Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

Molly C. Dwyer
Clerk of Court

November 28, 2018

No.:	18-80173
D.C. No.:	3:17-md-02801-JD
Short Title:	Chip-Tech, Ltd., et al v. Taitsu America, Inc., et al

Dear Appellant/Counsel

This is to acknowledge receipt of your Petition for Permission to Appeal under 23(f).

All subsequent letters and requests for information regarding this matter will be added to your file to be considered at the same time the cause is brought before the court.

The file number and the title of your case should be shown in the upper right corner of your letter to the clerk's office. All correspondence should be directed to the above address pursuant to Circuit Rule 25-1.

No. 18-_____

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

IN RE CAPACITORS ANTITRUST LITIGATION (NO. III),

ON PETITION FOR PERMISSION TO APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
The Honorable James Donato
Nos. 17-md-02801-JD; 14-cv-03264

PETITION OF FILM-ONLY DEFENDANTS FOR PERMISSION TO APPEAL UNDER RULE 23(f)

Jarod M. Bona
Aaron R. Gott
BONA LAW PC
4275 Executive Square, Suite 200
La Jolla, CA 92037
858-964-4589

Counsel for Defendants-Petitioners Taitsu America, Inc. and Taitsu Corporation

(Additional Counsel Listed on Signature Page)

Oral Argument Requested

CORPORATE DISCLOSURE STATEMENTS

Under Federal Rule of Appellate Procedure 26.1, the identity of each petitioner's parent corporation (if any), and any publicly held company that owns 10% or more of each petitioner's stock, is set forth below:

1. Taitsu America, Inc., a nongovernmental corporate party, is a wholly-owned subsidiary of Taitsu Corporation.

2. Taitsu Corporation, a nongovernmental corporate party, certifies that it has no parent corporation, and no publicly held corporation owns 10% or more of Taitsu's stock.

3. Shinyei Corporation of America, a nongovernmental corporate party, is a wholly-owned subsidiary of Shinyei Kaisha.

4. Shinyei Capacitor Co., Ltd., a nongovernmental corporate party, is a wholly-owned subsidiary of Shinyei Kaisha.

5. Shinyei Technology Co., Ltd., a nongovernmental corporate party, is a wholly-owned subsidiary of Shinyei Kaisha.

6. Shinyei Kaisha, a nongovernmental corporate party, certifies that it has no parent corporation, and no publicly held corporation owns 10% or more of Shinyei Kaisha's stock.

7. Shizuki Electric Co., Inc., a nongovernmental corporate party, certifies that it has no parent corporation, and no publicly held corporation owns 10% or more of Shizuki Electric's stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

The undersigned petitioners[1] respectfully request immediate review under Rule 23(f) of the district court's order certifying a single, overarching class of direct purchaser plaintiffs ("DPPs") comprising all persons who directly purchased film or electrolytic capacitors—two products that are noninterchangeable and exist in two separate industries. Petitioners are uniquely situated as entities that manufacture and sell only one of the products at issue: film capacitors. DPPs, however, have long misconstrued and capitalized on the U.S. Department of Justice's ongoing investigation into the electrolytic capacitor industry to attempt to sweep in these "film-only defendants." The order similarly disregards important distinctions that show why certifying a single class does not serve Rule 23 here. The district court eschewed the rigorous analysis required by Rule 23, surmising that it could instead deal with those issues at trial. This is manifest error and will certainly be a death knell to petitioners.

1. Petitioners are Shizuki Electric Co., Inc.; Shinyei Kaisha, Shinyei Technology Co., Ltd., Shinyei Capacitor Co., Ltd., and Shinyei Corporation of America; and Taitsu Corporation and Taitsu America, Inc.

This case also presents an unsettled yet important question about the upper limit for class certification in antitrust cases: whether purchasers of different, noninterchangeable products in separate industries can ***ever*** proceed as one class by alleging one single conspiracy despite the disparate proofs required to show antitrust impact and damages to the purchasers in those separate industries.

DPPs alleged a single, overarching conspiracy to fix prices among both film and electrolytic capacitor manufacturers shortly after the DOJ announced investigations into both industries in 2014. In 2017, DPPs moved to certify a single class of all direct purchasers of film or electrolytic capacitors between 2002 and 2013, relying heavily on evidence of a price-fixing conspiracy among electrolytic capacitor manufacturers, including numerous guilty pleas and substantial documentary evidence showing collusion among those manufacturers.

But that evidence did not show involvement by film capacitor manufacturers. The indisputable truth—which both DPPs and the order disregard—is that the DOJ conducted ***separate*** investigations into the electrolytic and film capacitor industries. All of the guilty pleas, requests for leniency, and plea agreements arose ***solely*** from the electrolytic

capacitor investigation. And the DOJ's film capacitor industry investigation ended more than 16 months before DPPs filed their motion without any criminal charges, guilty pleas, or other action—in fact, without a finding of ***any*** wrongdoing whatsoever.

Although DPPs sought to paint all defendants with the same brush, their "common" evidence relating to the DOJ investigation and resulting pleas does not apply to the film-only defendants and will not predominate in proposed class actions that intermingle the two industries. Indeed, the vast majority of the documents cited in DPPs' motion concern electrolytic capacitors, not film capacitors. DPPs' attempt to tie the film-only defendants into an alleged conspiracy concerning electrolytic capacitors relied on only two documents, and neither contains a scintilla of evidence to suggest—let alone prove—a single, overarching conspiracy spanning 12 years among manufacturers of two distinct, noninterchangeable products in separate industries.

DPPs' arguments baselessly assumed that film and electrolytic capacitors are substitutes—even though this contradicted their own complaint allegations describing a separate film capacitor industry. *See* Dkt. 1355, ¶107. Nevertheless, the district court certified the class,

accepting without analysis DPPs' blurring of the disparate groups of defendants by citing a litany of evidence that applied to only electrolytic capacitors while referring to it generally as evidence against all defendants. The district court dismissed the film-only defendants' arguments that bore on DPPs' inability to show common issues capable of classwide proof as to conspiracy or anticompetitive impact as "common merits questions . . . unsuitable for resolution at this stage" because class certification "is decidedly not an alternative form of summary judgment or an occasion to hold a mini-trial on the merits." Order at 16.

Class certification, however, is proper only after a rigorous analysis showing that the commonality and predominance requirements of Rule 23 are met. The district court's refusal to conduct this analysis is a manifest error that directly contradicts the Supreme Court's holding in *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). As a result, the film-only defendants face joint and several liability with defendants who admittedly conspired to fix prices in the separate, distinct, and much larger electrolytic capacitor industry, many of whom have already settled with DPPs. These small film-only companies will, in effect, be left holding

the bag for the electrolytic manufacturers that engaged in the wrongful conduct, pled guilty, and cut settlement deals with DPPs.

QUESTIONS PRESENTED

1. Did the district court manifestly err in granting class certification where the DPPs' evidence failed to show a single conspiracy or classwide anticompetitive impact across two noninterchangeable products in separate industries?

2. Is class certification ever appropriate in a price-fixing case where the proposed class includes purchasers of two entirely noninterchangeable products in separate industries merely because they allege a single conspiracy?

STATEMENT OF THE CASE AND FACTS

In 2014, DPPs filed a complaint alleging a single, overarching conspiracy to fix prices among Japanese manufacturers of film and electrolytic capacitors following a U.S. Department of Justice criminal investigation announcement. In contrast, the indirect purchaser plaintiffs (whose motion has not been argued or decided) alleged two separate conspiracies—one for the electrolytic industry and a separate

one for the film industry, and accordingly seek separate classes for certification.

