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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

Tracfone Wireless, Inc. v. AU Optronics Corp. 3:10-cv-3205-SI

SB Liquidating Trust v. AU Optronics Corp., 3:10-cv-5458-SI

Sony Electronics Inc. v. LG Display Co., Ltd., 3:10-cv-5616-SI

Alfred H. Siegel, as Trustee of the Circuit City Stores, Inc. Liquidating Trust, v. AU Optronics Corp., 3:10-cv-5625-SI

MetroPCS Wireless, Inc. v. AU Optronics Corp, 3:11-cv-829-SI.

Office Depot, Inc. v. AU Optronics Corp., 3:11-cv-2225-SI

Jaco Electronics, Inc. v. AU Optronics Corp., 3:11-cv-2495-SI

T-Mobile U.S.A., Inc. v. AU Optronics Corp., 3:11-cv-2591-SI

Electrograph Systems, Inc. v. NEC Corp., et al., 3:11-cv-3342-SI

Interbond Corp. of America v. AU Optronics Corp., 3:11-cv-3763-SI

Schultze Agency Services, LLC, on behalf of Tweeter Opco, LLC and Tweeter Newco, LLC, v. AU Optronics Corp., 3:11-cv-3856-SI

Master Docket No. M:07-1827 SI

MDL No. 1827

Case No. 3:10-cv-3205-SI
Case No. 3:10-cv-5458-SI
Case No. 3:10-cv-5616-SI
Case No. 3:10-cv-5625-SI
Case No. 3:11-cv-829-SI
Case No. 3:11-cv-2225-SI
Case No. 3:11-cv-2495-SI
Case No. 3:11-cv-2591-SI
Case No. 3:11-cv-3342-SI
Case No. 3:11-cv-3763-SI
Case No. 3:11-cv-3856-SI
Case No. 3:11-cv-4116-SI
Case No. 3:11-cv-4119-SI
Case No. 3:11-cv-4119-SI
Case No. 3:11-cv-4119-SI
Case No. 3:11-cv-5765-SI
Case No. 3:11-cv-5781-SI
Case No. 3:11-cv-6241-SI
Case No. 3:12-cv-335-SI
Case No. 3:12-cv-1426-SI
Case No. 3:12-cv-1599-SI
Case No. 3:12-cv-2214-SI
Case No. 3:12-cv-2495-SI

TRACK TWO DIRECT ACTION PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ENTRY OF A TRACK TWO SCHEDULING ORDER AND TRIAL SETTING

Hewlett-Packard Co. v. AU Optronics Corp., 3:11-cv-4116-SI

ABC Appliance, Inc. v. AU Optronics Corp., 3:11-cv-4119-SI

Marta Cooperative of America, Inc. v. AU Optronics Corp., 3:11-cv-4119-SI

P.C. Richard & Son Long Island Corp. v. AU Optronics Corp., 3:11-cv-4119-SI

Tech Data Corp. v. AU Optronics Corp., 3:11-cv-5765-SI

The AASI Creditor Liquidating Trust, by and through Kenneth A. Welt, Liquidating Trustee, v. AU Optronics Corp., 3:11-cv-5781-SI

CompuCom Systems, Inc. v. AU Optronic Corp., 3:11-cv-6241-SI

Viewsonic Corp. v. AU Optronics Corp., 3:12-cv-335-SI

NECO Alliance LLC v. AU Optronics Corp., 3:12-cv-1426-SI

Sony Electronics Inc. v. AU Optronics Corp., 3:12-cv-1599-SI

Sony Electronics Inc. v. Hannstar Display Corp., 3:12-cv-2214-SI

Rockwell Automation, Inc. v. AU Optronics Corp., 3:12-cv-2495-SI

Date: July 6, 2012
Time: 9:00 a.m.
Ct. Room: No. 10, 19th Floor
The Honorable Susan Illston

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The Direct Action Plaintiffs in the captioned cases ("Track Two DAPs" or "Plaintiffs") submit this Reply in support of their motion for entry of a pretrial and trial scheduling order.

I. INTRODUCTION

The Track Two DAPs proposed a cogent and reasonable scheduling plan that would allow the Court to conclude the LCD-related litigation in this Court in late 2013, approximately seven years after it began. Defendants object, and instead suggest that pretrial proceedings for the MDL should be strung along in three (or more) additional "tracks" that will drag out the litigation for at least three more years. Defendants provide no persuasive reason to create four tracks of DAP litigation, and no persuasive reason this litigation should continue for another 30 months. Track Two DAPs respectfully request that their proposed schedule be adopted by the Court, either as currently proposed or with only minor modifications to meet specific, demonstrated needs for alteration.

