensatory damages. However, *State Farm* dealt with constitutional limits on unfettered jury awards of punitive damages, not the ascertainment of actual damages by a jury in an antitrust case that are automatically trebled by statute. *Id.* at 417. Furthermore, both *State Farm* and *BMW* were similarly concerned with punitive damages awards based on conduct that was lawful in the state where it occurred, not the situation here where the jury will be asked to award actual damages based on the Defendants' price fixing activities that are uniformly illegal in the U.S. *Id.* at 421-23; *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996).

Defendants also cite to *Western Union Telegraph Co. v. Commonwealth of Pennsylvania*, 368 U.S. 71 (1961), but that case is equally inapposite. *Western Union* did not address antitrust liability under state and federal law, and, in fact, did not address tort liability at all. Rather, the case upon which Defendants rely for their sweeping constitutional argument about antitrust damages, concerns the *in rem* jurisdiction of the states. In *Western Union*, certain unclaimed property arguably existed in two states, with each state having jurisdiction over the property and the power to order its relinquishment. *Id.* at 75. The Court held that Western Union could not be forced to relinquish the unclaimed property to one state without assurance that it would not be required to relinquish the same property to another state. *Id.* There was a single "pot of money" and multiple claimants, and the Court understandably held that Western Union could not be liable to pay out more than the amount in the "pot" to multiple claimants. *Id.* at 76-77. However, not only is that situation readily distinguishable from the joint and several tort liability of antitrust defendants, but as explained above, no defendant has the right to claim that ***its*** due process rights are implicated unless and until it is required to pay more than three times the total damages caused by a conspiracy in which it was a participant. Thus, Defendants' analogy to the single pot of money in *Western Union* is misguided. A more proper analogy would be one pot for each jointly and severally liable cartel member.

These principles do not make due process irrelevant here. They do, however, put the due process argument in correct terms and demonstrate why Defendants' current motion is without merit. Assuming, *arguendo,* that due process limits the amount that a defendant can be forced to pay to three times the amount of damages for which that defendant may be held jointly and severally liable, that right comes into play only if, and only to the extent that, the defendant can demonstrate that ***it*** is being forced to pay an amount in excess of that limit. Until that happens, however, there is no due process violation to avoid; there is only speculation that ultimately a defendant might find itself with a due process claim. That speculation is no reason to consolidate the damage trials of these cases.

C. If any allocation of damages is eventually required, that will be a matter for the court, not the jury.

It is far from clear that even if some limited form of allocation were required under certain state statutes that this process would require consideration by a jury as opposed to the Court. That would be true even if there is a possibility that compliance with state statutes might implicate the class recoveries, since it is unlikely that there will be a final distribution of funds to the classes for a considerable period of time. Certainly none of the state statutes cited by Defendants require jury consideration for their application and, in fact, it would be hard to see how a jury could apply the several, very differently worded, statutes in any event.

The same is true as to any allocation that might eventually be required by due process. There is not even a hint in any of the cases cited by Defendants that due process limitations are to be applied by a jury. A jury's prerogative to determine an appropriate punitive damage award may be subject to limitation thereafter by a court, applying standards laid down by the Supreme Court, but the jury has no role to play in that later determination. The role of a jury in addressing due process issues is even more clearly beside the point in an antitrust case, since the imposition of "punishment" in the form of trebling is automatic, not discretionary, and juries are not even instructed about the fact that their damage award will be multiplied by three.

Moreover, courts routinely address due process objections through post-trial remittitur. Under both federal and state law, the Court can and should utilize remittitur to address any due

process claim of purported punitive damages. *See Morgan v. New York Life Ins. Co*., 559 F.3d 425, 443 (6th Cir. 2009) ("we will vacate the award and remand the case to the district court for an order of remittitur that will set the punitive damages in an amount that it determines is compatible with due process."); 735 Ill. Comp. Stat 5/2-1207 ("The trial court may, in its discretion, with respect to punitive damages, determine whether a jury award for punitive damages is excessive, and if so, enter a remittitur and a conditional new trial."); *Simon v. San Paolo U.S. Holding Co., Inc*., 35 Cal. 4th 1159, 1187 (2005) (the "appropriate order" to address excessive punitive damages is a remittitur); *Daka, Inc. v. McCrae*, 839 A.2d 682, 701-02 (D.C. 2003).

Similarly, the Court can utilize remittitur to address any due process concerns regarding duplicative damages. *See, e.g*., *Mattel, Inc. v. MGA Entm't, Inc*., Case No. CV 04-9049 DOC (RNBx), 2011 U.S. Dist. LEXIS 85928, 56-57 (C.D. Cal. Aug. 4, 2011) (remittitur is proper vehicle to address claim of duplicative recovery); *Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc*., 532 F.3d 1063, 1079 (10th Cir. 2008); *Eccleston v. New York City Health & Hosps. Corp*., 698 N.Y.S.2d 869, 870 (1999); *Louis DeGidio Oil & Gas Burner Sales & Service, Inc. v. Ace Eng'g Co., Inc.*, 302 Minn. 19, 29 (1974).

Although the DAPs hope that at some point they might be sufficiently successful that the Court may need to confront a properly-articulated due process issue, until that happens Defendants' due process motion is ill-conceived and premature, and should be denied.

III. CONSOLIDATION OF THESE CASES WOULD VIOLATE THE DIRECT ACTION PLAINTIFFS' RIGHTS AS OPT OUTS FROM THE CLASS ACTIONS.

Defendants suggest a variety of steps in response to the supposed duplicative recovery problem: consolidating all of the cases for trial; bifurcating each trial into liability and damage phases and having one combined damage trial; forcing the Direct Action Plaintiffs to become parties in the class case; deeming Direct Action Plaintiffs to be estopped by results reached in the class case; and more. The fatal flaw in all these approaches—even setting aside the fact that consolidated trials of this sort would present insurmountable management problems—is that they all violate the Direct Action Plaintiffs' due process rights as opt outs from the class actions.