As DPPs recognized in their complaint, film and electrolytic capacitors are distinct products with distinct characteristics and each comprise their own, entirely separate industries. The name "capacitor" and a basic purpose—regulating the flow of electricity—are about all they have in common. They are used for different applications and industries, are made from different raw materials, and are (for the most part) manufactured by different companies. Film capacitors are primarily custom-made products used for industrial applications, while electrolytic capacitors are commodity products used for consumer electronics. A large number of manufacturers do not make both film and electrolytic capacitors because they entail completely different material inputs, manufacturing and design processes, applications, sales and distribution structures, and end purchasers.

In early 2016, DOJ notified the district court that it "ended its criminal antitrust investigation into anticompetitive conduct that relates solely to film [defendants]." Dkt. 1097. It did so without having sought a single indictment or plea. DOJ did, however, find evidence of a conspiracy

to fix prices among electrolytic capacitor manufacturers, and it has since secured numerous indictments, pleas, and millions of dollars in fines and penalties from those electrolytic capacitor manufacturers.

Despite all of this, DPPs sought certification of a single class of all purchasers of film and electrolytic capacitors. In support of their motion, they submitted a substantial number of documents and two expert opinions. They relied extensively on the guilty pleas of electrolytic capacitor manufacturers, and the vast majority of the proffered documents concerned solely electrolytic capacitors.

In fact, DPPs had the benefit of four years of exhaustive discovery entailing several million documents and hundreds of hours of deposition testimony, but they relied on just two documents for their assertion of a single, overarching conspiracy—and neither of these documents suggests the film-only defendants participated in any conspiracy, let alone a 12-year conspiracy among manufacturers across two separate industries.

In opposition to DPPs' class certification motion, the film-only defendants submitted (Dkts. 1747 (public); 1750-3 (sealed)):

- DOJ's letter to the court stating the close of its investigation into the film-only industry without any action whatsoever;

- Analysis of DPPs' evidence showing zero evidence of film-only defendants' involvement in the alleged conspiracy;
- Uncontroverted evidence and expert opinion showing that film and electrolytic capacitors are noninterchangeable products sold in separate industries with significant practical differences;
- Evidence showing that film capacitor manufacturers face fierce competition from over 50 Chinese competitors; and
- Evidence and expert opinion showing that the film-only defendants manufacture and sell custom-engineered products for industrial applications at prices individually negotiated with unique end-customers, and other market characteristics showing that neither a single conspiracy or classwide anticompetitive impact was feasible.

DPPs did not attempt to rebut the film-only defendants' opposition. Indeed, their own allegations and evidence demonstrated that electrolytic capacitors are not interchangeable or substitutable with film capacitors. Dkt. 1747. DPPs' own expert testified that he performed no analysis concerning substitutability between film and electrolytic

capacitors and admitted that purchasers do not necessarily buy both types of capacitor.

The district court granted DPPs' motion for class certification, citing "a substantial body of factual evidence in the form of defendants' own documents and criminal guilty pleas." Order at 13. The district court glossed over or outright ignored each and every one of the film-only defendants' arguments that bore on DPPs' inability to show common evidence relating to the film capacitor market. It stated instead that "[w]hether or not there was a single conspiracy . . . are common merits questions that are unsuitable for resolution at this stage" because "[t]he class certification procedure is decidedly not an alternative form of summary judgment or an occasion to hold a mini-trial on the merits." *Id.* at 16.

RELIEF SOUGHT

The Court should grant interlocutory review under Fed. R. App. P. 5 and Fed. R. Civ. P. 23(f) and, following briefing on the merits, reverse or vacate the district court's certification order.

STANDARD OF REVIEW

Review of a certification order under Fed. R. Civ. P. 23(f) is appropriate where: (1) the class certification order is a "death-knell

situation" for either plaintiffs or defendants, and class certification is questionable; (2) the certification decision presents unsettled and fundamental issues of law related to class actions; ***or*** (3) the district court's certification order is manifestly erroneous. *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005). The district court's order is reviewed for abuse of discretion. *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001). Certification premised on legal error is an abuse of discretion. *Id.*

ARGUMENT

This Court should grant review of the order certifying the DPP class for the following reasons:

First, the district court's order is manifestly erroneous because it fails to conduct the rigorous analysis required under Rule 23(a) and (b)(3). Its refusal to entertain the film-only defendants' arguments bearing on the propriety of certifying a class of purchasers of noninterchangeable products sold in separate industries "simply because those arguments would also be pertinent to the merits determination" eschews well-established principles of class certification. *Comcast*, 569 U.S. at 34. Under the proper standard, DPPs' evidence and models fall

far short of establishing that conspiracy and anticompetitive impact are capable of measurement on a classwide basis.

Second, the certification order presents unsettled, fundamental issues of law relating to antitrust class actions. DPPs failed to show that film and electrolytic capacitors are homogenous products, or even that different film capacitor products are. The order fundamentally conflicts with numerous other district court decisions in this circuit, which hold that heterogeneous products and individualized price negotiations preclude classwide proof, and this Court has not decided the issue.

Third, the order creates a "death-knell" situation for the film-only defendants, who are small companies that compete in a relatively small industry compared to the considerably larger electrolytic industry. The film-only defendants—as to whom the DOJ did not make any finding of wrongdoing whatsoever—now face the unimaginable financial exposure of joint and several liability with a group of defendants—who have pled guilty—in a different industry that is 20 times larger despite no evidence to suggest a single, overarching conspiracy and substantial evidence showing such a conspiracy is not economically plausible.

I. THE ORDER IS MANIFESTLY ERRONEOUS BECAUSE THERE IS NO COMMON EVIDENCE ACROSS THE TWO DISTINCT CAPACITOR INDUSTRIES

The district court's order lumped together purchasers in two entirely different industries without the rigorous analysis required by Rule 23. Instead, it cited guilty pleas and documentary evidence relating to one such industry—electrolytic capacitors—as proof of classwide impact in both markets. It failed to entertain or even cursorily address the substantial and unrebutted arguments and facts submitted by the film-only defendants. It reasoned that such questions are merit questions that should only be resolved at summary judgment or trial.

The question on class certification is "not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather, whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (internal quotations and citation omitted). Rule 23 requires a "rigorous analysis" that "will frequently entail overlap with the merits of the plaintiff's underlying claim." *Comcast*, 569 U.S. at 33–34 (internal quotations and citations omitted).

The district court abandoned these principles in its analysis. Rather than look to whether the proof is common to the ***entire*** class, it

completely ignored the existence of two distinct products manufactured and sold in separate industries and used evidence relating to only one of those industries without explaining how evidence in one industry had any feasible application in the other separate industry. Throughout, the district court merely cites to a "substantial body of factual evidence in the form of defendants' own documents and criminal guilty pleas," which it says are "enough in themselves to establish common proof." Order at 13.

In fact, the district court cites to these guilty pleas ***seven*** times as support for its conclusion that DPPs satisfied their burden to show that they can produce common evidence to generate common answers under their theory of the case. But each of those pleas admits to a conspiracy to fix the prices of ***electrolytic*** capacitors—not a conspiracy to fix the prices of ***film*** capacitors or an overarching conspiracy to fix the prices of ***both*** film and electrolytic capacitors.

The district court's refusal to acknowledge that the criminal cases relate only to electrolytic capacitors is striking given its reference to *In re Graphics Processing Units Antitrust Litigation*, 253 F.R.D. 478, 495–96 (N.D. Cal. 2008). In *GPU*, the plaintiffs "failed to establish a way of showing classwide impact." Order at 14. The district court here sought to

distinguish this case from *GPU*, where "[the] defendants received subpoenas from [the] DOJ Antitrust Division but '[u]ltimately, the DOJ dropped its investigation without filing any indictments.'" *Id.* (quoting *GPU*, 253 F.R.D. at 482). Yet that is ***exactly*** a fact that is "glaringly absent" for the film-only defendants. By the district court's own logic, the dropped DOJ investigation into the film industry is a significant consideration—one that the district court wholly ignored.