II. ARGUMENT

A. The Track Two DAPs Proposal

The scheduling order proposed by the Track Two DAPs in their June 5 motion is essentially the same schedule the Plaintiffs proposed to Defendants as far back as January. That schedule was patterned after the Court's November 23, 2010, Order Re: Pretrial and Trial Schedule ("Scheduling Order 1"), and sought to achieve the same two goals Schedule Order 1 addressed. First and most important, Plaintiffs' proposal grouped all cases not on Track One into a single unified schedule to maximize judicial efficiency, ensure consistency of treatment, and minimize the delays and inconsistencies inherent in having multiple disparate schedules. Second, it provided what Plaintiffs believe are reasonable time frames for completion of the tasks remaining before trial. In particular, the proposed schedule provides

1. For six months of additional percipient discovery, consistent with the just over nine months of additional percipient discovery provided for in Scheduling Order 1 – *an amount of time that was allowed when much more discovery remained to be taken*.

2. For service of opening expert reports a month after the close of discovery (compared to a week in Scheduling Order 1).

3. For three months for Defendants to prepare opposition expert reports (compared to two months in Scheduling Order 1).

4. For two months to prepare reply expert reports (as in Scheduling Order 1).

5. For five additional weeks to take expert depositions (as in Scheduling Order 1).

6. For five additional weeks for Defendants to prepare dispositive motions (compared to three months in Scheduling Order 1).

See Proposed Order at 2-3.[1] Given the enormous amount of pretrial and discovery work that all parties have completed in these actions, and the considerable resources available to all parties in light of the magnitude of the claims asserted, this schedule provides ample time for every party to marshal its best case to present to the jury.

B. Defendants' Opposition

Defendants seek additional complexity and resultant delay. None of the four arguments presented, however, warrant rejection or substantial modification of Plaintiffs' proposal.

1. Additional Time for Discovery

Defendants' principal argument is that they should be afforded additional time for discovery, arguing that the Track One cases averaged approximately 20 months from the filing of the complaint to the close of discovery. *See* Opp. at 6-8. This argument completely misses the mark.

In April 2010, twenty months before the close of discovery in the Track One cases, fewer than 50 days of percipient witness depositions had been taken. Between April 2010 and the present, more than 300 additional days of such depositions have been taken, of both Plaintiffs and Defendants It is surely true that some additional discovery is necessary, particularly from later-filing Plaintiffs about issues relating to their specific claims. Such discovery, however, is a tiny sliver of the discovery that was needed two years ago (and before two intervening trials) to prepare these cases. It thus is not surprising that Defendants offer no showing regarding any specific further discovery that could not easily be completed within the time suggested by

[1] Defendants suggest that the first date in Plaintiffs' proposed schedule should refer to a deadline for leave to amend "with leave of Court" rather than "without leave of Court" as set out in Plaintiffs' motion (and Plaintiffs' prior meet and confer efforts). Opp. at 12 n.13. Defendants misread FRCP 15 and misunderstand Plaintiffs' proposal, which is and always was as written.

Plaintiffs. That is particularly true in this horizontal conspiracy case where the central issues involve Defendants conduct, which has been extensively explored already. *See, e.g.*, Docket No. 1641 (DPP Class Certification Order) at 26 ("Courts have frequently found that whether a price-fixing conspiracy exists is a common question that predominates over other issues because proof of an alleged conspiracy will focus on defendants' conduct and not on the conduct of individual class members").

In addition, to the extent Defendants genuinely seek some modest additional discovery, they offer no reason that such discovery has not *already* been accomplished. With the exception of the handful of cases Defendants wish to send to the inchoate waiting room of "Track 4" (a subject which is addressed below), all of the cases in which Defendants seek to extend discovery were filed between 51 and 82 weeks before Plaintiffs' proposed discovery cutoff, and all but three were filed more than 15 months before the proposed discovery cutoff.[2] Under the circumstances, Plaintiffs are confident that any additional discovery that needs to be taken can be accomplished within the period of the proposed discovery cutoff.

2. The NEC Defendants

Defendants also argue that Plaintiffs should be separated into various tracks or have their day in court delayed because some of Plaintiffs' cases "include five new and diverse NEC entities as defendants," who assertedly would be unduly burdened by an obligation to conclude discovery in December because "the first of the cases against the NEC defendants was not at issue until February 29, 2012." Opp. at 8-9. On that basis, Defendants suggest that the presence of NEC as a Defendant should postpone the close of discovery approximately 12 weeks. *See* Opp. at 12 (comparing Plaintiffs' proposed schedule with Defendants' proposed "Track 3" schedule, which moves the discovery cutoff from December 7, 2012, to February 28, 2013).[3]

[2] *See* Opp. at 17 n. 15 (seeking to avoid the December 2012 discovery cutoff for *Office Depot* (filed 5/9/11), *Jaco Electronics* (5/20/11), *Electrograph* (7/8/11), *Interbond* (7/29/11), *Schultze* (8/8/11), *HP* (8/19/11), *P.C. Richard* (8/23/11), *Tech Data* (12/1/11), *AASI* (12/2/11), and *CompuCom* (12/16/11)).