Members of a purported damage class have a constitutional due process right to opt out of that class. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class"); *In Re Piper Funds, Inc., Institutional Gov't Income Portfolio Litig.*, 71 F.3d 298, 303 (8th Cir. 1995) ("Reflecting due process principles, Fed.R.Civ.P. 23 (c)(2) requires that a putative member of a Rule 23 (b)(3) class action be given the opportunity to opt out and not be bound by the judgment.").

A plaintiff who wishes to litigate his claim on his own, rather than be at the mercy of the decisions of class action counsel and be bound by a settlement or verdict in the class action case, must have an opportunity to opt out. "[A]nd if he takes advantage of that opportunity ***he is removed from the litigation entirely***." *Phillips Petroleum,* 472 U.S. at 810-11 (emphasis added). The law gives a prospective class member a clear choice: he can stay in the class and be bound by the results of the class trial, or he may choose to opt out "and thereby preserve his opportunity to press his claim separately." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). Defendants—who struggle to construct a due process argument for their favored outcome—completely ignore this due process right.

Defendants suggest that the Direct Action Plaintiffs should be brought back into the class action cases as parties to those cases, or have their claims tried in a consolidated proceeding with the class cases. But that is inconsistent with the right to opt out, the whole point of which is that an opt-out plaintiff must be allowed to remove himself from the class litigation entirely. The Direct Action Plaintiffs chose to be represented by their own attorneys proceeding in their own cases precisely so they would not be dependent on the trial strategies and damage methodologies chosen by class counsel. Defendants act as if the Court should ignore the Direct Action Plaintiffs' due process right to present their claims in the way they want them presented, and instead casually throw the Direct Action Plaintiffs back into the class trial.

Defendants further argue that even if the Direct Action Plaintiffs' claims are tried separately, specific findings reached in the class case should be given preclusive effect in the later

cases. Again, Defendants are arguing that the Direct Action Plaintiffs should be stuck with results reached in a case they opted out of. Defendants suggest that such an outcome would be consistent with the Supreme Court's holding in *Taylor v. Sturgell*, 553 U.S. 880 (2008). (Def. Mem. at 21-23.) But nothing could be further from the truth; *Taylor* shows precisely why the Defendants' argument for estoppel must be rejected. In that case, Mr. Taylor brought a lawsuit seeking documents from the Federal Aviation Administration under the Freedom of Information Act; an earlier suit raising virtually identical issues had been decided in favor of the FAA. The trial court granted summary judgment to the FAA and against Mr. Taylor on claim preclusion grounds. The D.C. Circuit affirmed, relying on a theory of "virtual representation." The Circuit Court reasoned that even though Mr. Taylor had not been a party to the prior case, his claims could be precluded because he had the same interest as the prior litigant, had a "close relationship" with that litigant, and his position had been adequately represented in the prior case. *Taylor,* 553 U.S. at 889-890.

The Supreme Court vacated the Circuit's opinion, emphasizing "the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party." *Id.* at 898. The Court also stated that "[a] person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit," *id.* at 892, and cited with approval the traditional doctrines strictly limiting the scope of non-party preclusion. As a result, the Court expressly disapproved an expansive doctrine of virtual representation that it said would "allow[ ] courts to 'create *de facto* class actions at will.'" *Id.* at 901 (quoting *Tice v. American Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir. 1998)).

This, of course, is exactly what Defendants are trying to do here—rely on an argument of "virtual representation" to create a *de facto* class action encompassing all the cases in this MDL. *See also Rodriguez v. City of Albuquerque*, No. CIV 07-0901 JB/ACT, 2008 U.S. Dist. LEXIS 108660 at *5 (D. N. M. Dec. 22, 2008) (applying *Taylor*; people who chose not to join a class action "should know that they will not be later bound by that case in which they intentionally chose not to participate"). Such an outcome would violate the Direct Action Plaintiffs' due process rights.

Moreover, Defendants' proposed consolidation of all of the MDL cases for trial, or for a trial on damages, is not only unnecessary and unwise, it is also impossible where the cases were filed in other jurisdictions and were later transferred to this Court. Pursuant to 28 U.S.C. § 1407, all cases, other than actions by state attorneys general pursuant to § 4C of the Clayton Act, that were transferred to this Court by the Judicial Panel for Multidistrict Litigation from other districts will be remanded to the districts of origination "at or before the conclusion of such pretrial proceedings." As the Supreme Court unequivocally held in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40-41 (1998), a transferee court does not have the authority to reassign cases to itself for trial.

Defendants suggest that this Court could avoid *Lexecon* by ordering defendants to file motions seeking to transfer the actions brought in other districts to this Court for trial pursuant to 28 U.S.C. § 1404(a). But § 1404(a) requires more than a motion by defendants. It requires proof that each action could have been brought in this district or requires the consent of *all parties* to trial in this district. It may well be that one or more Direct Action Plaintiffs will ultimately request that their cases be tried before this Court, but Plaintiffs who wish to return to the jurisdictions in which they filed are under no obligation to provide such consent to transfer and the transferor Courts are not obligated to grant any such motions. At this point, it is not at all clear that each of the MDL cases will be transferred to this Court for trial pursuant to §1404(a). Defendants' suggestion that this Court should order Defendants to seek § 1404(a) transfers from the originating districts has no purpose other than adding unnecessary delay and expense.

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CONCLUSION

For the foregoing reasons, Defendants' motion should be denied.

DATED: April 4, 2012

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Attestation: The filer of this document attests that the concurrence of the signatories thereto has been obtained.