DPPs' evidence, likewise, was common only to purchasers of electrolytic capacitors. Of 141 documents submitted by DPPs, they cited only two in an attempt to tie the film-only defendants into the electrolytic conspiracy—and neither contained a scintilla of evidence to suggest—let alone prove—the single vast, overarching 12-year conspiracy among manufacturers of two noninterchangeable products in separate industries. These two documents were their best and only evidence after four years of exhaustive discovery. Moreover, DPPs' own damages models were inconsistent with their theory of liability: despite alleging a single, overarching price-fixing conspiracy across two different industries, their expert used different damages calculations with different overcharge percentages for film capacitors than for electrolytic capacitors.

Yet the district court did not address these facts and arguments submitted by the film-only defendants. It only referenced the single conspiracy issue in passing and dismissed it as a "common merits question[]" reserved for summary judgment or trial. Order at 16. The district court not only swept aside the vast differences between electrolytic and film capacitors but also ignored the specific characteristic and distinct end-uses for each film capacitor in its stated intention to avoid questions that also go to the merits. DPPs bear the burden of "satisfy[ing] through evidentiary proof" the provisions of Rule 23, *Comcast*, 1417 U.S. at 133, and a district court must conduct a "rigorous analysis" to determine those prerequisites . . . have been satisfied." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011) (citation omitted).

This was manifest error that precisely contradicts settled law: class certification is ***only*** appropriate where there is a "common contention" for which the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. The guilty pleas and documentary evidence shows there is a common contention with respect to electrolytic capacitor purchasers, but not film capacitor purchasers. And, as the Supreme Court more recently

explained, the district court was required to entertain and address the arguments that bore against class certification regardless of whether they are also merits questions. *Comcast*, 569 U.S. at 34.

II. THE QUESTION OF CLASS TREATMENT FOR HETEROGENEOUS PRODUCTS IS UNSETTLED

The question of whether class certification is appropriate in price-fixing cases involving distinct products in separate industries is one of fundamental importance for class action antitrust cases. Despite this question frequently appearing before district courts faced with class certification motions, it does not appear that the Ninth Circuit has resolved the question.

The district court's order certified a class of purchasers in two separate and distinct industries. The electrolytic industry involves commodity products: electrolytic capacitors are manufactured in bulk according to set product lists and are sold to distributors and manufacturers according to list prices. The other, the film industry, involves custom products: most film capacitors are manufactured for a specific customer for a specific need after significant consultation on engineering and design and negotiations on price. Setting aside that a price-fixing conspiracy across these two industries is not feasible, this

raises a fundamental question of the extent to which purchasers of differentiated products can seek class treatment.

Commoditization is crucial to a finding that common issues predominate as to antitrust impact. Non-commoditized products often require individualized inquiries into both anticompetitive impact and damages—they are used for different applications, subject to different standards and, most often, are purchased after individualized price negotiations. In the Northern District of California, at least three courts have agreed that where products are not commodity products with list prices, class certification is inappropriate. *See, e.g.*, *GPU*, 253 F.R.D. at 491 (denying certification where market was highly heterogeneous and many of the products were customized); *In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA, 2010 WL 2332081, at *8 (N.D. Cal. June 9, 2010) ("antitrust claims predicated on negotiated transactions, as opposed to purchases based on list prices, often entail consideration of individualized proof of impact"); *California v. Infineon Techs. AG*, No. C 06-4333 PJH, 2008 WL 4155665, at *5 (N.D. Cal. Sept. 5, 2008) (inference of impact "does not hold true when injury or impact can be shown only on an individualized basis").

The district court's order conflicts with these decisions. But it also goes further by combining purchasers of two distinct products in separate industries with completely different characteristics—one commodity and the other not—into a single certified class. The Court should grant this petition and resolve this conflict.

III. THE ORDER IS A DEATH-KNELL TO PETITIONERS

The district court's class certification order is a death-knell to the film-only defendants who have been swept up in the admitted criminal wrongdoing of the electrolytic defendants who sell products in the much larger electrolytic industry. Many of those electrolytic defendants have pled guilty to price-fixing electrolytic capacitors (and not film capacitors), and many have already settled with DPPs. The film-only defendants now face a trial where the jury might gloss over who pled guilty to what—just as the district court did. And the film-only defendants will be left holding the bag of ruinous joint and several liability for those guilty defendants' price-fixing in a completely different industry—over a billion dollars (according to DPPs' expert) when trebled and the settlements are subtracted. This alone warrants review of the order, which did not even address the arguments raised by the film-only defendants.

This Court has held that review under Rule 23(f) is warranted where, as here, a doubtful certification order results in financial exposure so great as to provide substantial incentives for the defendants to settle nonmeritorious claims to avoid both risk of liability and litigation expense. *Chamberlan*, 402 F.3d at 960.

The film-only defendants are small companies that operate in a relatively small industry compared to the electrolytic industry. DPPs' own expert's revenue calculations show that film capacitor revenues represented less than 6% of all defendants' total revenues. The total amount of overcharge claimed by DPPs for film capacitor purchases over the relevant period also is less than 6% of the overcharges they claim for electrolytic capacitor purchases. The film-only defendants were not prosecuted by the DOJ, which dropped its investigation into the film capacitor industry. Yet they now they face liability as defendants to a class that was certified based on DOJ's guilty pleas in the separate electrolytic industry. And they now face joint and several liability of over $1 billion. To make matters worse, many of the admittedly guilty electrolytic defendants have already settled—leaving the film-only defendants with the short stick. That sort of liability would be obviously

ruinous: by the calculations of DPPs' own expert, such a damages amount would be several times greater than the film-only defendants combined revenues over the entire 12-year class period.

The film-only defendants raised numerous arguments and uncontroverted facts casting significant doubt on DPPs' ability to meet their burden under Rule 23. And the film-only defendants are perhaps the most affected by the order. Yet the district court's order failed to address the points they raised. Its analysis is, at best, questionable under the "rigorous analysis" standard of *Comcast*.

CONCLUSION

For the foregoing reasons, this Court should exercise its discretion under Rule 23(f) and grant immediate review of the district court's class certification order.

Dated: November 28, 2018

BONA LAW PC

/s/ Aaron R. Gott

Aaron R. Gott
Jarod M. Bona
BONA LAW PC
4275 Executive Square, Suite 200
La Jolla, CA 92028

(858) 964-4589
aaron.gott@bonalawpc.com
jarod.bona@bonalawpc.com

Counsel for Defendants-Petitioners Taitsu America, Inc. and Taitsu Corp.

Additional Counsel:

Dated: November 28, 2018

DENTONS US LLP
/s/ Gaspare J. Bono

Gaspare J. Bono
Claire M. Maddox
DENTONS US LLP
1900 K St. NW
Washington, DC 20006
Tele.: (202) 496-7500
Fax: (202) 496-7756
gap.bono@dentons.com
claire.maddox@dentons.com

Andrew S. Azarmi
DENTONS US LLP
Spear Tower, One Market Plaza, 24th Fl.
San Francisco, CA 94105
Tele.: (415) 267-4000
Fax: (415) 356-3873
andrew.azarmi@dentons.com

Counsel for Defendants-Petitioners Shinyei Kaisha, Shinyei Technology Co., Ltd., Shinyei Capacitor Co., Ltd., and Shinyei Corporation of America.