[3] Defendants also propose expanding the period between the close of percipient discovery and the hearing of dispositive motions by approximately five weeks (from just under 11 months to a full year), yielding a total of 17 weeks of delay. To the extent Defendants' proposed Track 3 schedule is adopted for some or all of Plaintiffs, Plaintiffs respectfully request that the January 8, 2014, date for summary judgment oppositions be extended two weeks in light of the holiday season.

It was clever for Defendants to have NEC file their brief, but there are two fundamental flaws in Defendants' argument. First, NEC was sued in this MDL action on June 13, 2007. *See* Docket No. 144. The Direct Purchaser Class sued them on November 5, 2007. *See* Docket No. 366. They filed a motion to dismiss on February 19, 2008, and a reply in support on April 3. *See* Docket No. 463, 556. They were sued again, by ATS Claim, LLC, on October 14, 2009. *See* Docket No. 1323. On December 9, 2010, Electrograph filed a motion seeking leave to file an amended complaint naming NEC. *See* Docket No. 2199. On April 2, 2011, the Court denied the motion for leave to amend, noting that Electrograph would be filing a separate complaint against NEC. *See* Docket No. 2619. Three days later, on April 5, 2011, Electrograph did file suit against NEC, in an Eastern District of New York case that inevitably was transferred to this MDL on July 8, 2011. *See* Docket No. 3053. In short, not only was NEC involved in this litigation for some time in 2007-09, it has been a Defendant in this matter continuously for *more than 14 months* since April 2011. The suggestion that NEC cannot complete whatever discovery it claims to desire by December 2012 – a full 20 months after it was permanently brought into this litigation – is not credible.

Second, NEC's argument is actually backwards. To the extent that information *from* NEC is pertinent, it is Plaintiffs – not NEC – that need to rely on discovery to get that information. Presumably NEC knows what it did and what its records contain. Beyond that, to the extent that NEC's problem is a need to "study the record" in the case, its situation is no different from that of those Plaintiffs that have come even more recently to these cases. Further, as the Court has seen, the other defendants (like various groups of plaintiffs) have been cooperative and efficient in dividing up work that has general applicability.

3. The Burden of Simultaneity

Defendants next assert that Plaintiffs should be split into (largely arbitrary) groups because "the burden of having the close of discovery, expert reports, and summary judgment motions occurring simultaneously in approximately 20 cases at once is too great." Opp. at 9-10; *see also* Opp. at 12 ("ten cases . . . is a maximum that reasonably could be included in a single litigation track for the parties and the Court to be able to effectively administer and meet the

various pre-trial deadlines"). Apparently the idea is that it would be less burdensome to have some expert reports due at one time and some expert reports due at a second time and yet others due at a third time.

Defendants, again, offer no support for their blithe assertion, and it is difficult to discern any. As with the DAP 1 plaintiffs, the great majority of Plaintiffs likely will use joint experts, such that the burden of responding to additional expert reports is likely to be modest. In addition, there is no reason to believe that it would be more convenient to respond to one batch of expert reports while other cases are in the middle of percipient discovery, then a second batch of expert reports while other cases are in the middle of expert depositions and still others remain in percipient discovery, and then a third batch of expert reports while other cases are in the middle of expert depositions and still others are preparing for trial.

In short, Defendants' proposal to create four Direct Action Plaintiff tracks is likely to create significantly *more* burden on the parties and the Court than scheduling those cases to ensure they are at the same stage at the same time.

4. Allegedly New Cases

Finally, Defendants argue that the cases filed by the State of Oklahoma, Viewsonic, NECO Alliance, Rockwell Automation, and Sony Electronics and Sony Computer Entertainment America (collectively, for convenience, "Sony") should be postponed indefinitely on the ground that "[t]hese cases are at their very beginnings and motions to dismiss will not be considered – and in some cases filed – for months." Opp. at 14-15.[4] Defendants are certainly entitled to file motions to dismiss or motions for judgment on the pleadings at any point they wish, but that is no basis for indefinitely postponing a handful of cases. Defendants could have served discovery on Viewsonic, NECO, and Oklahoma in January, when the parties first began discussing the current proposed schedule, and on Rockwell in April when it filed its complaint. Perhaps more to the point, Defendants do not even assert that any significant discovery is needed from any of those parties. Other than transaction data, which all of these Plaintiffs either have produced or will

[4] Defendants also refer to an unsubstantiated "understand[ing]" that "there are additional opt-out cases that are being contemplated." Opp. at 15. Whether or not Defendants' speculation is borne out, it is at most a red herring since only the currently-filed cases are at issue in this motion.

produce in a timely manner, the only discovery Defendants argue might be needed from *any* party is discovery related to potential knowledge of the secret conspiracy. *See* Opp. at 8. Six months is more than enough time to take any discovery this implausible theory might warrant.