Dated: November 28, 2018

DAVIS WRIGHT TREMAINE LLP

/s/ Sanjay Nangia

Sanjay Nangia
Allison A. Davis
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111
Tele.: (415) 276-6577
Fax: (415) 489-9077
sanjaynangia@dwt.com
allisondavis@dwt.com

Counsel for Defendant-Petitioner Shizuki Electric Co., Ltd.

Pursuant to Ninth Circuit Rule 25-5(f), the filer attests that concurrence in the filing of this document has been obtained from each of the above signatories.

STATEMENT OF RELATED CASES

Other defendants in this action filed a separate petition today. The case number is not yet known to Petitioners.

CERTIFICATE OF COMPLIANCE

I certify that this petition contains 3,623 words and therefore complies with the word limitation established by the Ninth Circuit Rule 5-2(b), which sets a 20-page limit on petitions for permission to appeal (excluding the accompanying documents required by Rule 5(b)(1)(E)), in conjunction with Ninth Circuit Rule 32-3(2), which allows the filing of a proportionally spaced brief "in which the word count divided by 280 does not exceed the designated page limit."

This petition also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Century Schoolbook 14-point typeface using Microsoft Office Word.

/s/Aaron R. Gott
AARON R. GOTT

EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE CAPACITORS ANTITRUST LITIGATION (NO. III)

Case No. 17-md-02801-JD

ORDER RE DIRECT PURCHASER PLAINTIFFS' CLASS CERTIFICATION MOTION AND DEFENDANTS' *DAUBERT* MOTIONS TO EXCLUDE EXPERT OPINIONS

Re: Dkt. Nos. 1693, 1679, 1685
(Case No. 14-cv-03264-JD)

The plaintiffs in this multi-district antitrust litigation are putative classes of direct and indirect purchasers, along with a few companies that opted out of the direct purchasers group to pursue claims on their own. The core allegation is that defendants profited from a long-running, global price-fixing conspiracy in the capacitor industry. This order resolves the direct purchaser plaintiffs' class certification motion and defendants' *Daubert* motions to exclude plaintiffs' expert opinions.

BACKGROUND

The relevant product is the capacitor, an electronic component used to temporarily store and even out the flow of electrical energy. Capacitors are essential for the functionality of virtually all electrical circuits. Everything that runs on electricity usually has at least one capacitor in it, and complex devices like cell phones typically have hundreds.

Capacitors come in different types and are categorized by the material used in the dielectric, which is the insulating layer between a capacitor's chargeable plates. Capacitor dielectrics are typically made out of aluminum, tantalum, plastic film or ceramic material. Aluminum and tantalum capacitors are further classified as electrolytic capacitors, which are polarized. Electrostatic capacitors are not polarized.

The direct purchaser plaintiffs (DPPs) seeking certification bought standalone capacitors directly from one or more of the defendants. The four named direct purchaser plaintiffs are Chip-Tech, Ltd., Dependable Component Supply Corporation, eIQ Energy, Inc., and Walker Component Group, Inc. All are United States companies. The defendants are for the most part overseas capacitors manufacturers in Japan and other parts of East Asia. The DPPs allege a single conspiracy among the defendant electrolytic capacitor manufacturers and film capacitor manufacturers to fix prices and suppress competition in the markets for aluminum and tantalum electrolytic capacitors, and film capacitors.

The DPPs contend that the defendants, which number in the dozens, effectuated the conspiracy through regular cartel meetings. These meetings ranged from informal group communications by email and telephone to formal gatherings of senior executives in Asia, all for the purpose of illegally colluding on capacitor pricing and production. To illustrate the level of collusion among the conspirators, the DPPs say that the presidents and other high-level executives at the electrolytic manufacturers convened "presidents' meetings" and "joint committee meetings" two or three times a year to coordinate on pricing practices. Dkt. No. 1766-1 ("Mot.") at 7. The DPPs also point to frequent meetings and interactions between less senior personnel. *Id*. at 7-8. Film capacitor meetings are alleged to have been held approximately six times a year. *Id*. The conspiracy meetings regularly included a social component of golf outings, dinner and drinks, which provided additional opportunities for collusion. *Id*. DPPs contend that the conspiratorial effort was successful, and that the defendants artificially raised the prices of capacitors that were billed or shipped to the United States.

As this domestic civil action has unfolded, several parallel government investigations have been underway in overseas jurisdictions. China's National Development and Reform Commission, the Fair Trade Commissions of Japan, South Korea, and Taiwan, the competition commission of Singapore, Brazil's Administrative Council for Economic Defense, and the European Commission's competition authority have all pursued inquiries into price fixing for

capacitors. Dkt. No. 1766-2 ("Saveri Decl."), Ex. 1 ¶ 18.[1] Several of the investigations have resulted in the imposition of fines on various defendants.

In the United States, the Department of Justice brought parallel criminal prosecutions for the price-fixing conspiracy against a number of the defendants in this action and their individual employees. This Court is presiding over the parallel criminal cases. To date, the Court has taken guilty pleas from defendants NEC Tokin Corporation (Case No. 15-cr-426), Hitachi Chemical Co., Ltd. (Case No. 16-cr-180), Elna Co., Ltd. (Case No. 16-cr-365), Holy Stone Holdings Co. Ltd. (Case No. 16-cr-366), Rubycon Corporation (Case No. 16-cr-367), Nichicon Corporation (Case No. 17-cr-368), Matsuo Electric Co. Ltd. (Case No. 17-cr-73), and Nippon Chemi-Con Corporation (Case No. 17-cr-540). The Court sentenced each of these corporations to fines ranging from $600,000 to $60 million, along with a condition to implement detailed compliance programs to prevent future price fixing and other anti-competitive conduct. Two individual employees of defendant companies, Satoshi Okubo (Case No. 17-cr-74) and Tokuo Tatai (Case No. 15-cr-163), also pled guilty and were each sentenced to a term of imprisonment of one year and a day.

DISCUSSION

I. LEGAL STANDARDS

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quotations omitted). To proceed under this special exception, the party seeking class certification must satisfy through evidentiary proof, and not just through pleading, that all of the requirements of Federal Rule of Civil Procedure 23 have been met. *Id.* That includes each of the four requirements of Rule 23(a) -- "sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation" -- and at least one of the provisions of Rule 23(b). *Id.* The DPPs seek certification under Rule 23(b)(3), which is

[1] The corrected version of the declaration can be found at Dkt. No. 1766-2, and unless otherwise noted, all "Ex." references in this order are to exhibits to that declaration. The exhibits themselves were filed as attachments to Dkt. No. 1693.

appropriate when "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

For both the Rule 23(a) and Rule 23(b) requirements, the Court's analysis must be "rigorous" and may "entail some overlap with the merits of the plaintiff's underlying claim." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 465-66 (2013); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011); *Comcast*, 569 U.S. at 33-34. This is because "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id*. (quotations omitted). But the rigorous analysis must not be confused with a "license to engage in free-ranging merits inquiries at the certification stage"; merits questions should "be considered to the extent -- but only to the extent -- that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 466.

The purpose of Rule 23 is "'to select the metho[d] best suited to adjudication of the controversy fairly and efficiently.'" *Alcantar v. Hobart Service*, 800 F.3d 1047, 1053 (9th Cir. 2015) (quoting *Amgen*, 568 U.S. at 460, alteration in original). Consequently, class certification is not summary judgment by another name. The plaintiffs' burden is to present enough evidence to warrant adjudication of their claims on a class basis, not to win their case.

For the commonality inquiry under Rule 23(a)(2), what matters "is not the raising of common 'questions' . . . but rather the capacity of a classwide proceeding to generate common *answers*." *Wal-Mart*, 564 U.S. at 350 (quotations omitted, emphasis in original). Plaintiffs must show that their claims "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. For Rule 23(b)(3), plaintiffs must also show that the proposed class is "'sufficiently cohesive to warrant adjudication by representation'" in that common issues predominate over questions affecting only individual class members. *Amgen*, 568 U.S. at 469 (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). Plaintiffs need not prove that each element of their claim

is susceptible to classwide proof. *Id.* The "more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). Rule 23(b)(3) permits certification when "one or more of the central issues in the action are common to the class and can be said to predominate, . . . even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045 (2016) (internal quotations omitted). It is well-established that "damage calculations alone cannot defeat certification," *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010), and "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).

This Court has discussed in other orders the fuzzy line separating the Rule 23(a)(2) commonality inquiry and the Rule 23(b)(3) predominance determination. *See Ochoa v. McDonald's Corp.*, No. 3:14-cv-02098-JD, 2016 WL 3648550, at *5 (N.D. Cal. July 7, 2016). Our Circuit has recognized that the United States Supreme Court's decision in *Wal-Mart* established a "'rigorous' commonality standard" under Rule 23(a)(2). *Leyva*, 716 F.3d at 512. Courts have consequently found it appropriate to assess Rule 23(a)(2) commonality and Rule 23(b)(3) predominance together. *See, e.g., Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120-21 (9th Cir. 2017). That is the approach the Court takes here, while being mindful of the observation that "Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Comcast*, 569 U.S. at 34.

In addition to the DPPs' class certification motion, the Court has before it defendants' motions to exclude certain of DPPs' experts' testimony offered in support of class certification. The motions were made pursuant to Rules 104(a) and 702 of the Federal Rules of Evidence, as well as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The analysis under *Daubert* is "flexible" and there is no "definitive checklist or test." 509 U.S. at 593-54. The two touchstones for admissibility are reliability and relevancy. *Id.* at 599.

The parties' *Daubert* and Rule 23 arguments often overlapped, and so the Court's *Daubert* analysis is woven into the class certification analysis, with any remaining *Daubert* issues taken up at the end of the order.

II. DPPS' CLASS CERTIFICATION MOTION

The DPPs seek to certify this class:

> All persons that purchased capacitors directly from any of the Defendant Entities from January 1, 2002 to December 31, 2013 (the "Class Period"), where such persons are:
>
> (a) inside the United States and were billed or invoiced for capacitors by one or more Defendant Entities during the Class Period (*i.e.*, where capacitors were "billed to" persons within the United States); or
>
> (b) outside the United States and were billed or invoiced for capacitors by one or more Defendant Entities during the Class Period, where such capacitors were imported into the United States by one or more Defendant Entities (*i.e.*, where the capacitors were "billed to" persons outside the United States but "shipped to" persons within the United States).

Mot. at i.

DPPs clarify that "capacitors" as used in the proposed definition include aluminum, tantalum and film capacitors. *Id*. n.1. The defendant entities are AVX Corporation; ELNA Co., Ltd.; ELNA America Inc.; Holy Stone Enterprise Co., Ltd.; Milestone Global Technology, Inc. (d/b/a HolyStone International); Vishay Polytech Co., Ltd.; KEMET Corporation; KEMET Electronics Corporation; Matsuo Electric Co., Ltd.; Nichicon Corporation; Nichicon (America) Corporation; Nippon Chemi-Con Corporation; United Chemi-Con, Inc.; Nissei Electric Co., Ltd.; Panasonic Corporation; Panasonic Corporation of North America; SANYO Electric Co., Ltd.; SANYO North America Corporation; Rubycon Corporation; Rubycon America Inc.; Shinyei Kaisha; Shinyei Technology Co., Ltd.; Shinyei Capacitor Co., Ltd.; Shinyei Corporation of America, Inc.; Shizuki Electric Co., Ltd.; Taitsu Corporation; Taitsu America, Inc.; and TOSHIN KOGYO Co., Ltd. *Id*. n.2.[2] The "billed to" or "shipped to" the United States limitation in the class definition is undoubtedly related to the DPPs' stipulation to accept the Court's prior FTAIA

---

[2] The Court eliminated from DPPs' list those defendants that are marked as "settled/dismissed" in the most recent status update provided to the Court. Dkt. No. 2226.

ruling and to limit their case only to those categories of transactions the Court ruled were properly in the case. Dkt. Nos. 1302, 1421.

A. Numerosity (23(a)(1))

Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs state that the proposed class contains "almost two thousand members." Mot. at 18. That sizable number, and the facts and circumstances of this case, indicate that joinder of all members would be impracticable. The numerosity requirement is not contested by the defendants and the Court finds it satisfied.

B. Commonality (23(a)(2)) and Predominance (23(b)(3))

Defendants do not contest commonality. *See* Dkt. No. 1745 ("Opp."). Their main challenge is to predominance, and for that inquiry, the Court is guided by the elements of the underlying cause of action. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). There is just one here, for fixing prices in violation of the Sherman Act, 15 U.S.C. § 1. Dkt. No. 1831 ¶¶ 433-43. To prevail on that claim, DPPs will have to establish an "antitrust violation" (here, the alleged conspiracy), "antitrust impact," and "the fact of damages." *Comcast*, 569 U.S. at 42 (Ginsburg, J., and Breyer, J., dissenting); *see also In re Cathode Ray Tube (CRT) Antitrust Litigation*, 308 F.R.D. 606, 620 (N.D. Cal. 2015) (elements of price-fixing claim are "(1) a conspiracy to fix prices in violation of the antitrust laws ('conspiracy'); (2) an antitrust injury -- *i.e.*, the impact of the defendants' unlawful activity ('impact'); and (3) damages caused by the antitrust violations ('damages').").

1. Conspiracy

Whether defendants entered into a price-fixing conspiracy is of course a fundamental liability issue in this case. DPPs do not need to prove the fact of a conspiracy for certification, but only that the issue is common to the class and "is capable of classwide resolution . . . in one stroke." *Wal-Mart*, 564 U.S. at 350. This can be a relatively straightforward task because, as many courts have noted, the claim of a conspiracy to fix prices inherently lends itself to a finding of commonality and predominance, even when the market involves different products and prices. *In re Urethane Antitrust Litigation*, 768 F.3d 1245, 1254-56 (10th Cir. 2014).

There is no doubt that the question of a conspiracy is a common issue under Rule 23(a), which defendants do not deny. The dispute here is whether the DPPs have shown under Rule 23(b) that the existence of a conspiracy to fix prices is amendable to classwide proof. The record before the Court establishes that they have.

To a considerable degree, the fact of a conspiracy to fix prices has already been established by the criminal pleas. Eight corporations have pled guilty to conspiring, and accepted substantial criminal fines for their collusion. Two individuals have also pled guilty and been sentenced to time in a federal prison for their related conduct. In their plea agreements, defendants admitted they had "participated in a conspiracy . . . the primary purpose of which was to fix prices and rig bids of certain electrolytic capacitors sold in the United States and elsewhere." *See, e.g.*, Dkt. No. 9-2 at 3 (¶ 4(a)) in Case No. 16-cr-366 (Holy Stone); *see also* Mot. at 5 & n.8 (listing additional plea agreements). In addition, defendant Panasonic has applied for, and received on a conditional basis, leniency from the United States government under the Antitrust Criminal Penalty Enforcement and Reform Act ("ACPERA"). Plaintiffs state, without objection by defendants, that Panasonic must have admitted its "participation in a criminal antitrust violation." *Id.* at 4. It is worth noting that other jurisdictions outside the United States have also imposed fines for the conspiracy.