Defendants' arguments related to Sony are even less well-taken. In December 2010, Sony informed members of the LCD cartel that it was prepared to sue them, but further informed those potential defendants that it was willing to enter tolling agreements so that the parties could explore possible settlement as a means of avoiding litigation altogether. *See* Declaration of Richard Mooney filed herewith ("Mooney Decl.") ¶ 2. Of the cartel participants to whom Sony extended that offer, all but LG Display accepted. *Id.* (Sony therefore sued LG Display in December 2010.) Sony since has made specific settlement proposals to each of the "tolling" companies (and to LG Display, for that matter) and, in fact, has settled with several companies without the need for litigation. *Id.* ¶ 3. However, Sony was unable to reach agreements with a number of the "tolling" companies after more than a year of effort, and therefore filed suit against AUO, Hitachi, Sharp, and Toshiba in March 2012. *Id.*[5]

LG Display could have begun discovery against Sony 18 months ago, although it has chosen not to for reasons of its own. One reason may be that Sony Electronics produced purchase and sales transaction data in 2008 and 2009 in response to a Rule 45 document subpoena from class plaintiffs, and produced additional purchase and sales transaction data in response to an additional Rule 45 document subpoena in 2011 and 2012. Of course, Defendants could have begun discovery against Sony at any point, since Sony was a party to the MDL and subject to Rule 45 subpoenas. At a minimum, Defendants could have begun discovery when they were sued in March 2012 if they truly believed significant discovery is required, rather than waiting three

[5] Sony reached a mediated settlement agreement with Hannstar, but Hannstar inexplicably reneged on the agreement and Sony was forced to sue it on May 2. Mooney Decl. ¶ 4.

months and using their own failure to act in an effort to delay trial.[6] Moreover, to the extent that some or all of the companies Sony has now sued never had a true interest in settling, they – not Sony – are responsible for any delay in the commencement of litigation that Sony said it was prepared to file against them in late 2010.

In sum, the fact that five Plaintiffs filed suits in December 2011 or early 2012 is no basis for countenancing further delay or rejecting Plaintiffs' proposed schedule.

C. Efficient Resolution of N.D. Cal. LCD Litigation

In addition to fairly addressing the interests of the parties, the schedule adopted by the Court should take account of the Court's finite resources and the impact the LCD cases have had and will have on those resources. The Court already has addressed dozens of dispositive motions and presided over two lengthy jury trials, and the prospect of four further repetitions of the LCD conspiracy saga likely makes the Court feel uncomfortably like Bill Murray in *Groundhog Day*.

Plaintiffs' proposed schedule best meets the goal of judicial economy. *First*, there is no surer way to encourage efficient resolution of these cases than setting a schedule that includes a trial date for all cases. Nothing better serves to focus the mind of litigants on the proper disposition of their cases than the prospect of an upcoming trial. *Second*, any cases that do not settle still must be brought to an end. The first claims in this case were filed in 2006. Plaintiffs submit that ending District Court litigation no more than seven years later is not too lofty a goal. If any of the difficulties conjectured by Defendants do arise, the Court will of course retain discretion to divide the Plaintiffs into groups for trial or to lengthen the schedule as needed. By contrast, reassembling disparate tracks or compressing the schedule once lengthened is essentially impossible.

[6] Defendants suggest that a reason to delay the Sony trial indefinitely is that Hitachi and Toshiba have not responded to the complaints Sony filed in March 2012. *See* Opp. at 15 n.14. To the contrary, Hitachi and Toshiba themselves requested the 90 day response time, and explicitly agreed not to use their own delay as an argument in any scheduling dispute. *See* Docket No. 5648. Further, Hitachi and Toshiba would have responded to Sony's complaint yesterday (as Sharp and AUO did, by filing answers, *see* Docket Nos. 5999 and 6001), except that each asked for a further extension, which they again agreed not to use in any scheduling dispute. *See* Docket Nos. 6000 (Toshiba) and 5969 (Hitachi, including an agreement that the response will be an answer).

III. CONCLUSION

Plaintiffs have crafted a schedule that is sensible, achievable, fair to both Plaintiffs and Defendants, and respectful of the resources of the Court and this District's jurors. Plaintiffs respectfully request that the Court adopt it. Alternatively, if the Court believes additional time is absolutely necessary, Plaintiffs respectfully request that the Court place Plaintiffs on a single track on Defendants' proposed "Track 3" schedule (modified slightly for the holidays).

Dated: June 26, 2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June, 2012, that a copy of the foregoing was filed electronically through the Court's CM/ECF system, with notice of case activity automatically generated and sent electronically to all parties.

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