But the DPPs do not rely on the guilty pleas alone. They also present a substantial quantum of emails, reports, and other evidence harvested in discovery. For example, DPPs cite to a core set of 141 documents as "common documentary evidence and data confirming defendants' illegal conduct" that "reveals defendants' participation in hundreds of illegal cartel meetings and numerous illegal bilateral and multilateral meetings and communications." Mot. at 3-4. The documents show defendants discussing their goals of "restrain[ing] useless competition" and "striv[ing] to sustain prices by cooperating," Ex. 96, and exchanging information "in order to ensure all makers' profit generation and maintenance of [a] healthy market price." Ex. 85. They also show actual exchanges of competitively sensitive information such as pricing on capacitor sales. *See, e.g.*, Exs. 10, 12, 15, 30, 35. Many other documents evidence frequent, formal and informal meetings among defendants. *See, e.g.*, Exs. 9, 17, 20, 35, 36, 37, 38, 39, 59.

This record demonstrates that plaintiffs have enough common evidence to support classwide treatment of their conspiracy claim. Defendants have not identified any matters that would require a degree of individualized proof sufficient to defeat the DPPs' showing. Commonality and predominance are established for the element of a conspiracy.

2. Classwide Injury or Impact

The next question is whether plaintiffs can prove impact through classwide proof. Defendants treat this as a major battleground and focus their opposition on *Daubert* challenges to the plaintiffs' experts, Drs. James T. McClave and J. Douglas Zona.[3] Dr. McClave is an econometrician and statistician, and Dr. Zona an applied economist. Dr. McClave is plaintiffs' primary expert on the issue of impact, *see* Mot. at 14-15, and the majority of defendants' challenges are directed to his analysis. Defendants do not differentiate their challenges between classwide impact and damages. *See, e.g.*, Opp. at 8 ("DPPs cannot show predominance because their proposed econometric models are incapable of reliable proving class-wide impact or damages"). But the fact of injury is different from the amount of injury, and impact and damages should be analyzed separately, which the Court will do.

The appropriate concerns at this stage are not about the quality of the data Dr. McClave used or whether he included all the potential variables in his model. Challenges along those lines do not go to the admissibility of his opinions, but rather to matters of weight and probative value for a jury to evaluate. *Urethane*, 768 F.3d at 1261, 1263. Many of defendants' attacks miss this salient point by criticizing what Dr. McClave did or didn't take into account in running his analysis. Those observations may be grist for a good cross-examination at trial, but they do not play a material role in deciding whether Dr. McClave's work should be admitted under Rule 702. *See Obrey v. Johnson*, 400 F.3d 691, 695-96 (9th Cir. 2005) (a "regression analysis does not become inadmissible as evidence simply because it does not include every variable that is quantifiable and may be relevant to the question presented . . . [I]t is for the finder of fact to

---

[3] At the certification motion hearing, the Court mused out loud about the possibility of a further evidentiary proceeding. After spending a substantial amount of time reviewing the reports and *Daubert* arguments, the Court finds that the motions can all be resolved on the papers, and that the parties can be spared the time and expense of a further hearing.

consider the variables that have been left out of an analysis, and the reasons given for the omissions, and then to determine the weight to accord the study's results") (internal citation omitted).

The proper question is whether Dr. McClave practiced a generally accepted method for determining antitrust impact, or whether his work was "junk science" akin to predicting criminality by feeling the bumps on a person's head. *General Electric Co. v. Joiner*, 522 U.S. 136, 153 n.6 (1997). The materials presented to the Court show that his work is sound and reliable, and consistent with established econometric methods.

To start, Dr. McClave used a multiple regression approach that is a widely used econometric technique for determining whether prices were higher during a class period than they otherwise would have been without anti-competitive conduct. *See, e.g.*, *Urethane*, 768 F.3d at 1260-61; *Fond Du Lac Bumper Exchange, Inc. v. Jui Li Enterprise Co., Ltd.*, No. 09-cv-0852, 2016 WL 3579953, at *9 (E.D. Wis. 2016); *In re Graphics Processing Units Antitrust Litigation*, 253 F.R.D. 478, 495-96 (N.D. Cal. 2008) ("*GPU*"). Multiple regression analysis is a type of statistical tool that tests the relationship between dependent and independent variables to determine how the variables might impact each other or are causally related. *Urethane*, 768 F.3d at 1260-61; *GPU*, 253 F.R.D. at 493.

A fair reading of Dr. McClave's report leaves no doubt that he performed a multiple regression analysis in a reliable and professionally accepted manner. His analysis compared the prices charged during the period when the conspiracy allegedly operated (the "class period") with prices charged before or after the class period, when the market was unaffected by the alleged conspiracy ("benchmark" period). He called the difference between these prices the "overcharge." Saveri Decl., Ex. 2 ("McClave Opening") at 4. To perform this analysis, he constructed a transaction database, based on the transaction data produced by defendants and comprising over seven million individual transactions. *Id*. at 3. To test whether, "while accounting for factors that determine prices in a competitive market, prices [were] elevated above their competitive levels as a result of the alleged conspiratorial behavior," *id*. at 5, he included explanatory variables such as those based on the cost of the raw material used for the capacitor's dialectric, and demand. *Id*. at

6-7. He included a time variable, "to account for price-related factors not captured explicitly by the other supply and demand variables," as well as an "indicator or 'dummy' variable" for each type of capacitor at issue in DPPs' case. *Id*. at 5-7.

He concluded that his model accounted "for nearly all -- more than 98% -- of the variability in capacitor transaction prices," and found the "estimates of all three conspiracy period indicators" to be "positive and statistically significant," indicating that "aluminum product prices were elevated by 9.8%, tantalum product prices by 7.5%, and film product prices by 7.2%." *Id*. at 8. He takes these results as "empirical evidence" pointing to "an effective conspiracy that caused plaintiffs to pay supracompetitive prices." *Id*. He additionally opined that his model results lead to the "inference that all, or nearly all, class members are impacted." *Id*. He stated that the estimates provided by his multiple regression model could be used to calculate aggregate class overcharges during the class period as follows:

Capacitor Type	Revenue	Overcharge Percent	Overcharges
Aluminum	$3,062,325,188	8.9%	$272,546,942
Film	$382,759,263	6.7%	$25,644,871
Tantalum	$3,107,828,081	7.0%	$217,547,966
TOTAL	**$6,552,912,532**		**$515,739,778**

Id. at 9.

To be sure, defendants dispute Dr. McClave's conclusions, but they do not identify any methodological flaws sufficiently grave to bar admission of his work. They say, for example, that the data he used was "fatally deficient and unrepresentative," but it appears that Dr. McClave analyzed all reliable data that was produced by defendants and provided to him, *see* McClave Opening at 3 & n.5, including the non-trivial sum of over seven million individual transactions. And while defendants argue that Dr. McClave failed to account for rebates and discounts on a classwide basis, Dr. McClave's report itself states that "[p]rice adjustments were taken into account when sufficient information was provided to relate the adjustment to the original transactions." *Id*. at 3 n.6. In any event, these challenges again go to weight and not admissibility.

Defendants press the point that Dr. McClave's model is based on the "assumption that every purchaser of each of the three different types of capacitors at issue paid the same uniform overcharge (7.2% for film capacitors, 9.8% for aluminum capacitors, and 7.5% for tantalum capacitors) for all purchases during the twelve-year class period." Opp. at 4. Defendants say that while Dr. McClave claimed to have done a "customer-by-customer" analysis, this was nothing more than a comparison of each customer's actual prices with the "but-for" predicted prices for each customer, where the "but-for" price was based purely on the 8.9%, 6.7%, and 7.0% respective aggregate overcharge percentages he calculated for aluminum, film and tantalum capacitors over the entire 12-year alleged conspiracy period. They also contend that Dr. McClave's method "did not calculate separate overcharges for class members on an individual basis." Opp. at 4; *see also* Dkt. No. 1745-1 ("Papendick Decl."), Ex. 1 ("McClave depo excerpt") at 137:21-139:12 ("customer-specific" calculation uses uniform overcharge percentage for that product and compares that to actual prices paid; but-for overcharge percentage is never varied by customer).

Even if these criticisms were accepted for the sake of discussion, they do not warrant exclusion of Dr. McClave's work on *Daubert* grounds, or a denial of the DPPs' certification motion. That is because defendants demand too much. In effect, they argue that DPPs must prove that each and every putative class member was harmed before certification can be granted. But Rule 23 does not require proof of impact on each purchaser before a class can be certified. *Kleen Products LLC v. International Paper Co.*, 831 F.3d 919, 927 (7th Cir. 2016). Rule 702 and *Daubert* do not require what Rule 23 does not. In addition, the prevailing view, which the Court agrees with, is that "price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated." *Urethane*, 768 F.3d at 1254. Setting the certification bar at the extreme height defendants propose would almost certainly kill off most antitrust class actions well before an adjudication of the merits of the case.

What really matters "is whether the class can point to common proof that will establish antitrust injury (in the form of cartel pricing here) on a classwide basis." *Kleen*, 831 F.3d at 927. On this point, if DPPs had relied solely on Dr. McClave's analysis as common proof of classwide

impact, defendants' argument might pack some punch. But DPPs present much more than Dr. McClave's opinions. They offer Dr. Zona's analysis as well. Dr. Zona's report provided considerable material about how the structure of the market for capacitors was conducive to price fixing, including evidence about the concentration of manufacturers, the barriers to entry created by the manufacturing process, low elasticity of demand, and the commodity-like nature of capacitors. *See* Saveri Decl., Ex. 1 (Zona Opening). He also performed his own price dispersion analysis, which he says is consistent with the existence of the alleged conspiracy. *Id*. at 32-37. Dr. Zona opines that "one might expect a broader range of prices in collusive situations," *i.e.*, a bigger spread between the lowest and highest prices paid, and he goes on to show "an increase in price spread during the class period." *Id*. This price dispersion analysis supplements, but does not contradict, Dr. McClave's regression analysis, as defendants argue. Both experts' opinions go to DPPs' theory of liability, which is that defendants engaged in a price-fixing conspiracy that artificially raised the prices of the capacitors purchased by the putative class.

In addition, DPPs have a substantial body of factual evidence in the form of defendants' own documents and criminal guilty pleas. A good argument can be made that these sources are enough in themselves to establish common proof. The Court has already noted the panoply of emails, reports, meeting minutes and other documents produced by defendants showing that defendants themselves acknowledged that "their collusion had a wide impact on prices for capacitors." Mot. at 11-12; *see*, *e.g.*, Ex. 116 (meeting minutes reflecting successful "price restoration" and stating, "we have confirmed at today's meeting that all companies will proceed strongly."); Ex. 99 ("Price returns have started throughout the world. The entire world is also joining forces in correcting products that are not profitable."). And there are the guilty pleas in which defendants admitted their participation in a price-fixing conspiracy that had a substantial and intended effect in the United States. The criminal judgments that followed from these guilty pleas are admissible at trial as "prima facie evidence of the violation of antitrust laws." *City of Burbank v. General Electric Co.*, 329 F.2d 825, 834 (9th Cir. 1964); *see also* 15 U.S.C. § 16(a) ("A final judgment . . . rendered in any . . . criminal proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie

evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto").

These multiple sources of evidence amply support class treatment of the antitrust injury element. They also distinguish this case from others where class certification was found to be problematic. For example, the plaintiffs in *GPU* and *In re Optical Disk Drive Antitrust Litigation*, 303 F.R.D. 311 (N.D. Cal. 2014) ("*ODD I*"), who failed to establish a way of showing classwide impact, did not have the substantial evidentiary sources present here. This case has "plus factors" beyond the expert reports that were glaringly absent in those cases. *Cf. GPU*, 253 F.R.D. at 482 (defendants received subpoenas from DOJ Antitrust Division but "[u]ltimately, the DOJ dropped its investigation without filing any indictments"); *ODD I*, 303 F.R.D. at 314-15 (even though plaintiffs alleged a price-fixing conspiracy, much of the evidence plaintiffs pointed to related only to instances of "bid rigging," and the court noted that "[a]t least at this juncture . . . , plaintiffs have not proffered evidence or allegations that there were one or more instances in which the defendants' executive decision-makers entered into express agreements to fix prices across the board on an ongoing basis.").[4]

3. Damages

Defendants raise a number of issues about proof of damages. These include issues of customization of capacitors and other variations, such as different raw materials or amount of raw materials, different end uses and demands, and differences among class members with regard to bargaining power and pricing.

[4] Although defendants focus almost entirely on attacking Dr. McClave's analysis on its own terms, they make passing mention of their expert, Dr. John H. Johnson, IV, for the proposition that "Dr. McClave's own model shows a lack of class-wide impact for numerous putative class members." Opp. at 19-20. As plaintiffs rightly point out, Dr. Johnson's analysis appears to suffer from data sets that are too small. *See* Dkt. No. 1781 ("Reply") at 1 ("Dr. Johnson chops the data into tiny datasets -- running more than one regression per class member -- thereby reaching no statistically significant results for most class members and unreliable results purportedly suggesting no injury to others."). In addition, Dr. Johnson's remarks do not account for the other sources of evidence that the Court has considered in assessing issues of classwide proof.

Without a doubt, these issues may require further attention should the case go to trial. Even so, they pose no barrier to certification because, as discussed, these kinds of individualized damage variations do not defeat predominance. Our Circuit recently re-affirmed this view in *Torres*, 835 F.3d at 1135, when it determined that the district court correctly found that predominance was not defeated where "nearly all" of the individualized questions raised by the defendant went to "the issue of damages rather than liability." And to the extent any class members may not have paid any overcharges at all (assuming DPPs prevail on conspiracy and impact), that will bring into play the *Torres* court's statement that "the district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition." *Id.* at 1137.

It is also worth noting that a variety of tools can be used to address damages. These range from the appointment of a magistrate judge or special master to preside over individual damages proceedings, to altering or amending the class definition in response to developments at trial. *See In re Air Cargo Shipping Servs. Antitrust Litigation*, No. 06-MD-1175 (JG)(VVP), 2014 WL 7882100, at *63 (E.D.N.Y. Oct. 15, 2014). The Court may also call for a trial plan from DPPs that addresses how the aggregate damages estimated from their expert's report can then be apportioned among the class members. *See, e.g.*, *In re Lidoderm Antitrust Litigation*, No. 14-md-02521-WHO, 2017 WL 679367, at *11 (N.D. Cal. Feb. 21, 2017). Much can be done with the collaboration of counsel and the Court to manage damages issues. It is enough to find here that these issues do not warrant a denial of class certification.

4. Inclusion of Film and Electrolytic Capacitors and Claims Against AVX and KEMET

Defendants challenge the "implausible multi-product conspiracy" (*i.e.*, one that includes both electrolytic and film capacitors) and essentially attack the sufficiency of the evidence against AVX and KEMET. Opp. at 29-33. The film-only defendants have also filed an opposition to the same effect. Dkt. No. 1750-3.

But among other things, defendants do not dispute that at a minimum, Hitachi, Nichicon, NCC, Panasonic and Rubycon attended both film and electrolytic capacitors meetings. Opp. at 29

n.30. And while defendants argue that "different personnel from the different divisions of these defendants" attended these respective meetings, *id.*, DPPs have identified documents that suggest that for at least one of those companies, the same person attended both types of meetings. Exs. 39, 157, 158, 159.[5] DPPs have also submitted documentary evidence that shows both types of capacitors were sometimes discussed at the same meeting. *See*, *e.g.*, Exs. 126, 161, 162, 163. DPPs have further identified some common evidence they can offer to prove that AVX and KEMET joined the conspiracy through communications and meetings with Asian-based conspiracy members, even though they themselves were not based in Asia. Reply at 23-24 (citing, *e.g.*, Exs. 171, 172, 173).

These are sufficient for present purposes. Whether or not there was a single conspiracy and whether or not AVX and KEMET also joined it are common merits questions that are unsuitable for resolution at this stage. DPPs have sufficiently identified the common proof they can offer on both points. The class certification procedure is decidedly not an alternative form of summary judgment or an occasion to hold a mini-trial on the merits. *Alcantar*, 800 F.3d at 1053.

C. Typicality and Adequacy (23(a)(3)-(4))

Typicality and adequacy are satisfied as well. Defendants have not challenged the adequacy of class counsel, and the Court independently finds, based on the submissions by plaintiffs' counsel and from observing their performance over several years in this litigation, that they are more than up to the task.

For the individual named plaintiffs, defendants have not identified any alleged misconduct by Chip-Tech that pertains directly to the claims at issue. Although defendants vaguely refer to some possible individual defenses, they do not say what they are. Opp. at 35.

Nor have defendants otherwise meaningfully challenged the typicality or adequacy of any of the four named plaintiffs. None of them is situated so differently from the class they seek to represent that they might be subject to a conflict. The fact that Chip-Tech has exited the capacitor business and Dependable is now a "dissolved entity" are not disqualifying factors. Typicality may

[5] Exhibits 151 to 190 were filed with DPPs' class certification reply at Dkt. No. 1781.

be a bar to certification if other members would suffer because the named plaintiffs would be "preoccupied with defenses unique to" them. *Just Film*, 847 F.3d at 1116 (quotation omitted). DPPs have adequately shown that would not be the case for any of the named plaintiffs.

While some of the corporate designees may have made deposition statements that reflected a rather general understanding of the litigation, none were so "startlingly unfamiliar with the case" that they vitiated the possibility of serving as a class representative. *In re Facebook Biometric Information Privacy Litigation*, 326 F.R.D. 535, 543 (N.D. Cal. 2018) (quotations omitted). Moreover, "objections to adequacy based on a named representative's alleged ignorance are disfavored," and "[e]ven if the named plaintiffs have relied heavily on the advice of attorneys and others, it is hardly a badge of inadequacy to seek help from those with relevant expertise, particularly in a complex case like this one." *Id*. (citations omitted).

D. Superiority of Class Adjudication (23(b)(3))

The last remaining factor for class certification is superiority under Rule 23(b)(3). Defendants do not contest this factor. In analyzing it, the Court is to specifically consider "the likely difficulties in managing a class action." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126-28 (9th Cir. 2017).

As the preceding discussion indicates, a class action is clearly superior to individual proceedings here, especially on the questions of conspiracy, impact and fact of damages. Any remaining individualized questions on the calculation and distribution of damages can be managed. Consequently, the Court finds this factor satisfied as well, which concludes the class certification analysis in DPPs' favor.

III. DEFENDANTS' *DAUBERT* MOTIONS TO EXCLUDE PLAINTIFFS' EXPERTS MCCLAVE AND ZONA

The Court has already considered and rejected the main challenges to plaintiffs' experts. In the case of Dr. McClave, defendants' *Daubert* arguments are duplicative of their substantive arguments, and so the Court denies the motion to exclude his opinion for the same reasons. Dkt. No. 1679.

The Court also rejects the remaining *Daubert* arguments against Dr. Zona. Defendants seek to exclude Dr. Zona's opinion "that defendants engaged in the alleged conspiracy." Dkt. No. 1685. The Court acknowledges that that is a topic on which it is not likely to permit expert testimony at trial, but because Dr. Zona's opinion on that point was wholly immaterial to the Court's class certification analysis, defendants' motion to exclude that opinion is denied as moot. For Dr. Zona's price dispersion theory, again defendants' challenges go to weight, rather than admissibility. It is not junk science, and defendants' motion to exclude it is denied. Lastly, Dr. Zona's opinions about the reliability of Dr. McClave's work are also admissible as far as they go.

CONCLUSION

The direct purchaser plaintiffs' motion for class certification is granted, and defendants' *Daubert* motions to exclude the DPPs' expert opinions are denied.

The Court certifies a class consisting of all persons that purchased capacitors directly from any of the remaining defendants from January 1, 2002 to December 31, 2013 (the "Class Period"), where such persons are: (a) inside the United States and were billed or invoiced for capacitors by one or more Defendant Entities during the Class Period (*i.e.*, where capacitors were "billed to" persons within the United States); or (b) outside the United States and were billed or invoiced for capacitors by one or more Defendant Entities during the Class Period, where such capacitors were imported into the United States by one or more Defendant Entities (*i.e.*, where the capacitors were "billed to" persons outside the United States but "shipped to" persons within the United States). The Joseph Saveri Law Firm is appointed as counsel for the class.

DPPs are ordered to submit by **December 17, 2018**, a proposed plan for dissemination of notice to the class.

IT IS SO ORDERED.

Dated: November 14, 2018

JAMES DONATO
United States District Judge

CERTIFICATE OF SERVICE

I, Aaron R. Gott, hereby certify that on November 28, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system and caused a copy of the foregoing **PETITION OF FILM-ONLY DEFENDANTS FOR PERMISSION TO APPEAL UNDER RULE 23(f)** to be served via electronic mail to the following recipients:

Joseph R. Saveri James Dallal Demetrius X. Lambrinos Steven Williams JOSEPH SAVERI LAW FIRM, INC. 505 Montgomery Street, Suite 625 San Francisco, CA 94111 Telephone: 415-500-6800 jsaveri@saverilawfirm.com dlambrinos@saverilawfirm.com jdallal@saverilawfirm.com swilliams@saverilawfirm.com *Interim Lead Counsel for the Direct Purchaser Plaintiffs*	Joseph W. Cotchett Elizabeth Tran Adam Zapala COTCHETT, PITRE & McCARTHY, LLP 840 Malcolm Road, Suite 200 Burlingame, CA 94010 Telephone: 650-697-6000 jcotchett@cpmlegal.com ecastillo@cpmlegal.com azapala@cpmlegal.com *Interim Lead Counsel for the Indirect Purchaser Plaintiffs*

Scott N. Wagner BILZIN SUMBERG BAENA PRICE & AXELROD LLP 1450 Brickell Ave., Suite 2300 Miami, FL 33131-3456 Telephone: 305-374-7580 swagner@bilzin.com *Counsel for The AASI Beneficiaries Trust, by and through Kenneth A. Welt, Liquidating Trustee & Benchmark Electronics Plaintiffs*	Charles E. Tompkins Eric R. Lifvendahl Paul J. Ripp WILLIAMS MONTGOMERY & JOHN LTD. 233 S. Wacker Drive, Suite 6100 Chicago, IL 60606 Telephone: 312-443-3200 cet@willmont.com erl@willmont.com pjr@willmont.com *Counsel for Plaintiff Flextronics International USA, Inc.*

Date: November 28, 2018

BONA LAW PC

/s/ Aaron R. Gott
AARON R. GOTT

Counsel for Defendants-Petitioners Taitsu America and Taitsu Corp.